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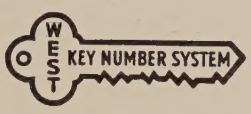
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CALIFORNIA REPORTER

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27 PACIFIC REPORTER

SECOND SERIES

219 Cal. 410

PEOPLE v. LEWIS et al.

Cr. 3688.

Supreme Court of California.

Nov. 21, 1933.

1. Criminal law ⇐1081.

Requirements as to time for filing notices of appeal are mandatory and jurisdictional (Code Civ. Proc. § 1054; Pen. Code, § 1239).

2. Criminal law ⇐1069(1).

Appellate court is without jurisdiction to consider appeal of defendant failing within five days after giving notice of appeal to file with clerk and present to trial court statement of grounds of appeal and points on which he relies, designating portions of reporter's notes necessary to be transcribed (Supreme Court and District Courts of Appeal Rule 2, § 7).

3. Criminal law ⇐1081.

Time for filing notice of appeal cannot be extended by stipulation or other action of parties or by order of court (Pen. Code, § 1239).

4. Criminal law ⇐1081.

Order of superior court, entered two months after motion to dismiss defendant's appeal for failure to file notice of appeal within two days after judgment, reforming codefendant's notice of appeal, filed in time, to include name of defendant, was void, and did not preserve appeal (Pen. Code, § 1239).

In Bank.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

C. K. Lewis and A. B. Crist were convicted of burglary and conspiracy to commit burglary, and they appeal. On motion to dismiss the appeal of the first named defendant.

Appeal dismissed.

Prior opinion, 24 P.(2d) 199.

John T. Mulligan, of Long Beach, and Robert H. Patton, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford and John L. Flynn, Deputy Attys. Gen., for the People.

SEAWELL, Justice.

The motion of respondent to dismiss the appeal of defendant C. K. Lewis is before this court upon hearing granted after decision by the Appellate Court, Second District, Division 1, denying said motion. We are of the view that said appeal must be dismissed.

Defendants C. K. Lewis and A. B. Crist were jointly tried and convicted in the superior court of Los Angeles county of burglary and conspiracy to commit burglary. Judgments against them were rendered on December 1, 1932. On January 3, 1933, respondent filed notice of motion in the appellate court to dismiss the appeal taken by Lewis from said judgment. It appeared from the record on appeal as it then stood that neither defendant gave oral notice of appeal upon the pronouncement of judgment; that defendant Crist filed written notice of appeal on December 2, 1932, but that defendant Lewis did not file notice until December 5, 1932, which was beyond the two-day period after judgment prescribed by section 1239, Penal Code. The hearing on the motion to dismiss was continued from time to time at the request of Lewis, according to respondent. On April 22, 1933, said appellant filed notice of motion for diminution of the record, which was unopposed by respondent. Thereafter the appellate court granted the motion for diminution and refused to dismiss the appeal of Lewis.

In the affidavit of Lewis' attorney in support of the motion for diminution, he averred that Lewis' name was "improperly omitted" from the notice of appeal filed in the superior court on December 2, 1932, and that on March 23, 1933, said court made its order "reforming said notice of appeal by inserting therein the name C. K. Lewis." He presented for filing a supplement to clerk's transcript containing said order of March 23, 1933, and also an "amended" notice of appeal. The order is entitled "Order Reforming Notice of Appeal," and is as follows: "Good cause appearing therefor, it is hereby ordered that the clerk of this Court insert the words C. K. Lewis in that Notice of Appeal herein filed on December 2, 1932, after the words A. B. Crist where the same appear." The notice of appeal as it appears in the supplement to clerk's transcript is as follows:

"Comes now the defendant, A. B. Crist, *and C. K. Lewis* / by his Attorneys Robert H. Patton and John Mulligan, and hereby gives notice that he appeals to the District Court of Appeal from the judgment of conviction herein rendered *and C. K. Lewis* against the defendant A. B. Crist / and from the order of the Trial court denying the Motion for New Trial as against defendant A. B. Crist *and C. K. Lewis*.

"Robert H. Patton

"John Mulligan by Robt. H. Patton

"Attorneys for Defendant A. B. Crist.

"Amended by order of Court by inserting the words 'and C. K. Lewis', this 20 day of April, 1933.

"Roy P. Clark

"Clerk, Dept. 26."

The words "and C. K. Lewis," as italicized above, indicate the additions made to the

Crist notice of appeal as filed on December 2, 1932. It is apparent from the above quotation that on April 20, 1933, the notice of appeal on file in the office of the county clerk of Los Angeles county since December 2, 1932, was altered by writing or typing in the name of Lewis, as indicated above, under authorization of the order of March 23, 1933. There is no claim that a mistake had been made in compiling the original record on appeal, as a result of which it did not correctly embody the proceedings had or documents on file (People v. Dresser, 16 Cal. App. 583, 117 P. 688), or that said record did not contain a true and correct copy of all notices of appeal on file in the lower court when said record was prepared. The proceedings had in the lower court when the order for amendment was made are not before us. Attorney Robert H. Patton signed his own name and that of John Mulligan as attorney for A. B. Crist on the Crist notice filed on December 2, while John T. Mulligan alone signed the Lewis notice, filed on December 5. The only averment in the affidavit in support of the motion for diminution as to the failure of Lewis to join in the Crist notice is that his name was "improperly omitted" from said notice. The affidavit is signed by Patton as attorney for Lewis.

[1, 2] The requirements as to the time for filing notices of appeal are mandatory and jurisdictional in both civil and criminal actions. People v. Walker, 132 Cal. 137, 64 P. 133; People v. Payne, 106 Cal. App. 609, 289 P. 909; People v. Sullivan, 123 Cal. App. 436, 11 P.(2d) 420; Lane v. Pellissier, 208 Cal. 590, 283 P. 810; Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486; Estate of Brewer, 156 Cal. 89, 103 P. 486; Estate of Turner, 139 Cal. 85, 72 P. 718; In re Kandarian, 187 Cal. 479, 202 P. 647; Williams v. Long, 130 Cal. 58, 62 P. 264, 80 Am. St. Rep. 68; section 1054, Code Civ. Proc.; 8 Cal. Jur. 518; 2 Cal. Jur. 404. Not only must the notice of appeal be filed in time, but a defendant who appeals from a judgment of conviction must, within five days after giving notice of appeal, file with the clerk and present to the trial court an application stating in general terms the grounds of his appeal and the points upon which he relies, and must designate the portions of the reporter's notes necessary to be transcribed. Where the defendant fails to conform with this rule (rule II, § 7, Rules of Supreme Court and District Courts of Appeal), the appellate court is without jurisdiction to consider his appeal. People v. Martin, 127 Cal. App. 93, 15 P.(2d) 202; People v. Rutledge, 114 Cal. App. 728, 300 P. 828; People v. Schroeder, 112 Cal. App. 550, 297 P. 105; People v. Riga, 104 Cal. App. 477, 285 P. 1069; People v. Davis, 103 Cal. App. 318, 284 P. 516.

[3, 4] The time for filing notice of appeal cannot be extended by stipulation or other action of the parties to the proceeding, or by order of the court. See cases cited, supra. The execution and filing of notice of appeal is done by a party or his attorney, and is not an act of the court. Where, through inadvertence or mistake of a party or his attorney, notice is not filed within the time limited by law, neither the trial court nor appellate court can afford relief thereafter by permitting filing of a tardy notice. What the trial court cannot do directly it cannot accomplish indirectly by authorizing amendment or alteration of a codefendant's timely notice of appeal by writing in the name of the defendant who failed to file notice in time. The order of the superior court "reforming" the notice of appeal was rendered two months after the Attorney General had moved the appellate court on January 23, 1933, to dismiss the appeal of Lewis. By virtue of the fact that the Lewis notice was not in time, the appellate court was without jurisdiction to hear his appeal, and the lower court could not confer jurisdiction on it by amending the Crist notice nunc pro tunc as of December 2, 1932. Although the evidence relied on by Lewis to show that his name was "improperly omitted" is not before us, and the order of March 23, 1933, contains the recital "good cause appearing" for the amendment, Lewis' appeal is not preserved thereby, since under no circumstances was the court authorized to extend the time for filing the notice of appeal. The order of March 23 was void ab initio.

The appeal of defendant Lewis is dismissed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.

219 Cal. 427

LINCOLN HOLDING CORPORATION v. LEVERING et al.

L. A. 13487.

Supreme Court of California.

Nov. 24, 1933.

Rehearing Denied Dec. 21, 1933.

1. Bills and notes ⇐94(1).

Holder's forbearance to sue on note, which became outlawed, was prejudice constituting valuable consideration for indorser's new note (Civ. Code, § 1605).

2. Contracts ⇐277(2).

Mere request by maker of note that payee return old note, indorsed by maker, without designating time therefor, *held* not demand placing payee in default and rendering him

liable in damages for noncompliance with request before old note was outlawed.

In Bank.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by the Lincoln Holding Corporation against N. L. Levering and others, in which named defendant filed a cross-complaint. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Martin M. Levering and Henry Trowbridge, both of Los Angeles, for appellant.

William W. Bearman and A. Feldman, both of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff on a promissory note for $2,500 executed by the defendant and appellant, N. L. Levering, who will be referred to herein as the defendant.

Prior to the execution of the note sued on, the plaintiff was the holder of a promissory note for $5,000 executed by the Big Bear Realty Corporation, recovery on which would be barred by the statute of limitations on December 4, 1928. The defendant was an indorser on said note. The plaintiff was intending to sue on the $5,000 note, and sought out the defendant indorser for a settlement. Pursuant to an agreement between the parties hereto, the defendant executed, under date of December 1, 1928, the note sued on herein, and delivered the same to the plaintiff, the plaintiff in turn agreeing to surrender the $5,000 note to the defendant.

The defendant filed a cross-complaint for the cancellation of the note sued on and for damages for the failure of the plaintiff to deliver the $5,000 note to the defendant prior to December 4, 1928. It was alleged in the cross-complaint that the parties agreed that the defendant should execute and deliver to the plaintiff a promissory note for $2,500 payable in six months; that in consideration thereof the plaintiff was to "immediately endorse, assign and deliver" the $5,000 note to the defendant; that the $5,000 note was not delivered to the defendant until long after the same had become outlawed, and that by reason of the delay there was no consideration for the $2,500 note, and that the defendant had been damaged thereby in the sum of $2,500.

The trial court found in favor of the plaintiff on the issues presented by both the complaint and the cross-complaint. On the appeal eighteen specifications of error are assigned. They need not be specifically noted. The substance of all of them is that the evidence is insufficient to support the findings and conclusions of the court that there was a valuable consideration for the $2,500 note and that the defendant suffered no damage by the plaintiff's failure to deliver the $5,000 note to the defendant prior to December 4, 1928.

[1] Unquestionably the evidence upholds the finding and conclusion that the $2,500 note was supported by a valuable consideration. It is undisputed that the $5,000 note would become barred on December 4, 1928. The defendant was an indorser on that note and presumably liable for the full amount of $5,000 thereon. The plaintiff intended to sue thereon unless a settlement could be obtained from the defendant. The plaintiff's actual outlay on account of said note was $2,500. It was therefore agreed that the plaintiff would accept a note for $2,500 executed by the defendant "in exchange" for the $5,000 note. This note was executed under date of December 1, 1928, and was accepted by the plaintiff in satisfaction of the defendant's obligation on the $5,000 note, and the latter note was permitted to outlaw so far as the plaintiff was concerned, for no suit was brought thereon. The plaintiff's forbearance to sue on the $5,000 note was a prejudice suffered by it, and alone was sufficient to constitute a good and valuable consideration for the new promise. Section 1605, Civ. Code; Belloc v. Davis, 38 Cal. 242, 256; 6 Cal. Jur. p. 173, and cases there cited. The cases relied upon by the defendant are to the effect that there is no consideration for a new note delivered upon condition of surrender of the prior note if the old note is still an enforceable obligation and is retained by the payee. Such is not this case. Here the retained note is not enforceable by the plaintiff because of its voluntary act in forbearing to sue thereon and permitting the same to become barred prior to the commencement of this action.

[2] On the question of alleged damages, it is the defendant's theory that the failure of the plaintiff to deliver to him the $5,000 note prior to December 4, 1928, deprived him of the right to pursue his rights and remedies against the Big Bear Realty Corporation. The defendant claimed at the trial that his agreement with the plaintiff was that upon the execution and delivery of the $2,500 note the old note would be assigned to him immediately and that before the 4th of December he demanded of the plaintiff that the old note be so assigned and delivered to him. But the proof showed, and the court found, that no agreement for an assignment of the old note was made, and that no demand for the surrender of the same was made prior to the time the same became barred by the statute. The mere request by the defendant that the plaintiff return to him the old note without designating any particular time was not such a demand, under the conditions shown by the record, as would place the plaintiff in default

and liable in damages for failure to comply with the request. It may be that, when the assignment and delivery of an old note forthwith is a material part of the transaction so far as the defendant indorser is concerned, so that he may be put in position to preserve his remedy against the maker, such immediate assignment and delivery would become of the essence of the contract. But the evidence is susceptible of the view that the consideration in the mind of the defendant at the time was merely to reduce his obligation on the old note to one-half its face value by the execution of the new note, and that, when the settlement of his obligation was thus accomplished, his desired purpose was attained. True, the defendant in his cross-complaint alleged damage by reason of the withholding of the old note until after December 4th, but there was no proof in support of that allegation or otherwise that the old note was or would have been of any value to him if it had been surrendered to him prior to that time.

We perceive no error in the record presented.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; IRA F. THOMPSON, J.

219 Cal. 408

PASQUALE v. PASQUALE.

S. F. 14782.

Supreme Court of California.

Nov. 17, 1933.

1. Bastards ⇐8.

Minor child could bring action by her guardian ad litem to establish child's paternity (Civ. Code, § 231).

2. Appeal and error ⇐907(3).

On appeal on judgment roll alone, Supreme Court would assume that findings and judgment were supported by evidence.

3. Appeal and error ⇐193(1).

Objections which might be raised by demurrer, but which were not presented in lower court, will not be considered by Supreme Court under allegation of insufficiency of complaint.

4. Bastards ⇐6.

Decree declaring defendant to be father of minor child *held* supported by findings that defendant was child's father, that child's guardian ad litem was her mother, and that defendant supported child and acknowledged her as his (Civ. Code, § 231).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Margarita Carmela Pasquale, also known as Margarita Pasquale Del Torre, a minor, by Anna Mare, her guardian ad litem, against Raffaele Pasquale, also known as Pasquale Del Torre. Judgment for plaintiff, and defendant appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Louis M. Piccirillo, Prosper L. Wolf, and Piccirillo & Wolf, all of San Francisco, for respondent.

WASTE, Chief Justice.

Margarita Carmela Pasquale, also known as Margarita Pasquale Del Torre, a minor, seven years of age, by her guardian ad litem, brings this action against the defendant for the purpose of having declared the existence between the defendant and herself of the relation of parent and child. The trial court, among other facts, found the defendant to be the father of the plaintiff, and Anna Mare, her guardian ad litem, to be her mother. It also found that since the birth of the minor the defendant has maintained and supported her in his home and has publicly acknowledged that the minor is his child. Pursuant to the findings, the court decreed the defendant to be the father of the plaintiff. Defendant has appealed on the judgment roll alone.

[1] It is first contended by the appellant that the court had no jurisdiction of the cause, upon the theory that the mother is the only person who can bring an action against an alleged father to have established the relation of parent and child under section 231 of the Civil Code. That section provides: "An action may be brought for the purpose of having declared the existence or non-existence *between the parties* of the relation of parent and child, by birth or adoption." (Italics ours.) The plain language of the section (note the italicized portion) is a sufficient answer to appellant's contention.

[2, 3] It is next contended that the complaint does not state a cause of action, and that therefore the court was without jurisdiction to render a judgment. It cannot be questioned that the court had general jurisdiction of the parties to the cause and of the subject-matter. The allegations of the complaint are somewhat scant, but they tender an issue as to the parentage of the plaintiff.

No demurrer was interposed, and the defendant rested upon a general denial of the material allegations of the complaint. The cause was tried without any objection, and findings were made which are sufficient to support the judgment. There can be no question, from the record, that, throughout the entire proceeding and the trial, the issues were clearly understood by the parties and by the court. The appeal being on the judgment roll alone, it must be deemed that the findings and judgment are supported by the evidence. Objections which might be raised by demurrer, but which were not presented in the court below, will not be considered in this court under an allegation of insufficiency of the complaint. Burmester v. McNear, 42 Cal. App. 527, 183 P. 832, and cases cited. See, also, Belser v. Allman, 134 Cal. 399, 66 P. 492.

[4] We are of the view that the findings, conclusively deemed to be supported by the evidence, support the judgment and decree.

The judgment is affirmed.

We concur: IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; SHENK, J.

135 Cal.App. 288

PEOPLE v. JARVIS et al.

Cr. 154.

District Court of Appeal, Fourth District, California.

Nov. 14, 1933.

Hearing Denied by Supreme Court Dec. 14, 1933.

1. Criminal law ⇨62.

Mere fact of agency alone under doctrine of respondeat superior is insufficient to impose criminal liability upon principal for acts of agent.

2. Criminal law ⇨80.

In prosecution under Deciduous Fruit Dealers Act, evidence not showing criminal liability of defendants for acts of agent who negotiated alleged cash sale *held* insufficient to support conviction (St. 1929, p. 671, § 16).

3. Indictment and information ⇨110(2).

Although indictment or information need not follow exact language of statute defining offense, it is generally sufficient to charge offense in statutory language, or in language of equivalent import.

4. Licenses ⇨42(3).

Information alleging that defendants acted as dealers in deciduous fruits without having license, although not specifying particular instance in which defendants acted as dealers without license, *held* sufficient (St. 1929, p. 671, § 16).

5. Criminal law ⇨678(1).

In prosecution for acting as dealers in deciduous fruits without license, refusing to require election between acts relied upon to establish guilt *held* not error (St. 1929, p. 671, § 16).

6. Licenses ⇨42(4).

In prosecution against president and general manager of corporation for acting as dealers in deciduous fruits without license, evidence showing defendants managed and controlled corporation and handled transactions in question *held* to support conviction notwithstanding contracts with fruit growers were made in name of corporation (St. 1929, p. 671, § 16).

7. Licenses ⇨40.

Fact that corporation contracting to purchase deciduous fruits from growers had obtained produce dealer's license *held* not to excuse president and general manager acting as dealers in deciduous fruits from obtaining special license (St. 1927, p. 1813, § 3; St. 1929, pp. 667, 671, §§ 5, 16).

8. Licenses ⇨42(4).

In prosecution against defendants for engaging in business as dealers in deciduous fruits without license, evidence *held* to sufficiently establish that defendants acted as dealers, warranting conviction (St. 1929, pp. 665, 671, §§ 1, 16).

9. Licenses ⇨42(5).

In prosecution against defendants for engaging in business as dealers in deciduous fruits without license, instruction that giving of produce dealer's bond by corporation of which defendants were officers did not affect criminal provisions of statute under which defendants were prosecuted *held* not error (St. 1929, p. 671, § 16).

10. Criminal law ⇨808½.

In prosecution for engaging in business as dealers in deciduous fruits without license, instructions, in statutory language, defining phrase "consignment shipper" and "produce dealer's license," *held* not erroneous (St. 1929, p. 671, § 16).

11. Criminal law ⇨823(4).

In prosecution for engaging in business as dealers in deciduous fruits without license, instruction requiring jury to find that defendants were "dealers" as defined and acted as such to warrant conviction *held* not erroneous as requiring jury to determine purely legal question whether defendants were "dealers," in view of other instructions defining

what constituted "dealer" (St. 1929, p. 671, § 16).

12. Criminal law ⇐783(1).

In prosecution for engaging in business as dealers in deciduous fruits without license, instructions relating to evidence of similar offenses and consideration thereof *held* erroneous, where information did not allege commission of specific acts, but merely that defendants engaged in business of dealer in deciduous fruits without license (St. 1929, p. 671, § 16).

13. Criminal law ⇐1122(1).

Where it did not appear that alleged erroneous instructions were not requested by defendants, court is not required to consider defendants' contention that giving of such instructions constituted reversible error.

14. Criminal law ⇐1186(4).

In prosecution under information charging defendants engaged in business as dealers in deciduous fruits without license, erroneous instructions relating to similar offenses and consideration thereof by jury *held* not prejudicial, precluding reversal (St. 1929, p. 671, § 16; Const. art. 6, § 4½).

15. Criminal law ⇐398(2).

In prosecution for engaging in business as dealers in deciduous fruits without license, copy of contract with grower, though not bearing grower's signature, *held* admissible, where defendants had possession of original and did not offer it in evidence (St. 1929, p. 671, § 16).

16. Criminal law ⇐1186(4).

In prosecution for engaging in business as dealers in deciduous fruits without license, error, if any, in admitting copy of contract with grower, *held* not prejudicial (St. 1929, p. 671, § 16; Const. art. 6, § 4½).

17. Commerce ⇐12.

State statute clearly confined to legitimate exercise of police power reserved to sovereign states is not repugnant to interstate commerce clause in Federal Constitution (Const. U. S. art. 1, § 8, cl. 3).

18. Commerce ⇐48.

Fact that state statute may incidentally affect interstate commerce does not render statute invalid as interference with interstate commerce (Const. U. S. art. 1, § 8, cl. 3).

19. Commerce ⇐64.

Statute making it felony for any person to act as dealer in deciduous fruits without license, although affecting dealers entering into contract for grapes to be shipped outside state, *held* not invalid as imposing direct burden upon and constituting unreasonable interference with interstate commerce (St. 1929, p. 671, § 16; Const. U. S. art. 1, § 8, cl. 3).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Leo F. Jarvis and another were convicted of two offenses under the Deciduous Fruit Dealers Act, and they appeal.

Affirmed in part, and reversed in part.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

B. M. Benson, of Fresno, for appellant Jarvis.

Iener W. Nielsen, of Fresno, for appellant Simpson.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendants were charged in an information filed by the district attorney of Fresno county with the commission of a felony, to wit, the violation of section 16 of the Deciduous Fruit Dealers Act (St. 1929, pp. 665, 671). The information contains two counts. In the first count it is alleged that the defendants willfully and unlawfully engaged in the business of dealer in deciduous fruits as defined in the act without having procured a license so to do. In the second count it is alleged that the defendants represented themselves to be cash buyers as defined in the act, "by then and there and under said representation purchasing for resale certain deciduous fruit, to-wit: grapes, of A. D. Orr and by failing within forty-eight hours after demand had been made upon them by said growers to pay the full purchase price of said deciduous fruits in lawful money of the United States, or by certified check or by cashier's check or in any other manner at all." Upon arraignment the defendants pleaded that they were not guilty of the offenses charged against them and were tried before a jury, which returned separate verdicts finding each defendant guilty of the two offenses charged in the information. A motion for a new trial and a motion in arrest of judgment was thereafter presented by each defendant. These motions were denied by the trial court. Judgment was thereupon rendered ordering that for each offense of which they were convicted the defendants be punished by imprisonment in the state prison at San Quentin, Cal., until legally discharged and that the sentences thus imposed should run concurrently. From this judgment the defendants have prosecuted the present appeal.

Numerous objections are urged by the appellants as grounds for the reversal of the judgment. Because of the fact that we have arrived at the conclusion that the verdict of conviction of each appellant of the offense

charged in the second count of the information is clearly not supported by the evidence disclosed by the record, the objection which relates to the second count may properly be first considered.

It is apparent that the second count of the information charges the appellants with the commission of a specific act which it is alleged constituted a violation of section 16 of the above-mentioned statute. This act was the representation made by appellants to A. D. Orr that they were cash buyers. Passing the objections which are presented to the sufficiency of the allegations contained in the second count and assuming, without deciding, that the pleading is not vulnerable to the various attacks urged against it, the complaint of appellants that the verdict of conviction of the offense charged therein is unsupported by the evidence remains to be decided.

The record shows that A. D. Orr was called by the prosecution as a witness and that he testified that he entered into three contracts with various individuals who represented themselves to be fruit buyers for the Federal Farm Lands, Inc., a corporation, of which appellant Jarvis was president and appellant Simpson was the general manager. In considering the sufficiency of the evidence to support the verdict of conviction of the offense charged in the second count, it will be assumed that the corporation was merely a convenient instrumentality by means of which appellants carried on their operations, that it was wholly controlled by appellants, and that, under the circumstances developed by the evidence, the trial court was warranted in disregarding the corporate fiction and amply justified in concluding that the various fruit buyers who entered into contracts with the witness Orr as agents of the corporation were in fact agents and employees of appellants. Orr testified that the first contract which he made with the Federal Farm Lands, Inc., was dated August 10, 1932, and that the agent who executed this contract for the corporation was H. S. Olsen. This was a written contract which was made on a blank form provided by the corporation. It was admitted in evidence. The contract shows that Orr agreed to sell to the corporation 40 tons of Thompson Seedless grapes at the specified price of $18 per ton. The instrument contained the following provision: "Payment to be made on following day after delivery." The second contract which was made by Orr with the corporation was also a written contract made on a similar form provided by the corporation and it was likewise admitted in evidence. This contract was dated August 12, 1932, and by it the grower agreed to sell to the corporation his entire crop of Malaga grapes. This contract contained the following provision: "Guaranteed not less than $15.00 per ton and 25% of returns over and above this amount after necessary deductions are made." The buyer who executed this contract for the corporation was R. C. Fitzsimmons. Orr testified that no grapes were delivered by him under this contract. The third contract which the witness Orr testified he entered into with the corporation covered the sale of about 5,000 pounds of Thompson grapes. It was not made on a form provided by the corporation, but was written by Orr himself on a piece of paper. It was executed for the corporation by one J. W. Files. This third contract was not offered in evidence and no testimony regarding its terms was presented. The record is silent as to whether it provided for payment on delivery or demand or whether it was a minimum price guarantee contract. The record also fails to disclose whether any grapes were delivered by Orr under this contract.

From the above résumé of the evidence respecting the three contracts which were made between A. D. Orr and the various fruit buyers for the corporation, it is evident that the only one which tended to support the allegations of the second count of the information was the first contract which was executed by Orr and by H. S. Olsen for the corporation on August 10, 1932. This must be true because Orr testified that no grapes were delivered by him under the second contract and the record contains no evidence as to the terms of the third contract or whether any grapes were delivered under it or whether, if such delivery was made, any demand for payment of whatever amount was claimed to be due therefor was ever made upon appellants or the corporation. It must be observed that the fact of demand of payment is, by the language of the second count, made an essential element of the charge that appellants represented themselves to be cash buyers. We are therefore impelled to the conclusion that the only transaction which tended to support the allegations of the second count was the contract entered into between A. D. Orr and H. S. Olsen on August 10, 1932, which provided for the sale of 40 tons of Thompson grapes at a fixed price of $18 per ton "payment to be made on the following day after delivery."

[1] In order, however, that criminal liability may be fastened upon appellants as a result of the making of this contract, the evidence must show that appellants, who, under the facts presented, were the principals, authorized the acts of their agent H. S. Olsen. The civil doctrine of respondeat superior is not carried into the criminal law so that the mere fact of agency is alone sufficient to impose criminal liability upon the principal. People v. Doble, 203 Cal. 510, 515, 265 P. 184, People v. Green, 22 Cal. App. 45, 50, 133 P. 334.

[2] The evidence wholly fails so to connect appellants with the commission of the offense charged in the second count of the in-

formation as to impose upon them criminal liability for the acts of their agent. The witness Orr testified unequivocally that he did not meet either of the appellants until after the contract was signed, that he never talked with either of the appellants until after he had delivered the grapes which were the subject of the contract or a part of them, and that neither of the appellants ever represented to them that they were cash buyers. Appellant Jarvis testified that he never gave any fruit buyer any instructions as to the buying of fruit and more particularly that he never gave the agent Olsen any instructions as to the purchase of fruit, that he himself employed no fruit buyers, that Olsen did not exhibit to him for his approval the Orr contract of August 10, 1932, which provided that payment should be made the day following delivery of the Thompson grapes, that he was not aware of the existence of such a contract until he saw it at the preliminary examination. Appellant Simpson was not interrogated regarding the aforesaid contract of August 10, 1932, nor was he asked what instructions he had given the agent Olsen. H. S. Olsen, whose name appears upon the contract as the person who executed it for the corporation, was not called to testify. The witness J. W. Files, who appears to have been the superintendent in charge of the fruitpacking establishment operated by Federal Farm Lands, Inc., in the city of Fresno, testified that he did not authorize Olsen to use any form of contract other than the minimum price guaranty contract which was provided by the corporation, that he did not furnish Olsen with the form of contract which was signed by A. D. Orr on August 10, 1932, that he did not authorize Olsen to execute the aforesaid contract, that Olsen exhibited the contract to him after it had been signed by Orr and that the witness told Olsen that he had no authority to pass upon a contract of that character and that Olsen should consult Jarvis or Simpson in regard to it, that he never discussed this particular contract with Jarvis or Simpson and heard nothing further regarding it.

It is therefore clear that not a scintilla of evidence was produced which tended to show that either of the appellants authorized or encouraged the agent Olsen to enter into the particular contract upon which the prosecution must have relied to establish the commission of the offense alleged in the second count of the information or that either of the appellants aided or abetted Olsen in making the contract or that either of the appellants were informed of the existence of such a contract until long after it had been executed. The evidence was wholly insufficient to warrant the verdict of conviction of either appellant of the offense specified in the second count of the information and that part of the judgment which adjudges them guilty thereof and orders that as punishment therefor each shall suffer imprisonment in the state prison must be reversed.

The objections which are urged to the verdict of conviction of the offense charged in the first count of the information and to that part of the judgment which adjudged appellants guilty of such offense and ordered that as punishment therefor each of them should suffer imprisonment in the state prison are likewise numerous. These objections may be classified as follows: First, objections which relate to the form of the information and challenge its sufficiency as a pleading; second, objections which attack the sufficiency of the evidence to support the verdict and the judgment which was rendered in conformity therewith; third, objections which relate to instructions given by the court and the failure to give certain instructions requested by appellants; fourth, an objection that the court erroneously admitted certain evidence; fifth, objections which attack the constitutionality of the act by virtue of whose provisions the prosecution of appellants was instituted. These objections will be considered seriatim.

[3, 4] It was strenuously contended throughout the trial of the action and it is now seriously urged that the first count of the information is fatally defective in that it fails to allege the commission of any specific act. The pleading alleges that on or about August 24, 1932, appellants "engaged in the business of dealer in deciduous fruits, as defined by the act * * * without having a license so to do." Section 16 of the statute provides that: "Any person who acts as a dealer as defined in this act without a license * * * is guilty of a felony." It is evident therefore that the language of the pleading, while it does not employ the exact wording of the statute, very closely follows it. It is contended that this is not sufficient and that the pleading should have specified the commission of some act or acts whereby appellants would have been informed with certainty what it was that they were accused of having done and could have prepared to meet the specific charge. It is also pointed out that during the trial evidence was admitted which showed the execution of a large number of contracts by the Federal Farm Lands, Inc., with various fruit growers and that it is impossible to discover from the verdict of the commission of what particular act appellants were convicted or to be assured that any two or more jurors agreed upon the guilt of appellants of the commission of any particular act.

It is the rule that although an indictment or information need not follow the exact language of the statute, it is nevertheless generally sufficient to charge an offense in the language of the statute which defines it or in language of equivalent import and that this rule applies particularly to purely statutory offenses. 14 Cal. Jur. p. 49. Conceivably ap-

pellants might properly have been charged with having acted as dealers in deciduous fruits in that on a specified date they did certain things which fell within the statutory definition of the term "dealer." "Dealer" is defined in the statute as being every person other than a cash buyer or consignment shipper who attempts to make money on any deciduous fruit by dealing with the grower thereof. Section 16 makes it an offense for any person to act as a dealer without having a license. The language of the statute appears to contemplate that the engaging in any single act as a dealer without a license shall amount to a violation of the statute. The information under consideration goes further and charges that appellants engaged in the business of dealer. The gist of the offense as charged is therefore the prosecution of the business of dealing in deciduous fruit without a license. During the trial of the action the prosecution produced evidence that fruit buyers employed by Federal Farm Lands, Inc., had made a number of minimum price guarantee contracts for the corporation with various growers. The sufficiency of this evidence to establish that appellants thereby acted as dealers within the language of the statute will hereafter be considered. Assuming for the present that the evidence thus presented was sufficient for the purpose indicated, it is apparent that under the charge as framed in the first count of the information, evidence which showed that appellants had, on any number of occasions, acted as dealers could do no more than establish the guilt of appellants of the single offense of engaging in the business of dealer without having procured a license therefor. State v. Bennett, 102 Mo. 356, 14 S. W. 865, 10 L. R. A. 717; State v. Finch, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437. Furthermore, again assuming that the evidence was sufficient for the purpose for which it was presented, it is clear that appellants were not prejudiced by the fact that the prosecution chose to proceed against them for the single offense of engaging in the business rather than to accuse them of having acted as dealers in a considerable number of instances for each of which acts they might have been convicted and suffered punishment.

[5] Closely related to the contention that the first count of the information is fatally defective in that it fails to allege the commission of any unlawful act is the objection that the trial court should have compelled the prosecution to elect what particular act it relied upon to establish the guilt of appellants of the offense charged in the first count. Demand that respondent make an election was made in the beginning of the trial and throughout the course of the proceedings it was repeatedly urged that the court compel an election. The refusal of the court so to do is assigned as error warranting a reversal of the judgment. Since we have reached the conclusion that the first count of the information is sufficient in charging that appellants engaged in business without specifying any particular instance in which they acted as dealers, it necessarily follows that we entertain the opinion that respondent was not required to elect any particular act upon which it would rely to establish the commission of the offense charged in the first count. This must be true, since it is obvious that respondent did not rely on any particular act or contract but upon all the acts whose commission it proved to establish that appellants had engaged in the business of dealing in deciduous fruits without a license. Under the charge as laid there was no occasion for the court to require an election. Proof that appellants had acted as dealers in a hundred different instances could justify their conviction of only the single offense charged.

[6] It is urged with much vigor that the evidence which was admitted is wholly insufficient to justify a conviction of the offense alleged in the first count of the information. Two particulars are specified in which it is contended that it is fatally insufficient. In the first place, it is pointed out that every contract upon which respondent relied to establish that appellants had engaged in the business of dealing in deciduous fruits without a license was a contract between the particular grower and Federal Farm Lands, Inc., a corporation, and that each of these contracts was executed for the corporation by an agent employed not by appellants but by the corporation. In the second place, it is contended that these various contracts were contracts which were expressly permitted to be made in accordance with the provisions of the Produce Dealers Act of 1927 (St. 1927, c. 860, pp. 1812, 1813) under which the aforesaid corporation was licensed and that the state of California having issued to Federal Farm Lands, Inc., a license to make such contracts and having collected from the corporation the required license fee, cannot now properly and fairly demand that appellants be punished for the commission of a felony which, under the facts shown, consists of making the very sort of contracts expressly permitted by the Produce Dealers Act.

With respect to the first of the two aforesaid specifications of insufficiency, it must be conceded that every contract which was produced by the respondent to support the accusation contained in the first count of the information was a contract between the grower named therein and Federal Farm Lands, Inc., and that the evidence showed that Federal Farm Lands, Inc., was a corporation duly organized under the laws of California. However, it was stipulated that this corporation had only two stockholders. These stockholders were the two appellants. The articles of incorporation were signed by the

two aforesaid individuals and by Elizabeth B. Stefanich on May 23, 1932, and it is therein stated that the three incorporators were appointed to act as the first directors. The evidence showed that Elizabeth B. Stefanich was the secretary of appellant Jarvis. It was also shown that appellant Jarvis was the president and appellant Simpson was the general manager of the corporation, and it was stipulated that Elizabeth B. Stefanich was made secretary of the corporation. The evidence showed that appellant Simpson was actively engaged in the management of the corporation; that appellant Jarvis "frequently" visited the fruit-packing house in the city of Fresno, which was the place where the business of the corporation was carried on; that appellant Jarvis, as president of the corporation, signed the checks which were given to fruit growers in payment for fruit delivered to the corporation; that the two appellants discussed the business of the corporation at all times; that J. W. Files, the superintendent of the packing house in the city of Fresno, was employed by the appellants; that J. W. Files talked with the appellants before the various "deals" were made; that J. W. Files and appellants employed the agents or fruit buyers who made the various contracts with the growers; that appellant Simpson authorized the printing of the form of contract which was used by the fruit buyers; that this form of contract was discussed at a meeting of the directors of the corporation. Assuming that the contracts which were shown to have been made for the corporation by the fruit buyers were sufficient to show that the corporation acted as a dealer in deciduous fruits under the language of the Deciduous Fruit Dealers Act, we think that it is preposterous to urge that appellants may successfully interpose the corporate fiction as a shield to protect them from the consequences of their own acts. It is too clear from the evidence that the corporation was entirely guided and managed and controlled by appellants to permit so thin a defense. People v. Epstein, 118 Cal. App. 7, 4 P.(2d) 555.

[7] The contention of appellants with respect to the second specification of evidentiary insufficiency rests largely upon the decision of the Supreme Court of California in the case of Moulton v. Williams Fruit Corporation (Cal. Sup.) 21 P.(2d) 936. It is argued that it was therein expressly decided that exactly the same sort of contract as those upon which respondent relied to establish the necessary element of engaging in the business of dealer is a consignment contract within the scope of the Produce Dealers Act of 1927, and since the Deciduous Fruit Dealers Act of 1929 expressly provides that it shall not apply to "Consignment Shippers" and since it was shown that Federal Farm Lands, Inc., was duly licensed in accordance with the provisions of the Produce Dealers Act of 1927, it is manifest that the evidence is wholly insufficient to justify the jury's finding that appellants had unlawfully engaged in the business of dealer in deciduous fruits without a license in violation of the provisions of section 16 of the Deciduous Fruit Dealers Act of 1929. This somewhat involved argument necessitates close analysis of the decision in Moulton v. Williams Fruit Corporation, supra, and a consideration of the scope and effect of the two statutes mentioned.

In the Moulton v. Williams Fruit Corporation case the facts were as follows: During the grape season of 1928, the Williams Fruit Corporation entered into written contracts with various grape growers to handle all their crops of grapes for said season. These contracts were all of the same general form and provided that the grower placed on consignment with the Williams Fruit Corporation his entire crop of grapes consisting of a stated acreage, more or less, grown at or near a specified place "$15.00 per ton guarantee." The fruit corporation in due course received the grape crops and marketed them to the best advantage, but failed to realize a net return sufficient to cover the specified guaranty. Thereupon, the growers relying upon the guaranty contained in their contracts, claimed to be creditors in an amount aggregating more than $5,000 and, in accordance with the provisions of the Produce Dealers Act of 1927, the director of agriculture of California in their behalf instituted an action against the fruit corporation and its surety on the bond which the corporation had given as required by the above-mentioned statute. The fruit corporation defaulted and the surety on the bond defended the action alone. Judgment was rendered against the defendants for the amount of the bond and the surety company appealed therefrom. Upon the appeal one of the contentions advanced by the appellant was that the transactions between the growers and the fruit corporation amounted to sales of the crops and that the growers by accepting the guarantees stated in the contracts had thereby extended credit to the produce dealer and that the bond did not purport to cover credit insurance and further that the contracts, because of the guaranties contained in them, had become in effect purely private contracts between the growers and the produce dealer for breaches of which the surety was not liable. The Supreme Court, through Mr. Justice Preston, briefly disposed of this contention by holding that the guaranties contained in the contracts were merely inducements to the growers to enter into the contracts and did not alter the essential features of the contracts which were contracts of consignment and not of sale and were covered by the comprehensive provisions of the Produce Dealers Act defining a produce dealer.

From the above recital it is evident that the bond which formed the basis of the action was one which was given in conformity with the provisions of the Produce Dealers Act of 1927, and that the action was instituted in accordance with the provisions of said act. When the cause of action arose the Deciduous Fruit Dealers Act was not in existence. This latter statute was not mentioned in the opinion. The only statute which was involved in the case was the Produce Dealers Act and the single problem presented related exclusively to this statute and to its interpretation.

The Deciduous Fruit Dealers Act which it is charged appellants violated by engaging in the business of dealer in deciduous fruits without a license was enacted by the California Legislature in 1929. It was approved on May 20, 1929, and by virtue of the legislative declaration of urgency therein contained, it became immediately effective. Section 17 of the act expressly provides that it "is not intended and shall not be construed to in any manner impair or repeal any part or provision of chapter 860 of the laws of California, 1927, approved June 1, 1927, and commonly known as the 'produce dealers act,' but the requirements for licensing and bonding of dealers in deciduous fruits, prescribed by this act, are in addition to all of the requirements and provisions of the said 'produce dealers act,' with the exception * * *" The exception mentioned relates to the giving of the bond required by the later act and is not herein involved. We have then in the Deciduous Fruit Dealers Act, with whose provisions we are alone concerned, a clear-cut, unequivocal legislative declaration that the later act is not intended to repeal the earlier act, but that the requirements for the licensing and bonding of dealers in deciduous fruits prescribed in the later act are in addition to all of the requirements and conditions contained in the earlier statute. Section 20 of the later act explains the reason which impelled the lawmaking body to impose additional restrictions upon dealers in deciduous fruits including grapes, and contains a mandate for its liberal construction. We perceive no difficulty in upholding the plain language of the later statute which provides that any person who acts as a dealer in deciduous fruits without a license shall be guilty of a criminal offense as a proper subject of legislative control. Nor can we accede to the suggestion that there is a conflict in the two statutes when we have in the later act the legislative intent so clearly expressed.

Furthermore, we think that careful analysis of the two statutes further demonstrates that by the Deciduous Fruit Dealers Act the Legislature intended to require that individuals who enter into contracts with the growers of deciduous fruits which contain provisions guaranteeing that such growers shall receive a specified minimum price therefor, must procure the license mentioned in the act and that the later statute places upon such dealers new and additional burdens not contemplated by or included in the provisions of the earlier statute. By section 3 of the Produce Dealers Act (St. 1927, p. 1813) it is provided that the application for a license thereunder shall state: (1) The class or classes of farm products which the applicant proposes to handle; (2) the full name of the applicant and if a firm, exchange, association, or corporation, the full name of each member of the firm or the names of the officers of such exchange, association or corporation; (3) the applicant's principal business address in California and the name or names of the person or persons authorized to accept service of process and legal notices generally. It is further provided that the applicant shall satisfy the licensing official of the applicant's character, responsibility, and good faith in seeking to conduct the business of produce dealer. The Deciduous Fruit Dealers Act (section 5) requires that an application for a license to engage in the business of dealer in deciduous fruits shall contain the following information: (1) Applicant's name and business address; (2) whether applicant is an individual, exchange, partnership, association, a group of persons, or a corporation, and if a corporation, where organized and where its principal place of business is located, and if incorporated in any state or country other than California, the address of its California office, together with the name and address of a person in California upon whom service of legal process in California suits can be made; (3) how long applicant has been engaged in business as a dealer in California; (4) whether or not applicant has made settlement in full with the growers of deciduous fruit handled by said applicant in either one of the two immediately preceding calendar years, and if such settlement has not been made, the name and address of each grower with whom settlement has not been made; (5) whether or not the applicant has controlled or conducted the operations of any company, partnership or corporation or other form of organization which has previously engaged in handling deciduous fruit, as a dealer, in a manner set forth in the act, and whether the applicant in such previous capacity had made settlement with all growers in California; (6) the names and addresses of three persons, including at least one bank, all within the state of California, of whom inquiries concerning the applicant may be made; (7) a statement of the approximate number of tons of deciduous fruits that the applicant expects to deal with during the next twelve months, detailing the number of tons of each kind of deciduous fruit included in the total; (8) such additional and different information concerning applicant or his business as the licensing officer shall deem advisable to have to enable

him to determine the applicant's qualification to engage in the business. It is evident that the information required to be furnished by the applicant for a deciduous fruit dealer's license is much more comprehensive and detailed than is required of the applicant for a produce dealer's license. The provision in the later act requiring the filing of a bond by the applicant for a deciduous fruit dealer's license is more comprehensive than the similar provision in the earlier act. The earlier statute specifically exempts from its operation all co-operative organizations. No such exemption is contained in the later statute. In other respects the Deciduous Fruit Dealers Act of 1929 is more comprehensive than the Produce Dealers Act of 1927. We entertain the opinion therefore that the Legislature intended to require a new and additional license by the later act and that the possession of a produce dealer's license procured in accordance with the provisions of the Produce Dealers Act is not sufficient to excuse the failure of a dealer in deciduous fruits to have obtained the special license required by the Deciduous Fruit Dealers Act.

[8] With respect to the evidence which is contained in the record, it is to be observed that during the trial a number of written contracts between grape growers and Federal Farm Lands, Inc., were admitted. These contracts were of the same general form and in brief provided that the grower placed his entire crop of a specified kind of grapes grown on described property for the season 1932, in the hands of Federal Farm Lands, Inc., to pack and market for the grower's account, the fruit to be picked and delivered at grower's expense to the packing house provided by Federal Farm Lands, Inc., at Blackstone and McKinley avenues in Fresno, Cal., at such times and in such quantities as Federal Farm Lands, Inc., might direct, Federal Farm Lands, Inc., to receive for furnishing all materials and labor in packing and loading f. o. b. cars said crop of fruit, the general rates in force during the current season and to have a lien upon the fruit for all expenses incurred and for all moneys advanced by it for picking, packing, or any reason whatsoever, and that any deficit that might occur would be payable upon demand of Federal Farm Lands, Inc. Following the signatures of the contracting parties each contract contained a provision to the following effect: "Guaranteed not less than $—— per ton and * * * % of returns over and above this amount after necessary deductions are made." The amount per ton which was guaranteed varied from $15 to $20 and the percentage of net returns in each contract is 25 per cent.

The evidence of the making of these contracts on the form authorized and provided by appellants containing minimum price guaranty provisions brought appellants squarely within the definition of dealer contained in the act and furnished ample justification for the jury's verdict that they were guilty of the offense charged in the first count of the information. Section 1 of the statute (St. 1929, p. 665) defines the terms "cash buyer," "consignment shipper," and "dealer." There is no pretense on the part of appellants that they were cash buyers. It is not therefore necessary to state the statutory definition of this phrase. It does, however, appear that appellants claim that the evidence shows that they were consignment shippers. The statutory definition of this term may therefore properly be examined. Subdivision (d) of section 1 of the statute defines a consignment shipper to be "every person (1) who represents himself as a 'consignment shipper' and (2) who contracts with the grower of deciduous fruits for the marketing thereof for the sole account and risk of said grower and who pays to said grower the net proceeds derived from said sale, and (3) who does not, either in writing or verbally guarantee any price to said grower for his deciduous fruits, but a consignment shipper may, at his option, by a written contract with the grower recite that said shipper has an order for any deciduous fruits of the variety covered by the contract at a named price and that said shipper agrees to use said grower's fruit to fill such order." It appears then that one of the necessary elements of this definition is that the consignment shipper shall not, either in writing or verbally, guarantee any price to the grower. But, as hereinabove noted, the various contracts which were admitted in evidence to support the charge contained in the first count of the information all contained minimum price guaranties. It follows, therefore, that in making these contracts appellants were not consignment shippers as defined in the act. Subdivision (e) of section 1 defines a dealer to include every person other than a cash buyer or consignment shipper who attempts to make money on any deciduous fruit by dealing with the grower thereof. Since appellants were not cash buyers or consignment shippers as these terms are defined in the act and since the evidence further shows that they attempted to make money by dealing with the growers of grapes it follows that they were dealers within the statutory definition of this term. Section 2 of the act, which is entitled "Scope of Act," provides in part that the statute "shall have no application to any 'cash buyer' * * * nor to any 'consignment shipper' *except in so far as any consignment transaction involves a written or verbal price guarantee* * * *." (Italics ours.) This language further indicates the legislative intent as to the persons who are affected by the provisions of the act and makes it clear that the above-described contracts which purported to be consignment contracts with minimum price guaranties were precisely the character of contracts which the Legislature intended should be placed under the supervision of the

director of agriculture and subjected to the regulations provided in the statute. We conclude, therefore, that appellants' second specification of evidentiary insufficiency is not well taken.

Complaint is made that the court erred in giving certain designated instructions and in refusing to give certain instructions which were offered and requested by appellants. With respect to the court's refusal to give the instructions offered by appellants it is to be observed that each of them related to the offense charged in the second count of the information. Since we have heretofore indicated our opinion that the conviction of appellants of the offense alleged to have been committed by them in the second count of the information is not supported by the evidence and that the portion of the judgment which refers to this offense must be reversed it is not necessary to give consideration to the proffered instructions.

[9] Appellants complain of seven instructions which were given by the court and which relate to the offense charged in the first count of the information. One of these instructions is in the following language: "You are instructed that the fact that the bond posted by Federal Farm Lands, Inc., with the State Department of Agriculture upon its application for a produce dealer's license may be held to apply to consignment contracts which involved a guarantee of a price, does not impair or involve the provisions of the dealers act, the '1929 act', and the fact that Federal Farm Lands, Inc., and its bondsmen may be held civilly liable under said bond does not affect the criminal provisions of the dealer's act, the '1929 act' under which these defendants are charged."

It is said that this instruction gives a graphic picture of the overlapping of the Produce Dealers Act of 1927 and the Deciduous Fruit Dealers Act of 1929, and illustrates the anomalous situation which is presented thereby in that consignment contracts covering farm products generally and containing minimum price guaranties are, under the construction placed on the Produce Dealers Act of 1927, by the decision in Moulton v. Williams Fruit Corporation, supra, held to be legal while exactly similar contracts covering deciduous fruits are expressly proscribed by the Deciduous Fruit Dealers Act of 1929, and the making of such contracts is denounced as a felony. This ingenious statement is not strictly correct. The making of such contracts is declared to be a felony by a dealer in deciduous fruits who has not procured a license in conformity with the provisions of the Deciduous Fruit Dealers Act. If such a dealer procures a license required by the later act and delivers to the state director of agriculture the bond which the statute declares must be furnished, he may freely enter into consignment contracts covering deciduous fruits and guarantee to the grower that he will receive a minimum price for the fruit. No particularly useful purpose would be subserved by indulging in a prolonged discussion of the reasons which animated the legislature to adopt the Deciduous Fruit Dealers Act. The very language of the statute shows that the law making body was acutely sensible of the importance to the people of California of the deciduous fruit industry and proposed to protect this industry by placing under the supervision and regulation of the proper department of the state government such transactions with respect to deciduous fruit as do not amount to sales for cash or to simple consignment contracts containing no guaranties that the grower will receive at least a stated price for his fruit. It is neither strange nor unreasonable that the Legislature should have taken such action. It is a perfectly natural incident in the development of enlightened public opinion with respect to an industry that is of paramount importance to the welfare of the people of the state. It has heretofore been mentioned that the Deciduous Fruit Dealers Act was not in existence when the cause of action in Moulton v. Williams Fruit Corporation arose. It is true that the statute had been adopted and written into the law of California when the opinion in the case was handed down. But the act of 1929 was not and could not be involved, and a discussion of its provisions would have been neither proper nor desirable. We cannot, therefore, agree with appellants' criticism of the above-quoted instruction and in our opinion the giving of it was not error.

[10] Two other instructions which relate directly to the two above-mentioned statutes are also attacked as improper. In one of them the court advised the jury as to the meaning of the term "consignment shipper" and in so doing defined the phrase in the very language of the Deciduous Fruit Dealers Act. In our opinion it was entirely proper for the court so to do. The second instruction to which objection is made is in the following language: "Under the law a produce dealer's license is a license to conduct a consignment business and does not include the business of a deciduous fruit dealer." That portion of the instruction which is declared to be particularly objectionable is the language "and does not include the business of a deciduous fruit dealer." The language criticized is in exact conformity with the provisions of the Deciduous Fruit Dealers Act, for a violation of which appellants were being prosecuted, and in our opinion the court properly included it in the instruction.

[11] Criticism is expressed of another instruction wherein the jury was advised that if it should find that appellants were "dealers" as this term had been defined by the court and that they were acting as dealers without a license a verdict of guilty of the

charge contained in the first count of the information should be returned. It is said that this instruction erroneously imposed upon the jury the burden of determining a purely legal question, viz., whether the appellants were dealers. However, it appears that the jury was fully and properly advised in another instruction what facts were required to be shown in order that it should appear that a person was a dealer under the language of the Deciduous Fruit Dealers Act. The instruction is not therefore vulnerable to the attack presented.

[12-14] Special complaint is voiced because the court gave three instructions which advised the jury that evidence had been offered of similar offenses to that alleged in the first count of the information and that before they could consider such evidence they should be convinced beyond a reasonable doubt that appellants had committed the act alleged in the first count and further that when the very doing of the act charged is in issue one of the essential facts admissible is the person's plan or design to do the act.

We are in accord with appellants' criticism of these three instructions and agree that they should not have been given. As we have heretofore pointed out the first count of the information was so drawn that it did not allege the commission of any specific act. It alleged that appellants had "engaged in the business of dealer in deciduous fruits." The language employed in the pleading did not, therefore, convey the idea that appellants had committed some specific, isolated act of dealing but that they had accomplished a number of transactions, all of which taken together showed that they had engaged in the business. It remains to be discovered whether it may fairly be declared that the jury was so misled by the instructions to the prejudice of appellants that a reversal is thereby required. It must, we think, be conceded that the instructions which conveyed to the jury the impression that the doing of some specific act had to be proved in order that the commission of the offense alleged in the first count of the information should be established were misleading. However, it is not so clear that appellants were thereby so prejudiced as to necessitate a reversal of the judgment. In our opinion, proof that appellants had made a number of contracts with growers was properly received for the purpose of establishing the commission of the offense charged. It is also clear, in our opinion, that proof that appellants had made any number of such contracts could do no more than establish the commission of the single offense alleged. But we do not understand that there was any denial by appellants that the various contracts made with grape growers were executed for Federal Farm Lands, Inc., by agents who were employed either by appellants directly or by their superintendent, J. W. Files, and that these contracts were in the very form which appellants had approved. Under these circumstances we think that it cannot be successfully maintained that appellants were prejudiced by the giving of the erroneous instructions. Under the allegations of the first count they could be and were convicted of the commission of a single offense, and it can make no practical difference that the jury was advised that evidence of the commission of similar offenses was admitted for the purpose of showing intent. It is impossible for us to conclude, after an examination of the entire record, that any other result than that which was obtained would have occurred had the criticized instructions not been given. Since this is true, no miscarriage of justice resulted. Section 4½, art. 6, Constitution of California. It is further to be noted that it has not been made to appear that the erroneous instructions were not requested by appellants, which is sufficient of itself to obviate the necessity of considering appellants' claim that the giving of them constituted reversible error. People v. Cebulla, 137 Cal. 314, 317, 70 P. 181, People v. Mesa, 121 Cal. App. 345, 347, 8 P.(2d) 920.

[15, 16] Appellants object that the court admitted in evidence a copy of a certain contract between a grower, R. H. Rathgern, and Federal Farm Lands, Inc., executed for the corporation by an agent, B. E. Benson. It is urged that the instrument is a copy and not the original of the contract; that it does not bear the grower's signature; that it contains the notation "cash on del.," whereas the original contains no such provision. With respect to what is contained in the original contract the means of knowledge are not open to us since the record shows that it was in the possession of appellants, who chose not to offer it in evidence. It is evidently a copy, but it was the copy which was furnished to the grower by appellants' agent. It is true that it does not bear the grower's signature, but we discover no denial that the original was signed by the grower. We think under the circumstances presented by the record that no error was committed in its reception and we are likewise of the opinion that if it be assumed that its admission was improper, no prejudice thereby resulted to appellants which affects the verdict and judgment of conviction of the offense alleged in the first count of the information.

[17-19] It is finally objected that the statute of whose violation appellants were convicted is unconstitutional in several respects. It is said that it is unconstitutional in that it conflicts with section 15 of article 1 of the California Constitution, which prohibits imprisonment for debt. It is a sufficient answer to this contention to observe that the same point was raised in People v. Perry, 212 Cal. 186, 298 P. 19, 76 A. L. R. 1331, and was there decided adversely to appellants' contention.

Furthermore, the claim of unconstitutionality in this regard relates only to the fact of nonpayment for fruit after demand, which bears upon the offense alleged in the second count of the information, and, inasmuch as we have heretofore indicated that the judgment of conviction as to this offense should be reversed for insufficiency of the evidence, it is not necessary to give further consideration to the claim that the statute is unconstitutional for the reason stated.

The statute is also said to be unconstitutional because it establishes as conclusive an unreasonable presumption that the mailing of a demand is evidence that such demand was made. This claim also relates solely, so far as this case is concerned, to the offense charged in the second count of the information and need not be considered.

It is finally urged that the statute is unconstitutional because it imposes a direct burden upon and constitutes an unreasonable interference with interstate commerce in violation of article 1, section 8, clause 3, of the Constitution of the United States. We understand that it is agreed that all of the grapes which formed the subject-matter of the various contracts which were received in evidence during the trial of the action were shipped to points in the United States outside the state of California. This contention therefore merits consideration.

For the purposes of this decision, the problem which is presented is whether or not the statute which requires a dealer in deciduous fruits which form the subject of interstate commerce to procure a license and deposit a bond constitutes an unreasonable interference with such commerce in violation of the Federal Constitution. This precise question was raised with reference to a similar provision contained in the Produce Dealers Act of 1927 in the case of Moulton v. Williams Fruit Corporation, supra, and was decided adversely to appellants' contention in an opinion written by Justice Sturtevant of Division 2 of the First Appellate District. 14 P.(2d) 88. A hearing was subsequently granted in the Supreme Court, and in the opinion written by Justice Preston, 21 P.(2d) 936, no mention is made of the point. The judgment of the superior court from which the appeal was taken was, however, affirmed by both the Supreme Court and by Division 2 of the District Court of Appeal for the First District.

Appellants place much reliance upon a decision of this court in the case of People v. Perry, 291 P. 233. Unhappily for appellants, a hearing was subsequently granted in the Supreme Court and in the opinion written by Justice Richards a different conclusion was reached from that which was reached in the Appellate Court. People v. Perry, 212 Cal. 186, 298 P. 19, 76 A. L. R. 1331. In the later opinion it was found unnecessary to decide whether or not the statute was unconstitutional for the reason stated. It is our conclusion that the reasoning of the decision in Moulton v. Williams Fruit Corporation (Cal. App.) 14 P.(2d) 88, is sound and that the Deciduous Fruit Dealers Act of 1929 does not conflict with the interstate commerce clause of the Federal Constitution. As therein pointed out, the statute "does not contain a trace of an attempt to regulate commerce." It does express a clear intent on the part of the Legislature to regulate dealers in deciduous fruits as defined in the act. The obvious purpose of the statute is to afford to the growers of deciduous fruits in California some measure of protection from the fraudulent practices of unscrupulous buyers which have for many years exercised a discouraging and detrimental influence upon one of the major industries of the state. To hold that an individual may with impunity violate the provisions of such a statute, merely because he ships into other states the fruits which he has procured in California from California growers would be unreasonably to extend the scope of that provision of the Federal Constitution which declares that Congress shall have power to regulate commerce among the several states of the Union. Statutes enacted by the lawmaking department of a state which are clearly confined to the legitimate exercise of the police power reserved to the sovereign states are not repugnant to the interstate commerce clause of the Federal Constitution. Plumley v. Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. Ed. 223; Missouri, Kansas & Texas Railway v. Haber, 169 U. S. 613, 628, 18 S. Ct. 488, 42 L. Ed. 878; Savage v. Jones, 225 U. S. 501, 525, 32 S. Ct. 715, 56 L. Ed. 1182. Counsel for appellants have not called to our attention any federal statute with which the Deciduous Fruit Dealers Act of 1929 conflicts and the fact that the California statute may incidentally affect interstate commerce is not a sufficient reason for declaring it invalid.

For the reasons stated, it is therefore ordered that the portion of the judgment herein in which decrees that appellants are guilty of the offense charged in the second count of the information and adjudges that they be punished therefor by imprisonment in the state prison for an indeterminate period is reversed. In all other respects the judgment from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

KLEIN v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 8841.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1933.

Rehearing Granted Nov. 22, 1933.

1. Constitutional law ⇐102(1).

Tenure which vice principal of San Francisco elementary schools acquired was vested right which could not be divested by repeal of statute creating tenure (Pol. Code, § 5, and § 1793, subd. 1, and §§ 1609, 1617, as amended; School Code, § 10.3; St. 1931, p. 3057, § 135).

2. Schools and school districts ⇐133.

Vice principal of San Francisco elementary schools, appointed to position in 1921, did not acquire permanent tenure so as to prevent her dismissal except for cause, since under existing laws principal could not acquire tenure, and vice principal performed duties of assistant principal, having same rights as principal (Pol. Code, § 5, and § 1793, subd. 1).

3. Mandamus ⇐79.

Vice principal of San Francisco elementary schools who had been employed continuously since 1921, being entitled to permanent classification, *held* entitled to mandate compelling board of education to restore her to her position after her dismissal without cause, since charter providing that vice principals shall be classified as permanent employees after three years' employment applied to all vice principals whether their three years of employment was before or after adoption of charter (St. 1931, p. 3057, § 135).

Proceeding by Marie G. Klein against the Board of Education of the City and County of San Francisco, State of California, and Ira W. Coburn and others, constituting the commissioners thereof. From a judgment directing issuance of a peremptory writ of mandate commanding the board to restore petitioner to her position as permanent vice principal in elementary schools, defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellants.

Francis W. Murphy, of San Francisco, for respondent.

GRAY, Justice pro tem.

The board of education of the city and county of San Francisco and the members thereof appeal from a judgment directing the issuance of a peremptory writ of mandate commanding them to restore respondent to her position and status as a permanent vice principal teacher in the elementary schools of said city and county. In October, 1904, respondent, having served the probationary period of two years, was elected a permanent teacher in such schools, without limitation as to time. On August 16, 1921, after two years' probationary service, she was elected vice principal in such schools, without limitation as to time. Thereafter for ten years she was continuously employed as a vice principal and teacher in various elementary schools to which she was assigned and, as such, performed the supervisory and administrative functions of a vice principal, and also taught classes daily. On August 11, 1931, the board dismissed her as a vice principal, but retained her as a teacher. Such action was not taken for any cause, for which the law authorized the board to dismiss the holder of a permanent tenure.

[1] Respondent's tenure as vice principal, but not as teacher, is here involved. The sole question for decision is whether, under the above facts, she had previously acquired a tenure, which prevented her dismissal except for cause. She contends first that section 1793 of the Political Code gave her such tenure upon her election on August 16, 1921, and, second, that section 135 of the new San Francisco charter (Stats. 1931, pp. 2973, 3057) granted her such tenure. As to the first contention, appellants deny that a vice principalship is a position of which the state law permits the acquisition of a permanent tenure, and as to the second, they question the constitutionality of the charter section. At the time of her election, subdivision 1 of section 1793 read as follows: "The holders of city, or city and county, certificates are eligible to teach in cities, or cities and counties, in which such certificates were granted, in schools or classes of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one of this code, duly ascertained and approved by the boards of education of such cities, or cities and counties." From its enactment in 1881 to its repeal by the School Code of 1929 (section 10.3), the language of this subdivision has remained substantially the same. Anderson v. Board of Education, 126 Cal. App. 514, 15 P.(2d) 774, 16 P.(2d) 272. Such tenure, as had been previously acquired, was a vested right of which respondent was not deprived by such repeal. Gastineau v. Meyer (Cal. App.) 22 P.(2d) 31.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 37 P.2d 74.

Indeed, section 5 of the preliminary provisions of that Code expressly continued such tenure.

Respondent's argument, in support of her first contention, rests upon the case of Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, followed under similar facts, without further discussion in Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26, and approved, arguendo, in Barthel v. Board of Education, 153 Cal. 376, 95 P. 892. While never overruled, its decision, it has been held, should be strictly confined to its facts. Marion v. Board of Education, 97 Cal. 606, 32 P. 643, 20 L. R. A. 197; Bates v. Board of Education, 139 Cal. 145, 72 P. 907. Decided in 1890, the Kennedy Case holds that the holder of a city and county certificate who had been elected principal teacher of a San Francisco grammar school and who was thereafter transferred to the same position in a school of lower grade, was entitled to a writ of mandate, restoring her to the first position. As therein stated, this decision depended upon the construction to be given to sections 1617 and 1793 of the Political Code. It was determined that section 1617, authorizing the employment of a teacher, limited the time of such employment by a board of trustees, but not by a board of education; and that a holder of the requisite certificate after election as teacher, without limitation as to time, could be dismissed only for the causes specified in section 1793.

Since an essential factor in that decision was the absence of any time limitation upon the board of education in the employment of a teacher, it is necessary, before applying its doctrine, to ascertain whether the then existing law contains such limitation. The history and exact language of the numerous amendments to section 1617, to section 1609, into which the former was transposed, and to the various sections of the School Code, which superseded the latter, may be found in the cases cited in this paragraph. Section 1617 was amended in 1911 (St. 1911, p. 1362) so as to expressly authorize the employment of a principal. "Prior to 1911 the power to employ a principal was included in the general authorization to employ teachers." Godward v. Board of Trustees, 94 Cal. App. 160, 161, 270 P. 725. Section 1793 granted a tenure only to holders of city or city and county certificates, but a statewide teachers' tenure was provided in 1921 by amendment to section 1609 (St. 1921, p. 1663). Anderson v. Board of Education, supra. The case of Bland v. Board of Trustees, 67 Cal. App. 784, 228 P. 395, holds that, under section 1609, as amended in 1921, a principal did not have tenure and therefore could be dismissed arbitrarily after the expiration of the term for which he was elected. Under section 1609, as amended in 1927 (St. 1927, p. 1913), the trustees of a school district are not authorized to employ a principal for a longer term than one year. Godward v. Board of Trustees, supra. A person employed both as principal and teacher may, under the School Code, acquire tenure as teacher, but not as principal. Gastineau v. Meyer, supra. In Anderson v. Board of Education, supra, the court purposely refrained from deciding whether a principal in a San Francisco school could obtain tenure under the School Code alone. At the time of these decisions, the distinction, noted in the Kennedy Case, between a city board of education and the trustees of a rural school district as to the power of employment of a principal or a teacher had been eliminated.

[2] Although the state law has never specified the position of vice principal, it was tacitly assumed in Harby v. Board of Education, 2 Cal. App. 418, 83 P. 1081, that a vice principal's right of tenure was governed by the law applicable to a principal. Appellants' rules, adopted December 28, 1910, provide for the position of vice principal, and its rules, adopted January 1, 1927, define the duties of a vice principal. These duties are of the same general nature—to wit, supervisory and administrative—as are performed by a principal, although they are more subordinate and less important. A vice principal therefore would seem to be an assistant principal (see Bland v. Board of Trustees, supra) having the same rights of tenure as a principal. But from the above cited cases it appears that, under the law as it stood at the time when respondent claims to have acquired tenure, a principal was not permitted to acquire tenure. Respondent's first contention is therefore untenable.

[3] Section 135 of the new charter provides that: "All * * * vice-principals, principals * * * shall be classified as permanent employees in their respective positions after they have been successfully employed in such positions in the school department for a probationary period of three years. In the absence of any action to the contrary by the board of education at the end of the third year of such employment the classification shall be considered as permanent." In upholding the constitutionality of said section 135, the court in Anderson v. Board of Education, supra, at page 520 of 126 Cal. App., 15 P.(2d) 774, 776, said: "Our conclusion is that section 135 of the San Francisco charter is wholly consistent with and in no wise in derogation of the general purposes of the state tenure law and that, in adding principals and vice principals to those who are protected from dismissal without cause, the city has merely furthered the general purposes of the state act (or clarified that act, as the case may be) without taking anything away from its principles or purposes." Applying that section, the court decided that a person who had been employed continuously for more

than three years (a portion of which time was before the adoption of the new charter) as principal of an evening high school could not be removed from such position without cause. The charter applies to all vice principals, irrespective of whether their three years of employment was before or after its adoption. Kennedy v. Board of Education, supra; Clark v. Board of Education, 64 Cal. App. 757, 222 P. 854. It being undisputed that respondent had been employed for more than three years, she became entitled to a permanent classification, and could not be dismissed without cause.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

PEOPLE v. TWEDT.*

Cr. 157.

District Court of Appeal, Fourth District, California.

Nov. 20, 1933.

Hearing Granted by Supreme Court Dec. 18, 1933.

1. Criminal law ⇐112(1).

In prosecution for selling securities without permit, that defendant's acceptance of complaining witness' offer to purchase stock was mailed in county other than where he was prosecuted did not take jurisdiction of case out of county of prosecution (St. 1917, p. 673, as amended; Civ. Code, §§ 1726, 1729; Pen. Code, § 781).

2. Criminal law ⇐147.

Prosecution for sale of securities without permit *held* not barred by limitations, where information was filed exactly three years subsequent to mailing of defendant's letter accepting complaining witness' offer to purchase stock (St. 1917, p. 673, as amended; Civ. Code, §§ 1726, 1729).

3. Criminal law ⇐200(1).

Co-operative acts constituting but one offense when committed by same person at same time, when combined, charge but one crime, and but one punishment can be inflicted.

4. Licenses ⇐42(4).

Evidence sustained conviction for sale of corporate stock without necessary permit therefor (St. 1917, p. 673, as amended; Civ. Code, §§ 1726, 1729).

5. Licenses ⇐42(4).

Defendant's offer to sell stock to complaining witness and negotiations for its sale *held* insufficient to sustain conviction for offering stock for sale, and negotiating for sale thereof without necessary permits, since such offer and negotiations were but part of sale (St. 1917, p. 674, § 2, subd. 8, as amended by St. 1929, p. 1252; Civ. Code, §§ 1726, 1729).

6. Criminal law ⇐755.

Refusing instructions incorrectly stating law applicable to case, and which invaded jury's province, *held* not error.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

O. J. Twedt was convicted of violations of the Corporate Securities Act, and he appeals.

Affirmed in part, and reversed in part.

Thomas F. Lopez, of Fresno, and G. W. Cartwright, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Siebert Sefton, Deputy Atty. Gen., for the People.

MARKS, Justice.

Appellant was charged by an information filed by the district attorney of Fresno county on May 19, 1933, with three separate offenses consisting of violations of the Corporate Securities Act (St. 1917, p. 673, as amended). The first count alleges that on or about the 20th day of May, 1930, in Fresno county, he *offered for sale*, to Eveline Kloster, securities of the Linda Mineral Products Company without having a permit from the commissioner of corporations. The second count alleges that at the same time and place he *negotiated for the sale* of securities of the same company with Eveline Kloster without any such permit. The third count alleges that at the same time and place he *sold* securities of the same company to Eveline Kloster without the necessary permit. It is further alleged in the information "that the offenses set out in the three counts of this information are different offenses arising out of the same transaction and connected in their commission." Appellant was found guilty on all three counts and was sentenced on each of them to confinement in the state penitentiary. His motions for new trial and for arrest of judgment were denied. He is here on appeal from the judgment and orders denying his motions.

The Linda Mineral Products Company is a California corporation. On September 17, 1928, it was granted a permit to sell certain of its capital stock. This permit was suspended on January 4, 1930. An amended permit was issued to it on May 21, 1930. It is admitted by counsel for both parties that the only criminal acts which may be con-

sidered here in support of the judgment are those which were committed on May 19 and May 20, 1930, as the statute of limitations had run against all prior acts and the permit of the commissioner of corporations became effective on May 21, 1930, so that offering for sale, negotiating for the sale of, or selling the stock of the Linda Mineral Products Company was lawful on and after that date.

Miss Kloster, who was a teacher in the Fresno High School, had a brother who had become acquainted with a sister of appellant while attending a university. At the request of her brother, Miss Kloster called upon Miss Twedt and her mother at their residence in Los Angeles during the Christmas holidays of 1929. She there met appellant and heard him recount in the most glowing terms the prospects for the financial success of the Linda Mineral Products Company, of which he was president. In 1930 Miss Kloster called upon Miss Twedt and her mother at their home in Oakland during the Easter school vacation of that year. She did not then see appellant.

About May 2, 1930, while Miss Kloster was teaching her class in Fresno, she was called by appellant over a long-distance telephone, probably from San Francisco. He told her that the Linda Mineral Products Company had been suddenly disappointed in raising $5,000 from another party; that it was financially embarrassed because of the failure to receive this money and that it needed it badly. He asked her to purchase stock in the company to this amount. She replied that she did not have the money. He then asked her if the members of her family could not make up the amount as he did not want to place the stock in small amounts with a number of purchasers. The conversation ended by appellant asking Miss Kloster to think it over. She sent him a night letter on the same evening, the contents of which are not in the record.

About May 6, 1930, Miss Kloster received a telegram from appellant advising her that he would arrive in Fresno at 10 o'clock that evening and asking to see her. Appellant had a long conference with Miss Kloster and one of her sisters that evening when the prospects of the company and the sale of its stock were discussed in considerable detail. Miss Kloster informed him that she might buy $700 worth of the stock, one of her sisters $300, and a Miss Smith $500. Appellant still wanted to sell $5,000 worth in a single transaction and again asked that the matter be further considered.

About May 13, Miss Kloster received another telegram from appellant asking for another appointment with her in Fresno at 10 o'clock that night. He then informed Miss Kloster that he had decided to let the three women have the $1,500 worth of stock and wanted the check immediately. Miss Kloster informed him that her money was not immediately available; that she hoped to be able to get it together so that it might be sent by the 20th of May. He suggested a postdated check, but it was not given him. On Saturday, May 17, 1930, Miss Kloster sent appellant a special delivery letter to his Oakland residence address which he received the next day, the contents of which appellant described as follows:

"She said she had talked to Dorothy Smith the next morning and that Dorothy and I agreed, was very happy to put in $500, and that—so if it was all right with me, why then she would take $500 worth of stock. * * * Oh, yes, she was going to take,—she and her sister had agreed, decided to take the stock, and also that if it was all right, why that they would take that, and also Dorothy Smith would take it. * * * She said that she did—that she would send the money, that they had decided to take the stock, and that she was going to send the money on Tuesday, as I recall it.

"Q. She said—do you recall whether there was any mention as to the amount of money? A. Yes, there was. They were taking $1500 worth."

Appellant replied to this letter by one dated May 18, 1930, and which was postmarked at Oakland, California, May 19, 1930, at 12:30 p. m. This letter contains the following: "Sending the 'Proceeds' on Tues. as you state is perfectly alright. It would have been O. K. to have sent the check because I would have held it till you told me it was good but is it just as O. K." "Tuesday" was May 20, 1930. On the afternoon of that day Miss Kloster and Miss Smith inclosed two checks in an envelope, one signed by the former for $1,000, and one signed by the latter for $500, in payment of the stock, and mailed them in Fresno. They were received and cashed the next day in San Francisco. The stock was issued and delivered in June, 1930.

Our study of the evidence leads to the following conclusions: (1) On May 2, 1930, appellant, over the telephone, offered to sell Miss Kloster $5,000 worth of the stock of the Linda Mineral Products Company. This offer was rejected. (2) On May 6, 1930, in Fresno, appellant renewed the offer to sell the same amount of stock to Miss Kloster. She rejected this offer, but did discuss with him the purchase of $1,500 worth of stock, $700 for herself, $300 for her sister, and $500 for Miss Smith. Appellant did not accept this offer of purchase, if it could be so termed, and left asking Miss Kloster to think the matter over further. (3) On May 13, 1930, appellant, in Fresno, offered to sell Miss Kloster $1,500 worth of the stock of the corporation if the purchase price were paid in cash, or if a postdated check were

given him for it. This offer was rejected as Miss Kloster did not have the cash available and would not give him a postdated check. (4) By her letter of May 17, 1930, Miss Kloster offered to purchase $1,500 worth of the stock, provided she could pay for it on May 20, 1930. This offer was accepted by appellant in his letter dated May 18, 1930, postmarked May 19, 1930. (5) The checks in payment of the stock were mailed May 20, 1930, cashed on May 21, 1930, and the stock issued in June, 1930.

The provisions of the Civil Code in effect at the time of the transaction provided that "an agreement for sale is * * * a mutual agreement to sell and buy." Section 1726. "An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor." Section 1729.

It is evident that the conversations between appellant and Miss Kloster on the 2d, 6th, and the 13th days of May did not result in any contract of sale, but in rejections of the offers to sell by Miss Kloster. "A communication from the offeree to the offeror, stating in effect that the offeree declines to accept the offer is a rejection." "A counter offer by the offeree, relating to the same matter as the original offer, is a rejection of the original offer, unless the offeror in his offer, or the offeree in his counter-offer states that in spite of the counter-offer the original offer shall not be terminated." Restatement of the Law. Contracts, §§ 37, 38.

[1] The first time the minds of the parties met on the transaction was in the exchange of the letters dated May 17, and May 18, 1930. There arose from these letters an agreement to buy and sell. It makes no difference here that the acceptance was mailed in Alameda county and the case tried in Fresno county. Where a public offense is committed, part in one county and part in another, the jurisdiction of the case is in either county. Section 781, Pen. Code; United States v. Ford (D. C.) 3 F.(2d) 643–647; People v. Boggess, 194 Cal. 212, 228 P. 448; People v. Bocchio, 80 Cal. App. 138, 251 P. 672.

In 6 California Jurisprudence, 57, it is said: "When the parties to a proposed contract have themselves fixed the manner in which their assent is to be manifested, assent in any other mode will not be presumed. But where no condition is provided by the proposer concerning the communication of the acceptance, any reasonable and usual mode may be adopted, and consent will be deemed to have been fully communicated between the parties as soon as the acceptance is put in the course of transmission, and beyond the control of the party accepting. A telegram accepting an offer takes effect on its deposit for transmission. And it seems to be settled that when the proposal is unconditionally accepted by a letter deposited in the mail properly addressed to the proposer the contract is complete."

[2] There is no evidence in the record showing when the letter written by appellant to Miss Kloster and dated May 18, 1930, was actually deposited in the mail. The envelope was postmarked in Oakland at 12:30 p. m. on May 19. This furnishes sufficient evidence to support the implied finding of the jury that it was mailed at an earlier hour on that day and that the contract to sell the stock was then complete. As the contract of sale was completed on May 19, 1930, the statute of limitations had not run against it.

Subdivision 8 of section 2 of the Corporate Securities Act in effect at the time of the transaction here involved provided in part as follows: "'Sale' or 'sell' shall include every disposition, or attempt to dispose, of a security or interest in a security for value. * * * 'Sale' or 'sell' shall also include a contract of sale, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a subscription or an offer to sell, directly or by an agent, or a circular letter, advertisement or otherwise." St. 1929, pp. 1251, 1252.

[3-5] It is evident under this definition that an offer to sell stock must be included in the sale where one is made to the offeree. It is also difficult to understand how a sale can be completed without negotiations for it. It has long been the rule in California "that co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.' Wharton, Criminal Law, approved in People v. Shotwell, 27 Cal. 394." People v. Clemett, 208 Cal. 142, 280 P. 681. See, also, People v. Buchanan, 106 Cal. App. (Supp.) 765, 288 P. 50, and Schroeder v. United States (C. C. A.) 7 F.(2d) 60.

If we should regard the letter of appellant which was mailed in Oakland on May

19, 1930, as a counter offer of sale conditioned upon payment on May 20, instead of an acceptance of the offer of Miss Kloster to buy the stock, the legal situation remains the same. It would be but one step in the transaction which resulted in the sale to the person to whom the offer was made, acceptance being by mailing the checks in Fresno on the 20th. All acts prior to May 19 were barred by the statute of limitations. Under this state of the record the evidence sustains the conviction of appellant under the count of the information charging him with the *sale* of the stock. The conviction under the other two counts of the information charging that appellant *offered* the stock for sale to Miss Kloster and *negotiated* with her for its sale cannot be sustained.

[6] Appellant complains of the trial court's refusal to give two instructions proposed by him. Neither instruction correctly stated the law applicable to the facts of this case. The first invaded the province of the jury by instructing on a question of fact. It would have been error to have given either of them.

Appellant assigns as reversible error remarks made by the district attorney in his closing address to the jury. It is evident that he was replying to some argument which counsel for appellant had made during their addresses to the jury on the question of the lack of any fraud or intent to defraud any one on the part of appellant. The arguments of defense counsel to which the reply was made do not appear in the record, therefore we cannot determine just what called forth the rather fiery argument of the prosecutor or the excuse for it. Under the circumstances we cannot regard the remarks as sufficiently prejudicial, assuming, but not holding, prejudice, to require a reversal. People v. Bragdon, 103 Cal. App. 20, 283 P. 881; People v. Ciulla, 44 Cal. App. 719, 187 P. 46.

The judgment under the first count of the information where appellant was found guilty and sentenced because he "offered for sale to one Eveline Kloster securities of the Linda Mineral Products Company" is reversed.

The judgment under the second count of the information where appellant was found guilty and sentenced because he "negotiated with Eveline Kloster for the sale of certain securities of the Linda Mineral Products" is reversed.

The judgment under the third count of the information where appellant was found guilty and sentenced because he "sold to one Eveline Kloster securities of the Linda Mineral Products Company" is affirmed.

The order denying appellant's motion for new trial is reversed as to the offenses charged in the first and second counts, and affirmed as to the offense charged in the third count of the information.

The order denying the motion in arrest of judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

135 Cal.App. 324

BRADFORD v. SARGENT et al.

Civ. 688.

District Court of Appeal, Fourth District, California.

Nov. 15, 1933.

Hearing Denied by Supreme Court Jan. 12, 1934.

1. Automobiles ⇐192(11).

Under statute respecting responsibility for minor's negligence, owner *held* not liable for damages caused by automobile driven by licensed minor with whom owner's son was riding (St. 1923, p. 532, § 62(a–c), as amended by St. 1929, p. 522, § 23).

2. Automobiles ⇐192(1).

"Express permission" within statute respecting automobile owner's liability includes prior knowledge of intended use and affirmative and active consent thereto (Civ. Code, § 1714¼).

> Civ. Code, § 1714¼, provides, in substance, that owner of motor vehicle shall be responsible for damages resulting from negligence in operation thereof, by any one using or operating it with permission, express or implied, of owner.
>
> [Ed. Note.—For other definitions of "Permission; Permit," see Words & Phrases.]

3. Automobiles ⇐192(1).

"Implied permission" within statute respecting automobile owner's liability means sufferance of use or passive permission deduced from failure to object to known past, present, or intended future use under circumstances where use should be anticipated (Civ. Code, § 1714¼).

[Ed. Note.—For other definitions of "Implied Permission," see Words & Phrases.]

4. Automobiles ⇐242(6).

One seeking to hold owner liable for negligence of another operating automobile has burden of proving express or implied permission to use automobile (Civ. Code, § 1714¼).

5. Automobiles ⇐242(6).

Presumptions under statute that person is innocent of crime, and that law has been

obeyed, *held* insufficient to sustain burden of proof on injured person to establish that automobile injuring him was operated by owner's son with owner's express or implied permission (Code Civ. Proc. § 1963, subds. 1, 33; Civ. Code, § 1714¼).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Clarence A. Bradford against A. M. Sargent and others. From a judgment for plaintiff, defendant named appeals.

Reversed.

Swing & Swing, of San Bernardino, and Voltaire Perkins, of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondent.

MARKS, Justice.

Respondent recovered judgment against appellant and defendants for damages suffered in a motor vehicle accident which occurred on G street in the city of San Bernardino, between 5 and 6 o'clock on the afternoon of Saturday, June 13, 1931. This appeal is taken by A. M. Sargent alone.

A. M. Sargent was the owner of a Ford coupé. Andy Sargent was his minor son of the age of about sixteen years, and Lee Swartz was a minor of the age of about nineteen years at the time of the accident. A. M. Sargent and his son Andy lived in the city of Colton, and Lee Swartz in the city of San Bernardino.

At about 10 o'clock on the morning of June 13, 1931, Earnest Hartzell and Andy Sargent entered the Ford coupé which was at the residence of appellant in Colton, and Hartzell drove it to the home of a girl friend in San Bernardino where the two boys met Lee Swartz. At about 4 o'clock in the afternoon, some other youth having taken Swartz's automobile, and he desiring to go to his home on an errand of his own, Swartz and Andy Sargent entered the Ford coupé and went to the Swartz residence. In returning to the home of the young lady, with Swartz driving, the accident happened which caused the injury of respondent.

There is little conflict in the evidence as to the happening of this accident, which may be described as follows: Respondent and two others were engaged in trimming branches from a eucalyptus tree growing in the parking on the west side of G street in the city of San Bernardino. Three limbs had been felled, and two of them had been removed prior to the time of the accident. The third had been cut into two pieces, one of which was about twelve inches in diameter and eighteen feet in length. It had been moved so that the lower end rested on the westerly portion of G, street with the other end across the curb and on the sidewalk. On the end which projected into the street, there was a large splinter about two feet long, and of a width which a witness described as equaling the width and thickness of his hand at its junction with the limb, tapering to a point at the extreme end. Respondent and the two others were about to remove this limb from the street by dragging it behind an automobile which was standing on the street about five feet easterly from the westerly curb, with the rear end about three feet south from the limb which was fastened to it by a short rope. Respondent was standing on the left rear bumperette of the automobile so that he might signal approaching traffic and also signal the driver of the car when it was safe to proceed. There is some conflict in the evidence as to the distance the limb projected into the street. Respondent's witnesses fixed this distance at between eight and twelve feet. The defendants testified that it projected to about the center of the street, a distance of some twenty feet easterly from the westerly curb.

Defendants entered G street from the west on an intersecting street a little less than two blocks north of the place of the accident. They proceeded southerly on G street at a speed variously estimated at between twenty-five and forty miles per hour, with Swartz driving. He swerved the automobile to his left when about twenty-five feet from the limb in order to go around it. When passing it, both defendants heard a slight click which they described as a sound similar to that which would be made by a stick hitting the car when run over. They proceeded on their way without stopping and without any knowledge of an accident, returning to the house of the young lady. They examined the Ford and found that the connection holding the right end of the front bumper was slightly bent. It is evident from the testimony of all the witnesses that this had been caused by its striking the end of the splinter of the limb in the street.

Late in the evening of the same day the two defendants learned that respondent had been injured by an automobile striking the splinter of the limb and rolling it over upon him. This was the first intimation they had that an accident had happened. They immediately went to the house of respondent, but did not see him that night, as the hour was late and the house was dark. They returned with two other youths the following day and talked with respondent, informing him of their participation in the accident.

On the 14th day of February, 1929, Andy John Sargent, one of the defendants, then of the age of fourteen years, signed an application for a motor vehicle operator's

license. It was joined in and signed by his father, and Gertrude Sargent, his mother. An operator's license was issued to Andy on this application. Gertrude Sargent was deceased at the time of the trial.

Andy Sargent was arrested on the 18th day of March, 1931, in the city of San Bernardino for violating provisions of the California Vehicle Act. On March 20, 1931, his operator's license was suspended for ninety days by the police judge and delivered to the judge who apparently had possession of it at the time of the accident.

Prior to March 20, 1931, the Ford coupé had been used principally by Andy Sargent to travel to and from his home in Colton to school in San Bernardino. On March 20th appellant forbade his son to drive or use the Ford or to permit any one else other than Gordon Maltzberger to drive it for him. Maltzberger was a neighbor boy, and was permitted by appellant to drive the Ford between Colton and San Bernardino for the sole purpose of furnishing Andy Sargent transportation to and from school and nowhere else. Up to the day of the accident it appears that Maltzberger was the only youth who had driven the Ford after March 20, 1931.

Appellant was employed by the Colton Cement Company, and on the day of the accident left his home at about 5 o'clock in the morning for the place of his employment. Mrs. Sargent was employed in San Bernardino. She left the family home that morning at about 8:30. Neither returned until late in the afternoon. Andy Sargent and Earnest Hartzell, a boy friend of Andy's, were left alone at the Sargent home on the morning of June 13th. Another youth arrived at the residence at about 9 o'clock, during the absence of both parents, and took the two youths for a ride in his automobile, returning them to the Sargent home an hour later. The Ford coupé was standing in the driveway of the residence where it had been left the night before by appellant. Earnest Hartzell desired to return to San Bernardino in the Ford. Andy told him that his father would not like it, as he had instructed him not to use the Ford nor permit any one to do so. Earnest entered the car, and was followed by Andy. He drove to San Bernardino and to the house of the young lady we have mentioned. Andy at no time drove the automobile.

Respondent seeks to support the judgment under the provisions of section 62 of the California Vehicle Act (as amended by St. 1929, p. 522, § 23) as in force at the time of the accident and also under the provisions of section 1714¼ of the Civil Code.

Appellant urges that respondent was guilty of contributory negligence as a matter of law, and therefore cannot recover. He urges that respondent obstructed a public street without a permit and maintained a nuisance thereon and became a guarantor of the safety of all travelers using it. Without passing on the soundness of this argument, it is sufficient to say that within the past several years it has been generally held in California that the question of whether the admitted negligence of a plaintiff contributed to his injury is a question of fact for the trial judge or jury. Hart v. Farris (Cal. Sup.) 21 P.(2d) 432.

[1] The contention that appellant's liability was fixed under the terms of subdivisions (a) and (b) of section 62 of the California Vehicle Act has been resolved in favor of the appellant by the case of Lundquist v. Lundstrom, 94 Cal. App. 109, 270 P. 696, regardless of any question of the effect of the suspension of Andy's operator's license by the police court. In the Lundstrom Case it appears that the automobile in question was owned by Marcus Lundstrom, a minor, whose mother had signed his application for an operator's license, and was being driven at the time of the accident by Gilbert Talbot, a minor, who was also a licensed operator. The court held that Mrs. Lundstrom could not be held liable under the provisions of subdivisions (a) and (b) of section 62 of the California Vehicle Act as then in force (Stats. 1923, p. 532) because her minor son was not *driving* the automobile. The facts of that case and of the instant case cannot be distinguished. Lee Swartz, a minor, who was a licensed operator, was driving the Ford coupé at the time of the injury of respondent.

Subdivision (c) of section 62 of the California Vehicle Act (as amended by St. 1929, p. 522, § 23), in effect at the time of the accident, imputed to the parents the negligence of a minor whether a licensed operator or not "driving a motor vehicle upon a public highway with the express or implied permission of a parent or parents." Here again we conclude that, under authority of Lundquist v. Lundstrom, supra, there could be no liability on the part of appellant because his son was not driving the car at the time of the accident. See, also, Bosse v. Marye, 80 Cal. App. 109, 250 P. 693, for further definition of "driving."

[2-4] Section 1714¼ of the Civil Code provides in part: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." Under the language of this section and the definition of the word "operating" in Bosse v. Marye, supra, a liability for the accident would attach to appellant for the injury of respondent if the Ford coupé had been then driven or operated with his permission, express or im-

plied. It is therefore necessary for us to determine whether there is any evidence in the record supporting the conclusion that appellant gave either his express or implied permission to his son to use the automobile on the day of the accident.

Express permission would necessarily include prior knowledge of the intended use and an affirmative and active consent to it. An implied consent would indicate a sufferance of use or a passive permission deduced from a failure to object to a known past, present, or intended future use under circumstances where the use should be anticipated. Knowledge of some act or intended act on the part of the user by the owner should be necessary before consent to use should be implied. People v. Conness, 150 Cal. 114, 88 P. 821, Cramer v. Jenkins, 82 Cal. App. 269, 255 P. 877, 256 P. 444; People v. Duncan, 22 Cal. App. 430, 134 P. 797. It is obvious that the burden of proving an express or implied permission rests on the party asserting the protection of the statute.

From the testimony in the record it appears that appellant on March 20, 1931, gave his son positive instructions not to drive or use the Ford coupé for ninety days and to permit no one else to drive it except Gordon Maltzberger, and Gordon could only drive Andy to and from school and nowhere else. These instructions had not been violated up to the day of the accident. Appellant left his home for work at about 5 o'clock, and Mrs. Sargent left at about half past 8 o'clock on the morning of June 13th. Neither knew that the Ford coupé had been taken and used on that day until after the accident.

[5] Respondent seeks to sustain the judgment by a presumption which he maintains supports it. He arrives at this assumption by the following ingenious and circuitous route: "Among the disputable presumptions enumerated in section 1963, Code of Civil Procedure, are: '1. That a person is innocent of crime or wrong; * * * 33. That the law has been obeyed.' Section 499b of the Penal Code make(s) it a misdemeanor to take an automobile 'without the *permission* of the owner thereof * * * for the purpose of temporarily *using* or *operating* the same.' Section 146 of the California Vehicle Act (St. 1923, p. 564) at the time of the collision in question declared 'any person' to be guilty of a felony '* * * who shall drive a vehicle not his own, *without the consent of the owner* thereof, and in the absence of the owner and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same. * * *' (Italics ours.) Section 146 further provides that any person who assists or is a party or accessory to 'such * * * unauthorized taking or *driving* is also guilty of a felony.' Section 148 of said act (as amended by St. 1927, p. 1440, § 38) at the time of said collision provided that: 'Any person who shall *without the consent of the owner* or person in charge of a vehicle * * * who, while such vehicle is at rest and unattended, shall attempt * * * to set said vehicle in motion shall be guilty of a misdemeanor.'" He cites the following cases in support of this argument: People v. Milner, 122 Cal. 171, 54 P. 833; Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Poncino v. Reid-Murdoch & Co., 212 Cal. 325, 298 P. 818; Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Rapolla v. Goulart, 105 Cal. App. 417, 287 P. 562; Fortier v. Hogan, 115 Cal. App. 50, 1 P.(2d) 23; Bushnell v. Yoshika, 115 Cal. App. 563, 2 P.(2d) 550; Pitt v. Southern Pacific Co., 121 Cal. App. 228, 9 P.(2d) 273. We have examined these cases, and none of them is factually in point.

Other states have adopted provisions similar to section 1714¼ of the Civil Code. New York and Michigan have somewhat similar enactments which have been construed by their courts. Psota v. Long Island Ry. Co., 246 N. Y. 388, 159 N. E. 180, 62 A. L. R. 1163; Chaika v. Vandenberg, 252 N. Y. 101, 169 N. E. 103; Arcara v. Moresse, 258 N. Y. 211, 179 N. E. 389; Kelly v. City of Niagara Falls, 131 Misc. 934, 229 N. Y. S. 328; Atwater v. Lober, 133 Misc. 652, 233 N. Y. S. 309, 311; Union Trust Co. v. American Commercial Car Co., 219 Mich. 557, 189 N. W. 23.

The New York statute contains an important provision not appearing in the California enactment; namely, that the use of the automobile with the express or implied permission of the owner must be *legal*. This must be borne in mind in considering the authorities from that state. By eliminating the portions of the opinions discussing the legality of the use of an automobile by a person other than the owner, we find the rule clearly announced in that state that the use of an automobile without the express or implied permission of the owner or contrary to the express instructions of the owner, as to the locality in which it might be operated, creates no liability on the part of the owner for the negligent acts of the user. The case of Atwater v. Lober, supra, is factually similar to the instant case. It is there said:

"The intent of the Legislature was to make the owner liable for the negligence of any person to whom he might give permission to operate his car. Plaumbo v. Ryan, 213 App. Div. 517, 210 N. Y. S. 225; Leppard v. O'Brien, 225 App. Div. 162, 232 N. Y. S. 454.

"Implied authority is actual authority circumstantially proved, and is the authority the principal intended his agent to possess [citing cases], and is actual authority evidenced by conduct of the principal which has been such as to justify the jury in finding

that the agent had actual authority to do what he did (Moore v. Switzer, 78 Colo. 63, 239 P. 874). * * *

"The burden of proof was on the plaintiff to establish all the material allegations of his complaint, including the permission of said Joseph W. Lober, by a fair preponderance of the evidence (Legenbauer v. Esposito, 187 App. Div. 811, 176 N. Y. S. 42), and not by speculation or conjecture.

"To permit means to allow or consent to, and is the legal equivalent that it was done with the consent and knowledge of the person charged (U. S. v. San Francisco Bridge Co. (D. C.) 88 F. 891), implying an intent to do the thing complained of. Thus knowledge and an active operation of the mind are required, and the passive happening of the event is not enough. People ex rel. Hausauer-Jones Printing Co. v. Zimmerman, 58 Misc. 264, 109 N. Y. S. 396; MacFarlane v. Mosier & Summers, 79 Misc. 460, 141 N. Y. S. 143.

"Knowledge is prerequisite to consent, and permission cannot be implied from mere user without proof of knowledge thereof. * * * As Judge Blatchford said when construing a federal statute: 'Every definition of "suffer" and "permit" includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is what is to be done.' (Gregory v. U. S., 17 Blatchf. 325, Fed. Cas. No. 5803). * * * It cannot be said that one has permitted or suffered a thing when he had no knowledge of it; the words 'suffered' and 'permitted' necessarily implying knowledge, and do not impose any duty to prevent or to use reasonable care to prevent, except where he permits or suffers after acquiring knowledge. Clover Creamery Co. v. Kanode, 142 Va. 542, 129 S. E. 222. Obviously the father could not permit that which he did not know about. * * * If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed. [Citing cases.] The difficulty of proving permission and legal use does not change the law or rules of evidence or liability. The Legislature made the owner liable for the negligence of any person to whom he loaned his car, but went no further; it did not otherwise change any of the rules of liability. Fluegel v. Coudert, 244 N. Y. 393, 155 N. E. 683; Leppard v. O'Brien, supra. It did not increase the liability of the lender beyond that of the master for those acts of his servant coming within the scope of his employment. The Legislature may not be presumed to make any innovation upon the common law further than is required by the mischief to be remedied. * * * If the car was being driven without the owner's permission or contrary to his express orders, no liability attached to him."

The Michigan statute is quite similar to our own, and does not contain the element of *legal* use appearing in the New York enactment. Union Trust Co. v. American Commercial Car Co., supra. It was there held that the plaintiff must sustain the burden of proving that the use of the motor vehicle at the time of the accident was with the express or implied permission of the owner in order to maintain an action against him; that proof of permission to use the motor vehicle for a limited time on a preceding day would not suffice.

Under the facts of this case, we are of the opinion that the disputable and indirect presumptions "that a person is innocent of crime or wrong" and "that the law has been obeyed" (section 1963, Code Civ. Proc.) are not sufficient to sustain the burden of proof resting upon respondent to establish that the Ford coupé at the time of the accident was operated by his son "with the permission, express or implied," of the owner (section 1714¼, Civ. Code).

The judgment against appellant is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

135 Cal.App. 396

RICHBART v. ULLMAN et al.

Civ. 7786.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1933.

1. Usury ⇨42.

Lapse of reasonable time in completing loan and paying over money after time papers are dated does not render loan usurious, where parties act in good faith and without intention to evade usury laws (Gen. Laws 1931, Act 3757).

2. Guaranty ⇨11.

Where defendants signed instrument of guaranty in reliance on escrow instructions disclosing that signature of another was to be affixed to instrument, in absence of other's signature no contract of guaranty existed.

3. Guaranty ⇨87.

Evidence that defendants signed guaranty in reliance on escrow instructions calling for signature of another *held* available under answer and stipulation.

Answer of one defendant alleged that there were to have been guarantors other than ones appearing on guaranty contract, but that some of guarantors had

been changed to the prejudice of defendant, and stipulation entered into at opening of trial provided that defense pleaded in behalf of any one defendant should be considered as pleaded and available to all other defendants.

YORK, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by L. Richbart against S. Geo. Ullman and others. From an adverse judgment, plaintiff appeals.

Affirmed.

O'Melveny, Tuller & Myers and Albert Parker, all of Los Angeles, for appellant.

Arthur C. Fisher and S. A. Shoop, both of Los Angeles, for respondents Ullman and Williams.

YORK, Justice (dissenting in part).

This is an appeal by plaintiff from a judgment in favor of defendants, who were the guarantors of a promissory note for $25,000 payable to plaintiff, maturing five years after its date—March 5, 1928—bearing interest at 12 per cent. per annum and secured by a deed of trust.

As against defendant M. H. Horton, the appeal has been dismissed, by reason of his discharge as a bankrupt.

The loan was handled through an escrow held by American Safe Deposit Company, the parties to the escrow being plaintiff and the corporate maker of the note, Theatrical Enterprises, Inc., the latter not being named a party defendant in the suit. The escrow instructions provided, among other things, that plaintiff handed the escrow holder his check for $25,000 payable to Theatrical Enterprises, Inc., but that it was *not to present* the check for payment until it held for the account of plaintiff a deed of trust covering four parcels of real property and the note secured thereby, together, with a guaranty of title showing the trust deed a prior incumbrance upon the property. The instructions were dated March 5, 1928, and it was provided that they were not to run longer than a period of ten days from their date. On *March 5, 1928*, when the check was delivered to the escrow holder, plaintiff did not have sufficient funds on deposit with the bank to meet the check, but on March 17th he learned that all necessary papers were in the hands of the escrow holder and that the check was about to be presented to the bank, and thereupon deposited the amount of the check in the bank upon which it was drawn, and on *March 21, 1928*, the check was paid.

Upon trial of the action it was found by the court that "plaintiff L. Richbart asked, demanded and charged a greater sum for the loan of said $25,000.00 than at the rate of $12.00 per $100.00 for one year; that it is true that he thereby violated the provisions of Act 3757 of the General Laws of the State of California; that it is true that he asked, demanded and charged interest at the rate of 12% per annum on the sum of $25,000.00 from the 3rd day of March, 1928, for a period of five years thereafter and that he did not actually loan said sum of $25,000 until the 21st day of March, 1928."

The court found as conclusions of law: "That by charging and exacting interest on the loan of $25,000.00 at a greater rate of interest than at the rate of 12% per annum, the plaintiff violated the provisions of Act 3757 of the General Laws of the State of California; that plaintiff thereby became precluded and is precluded from maintaining any action for the collection of said $25,000 until the full period of time it was contracted for has elapsed, to-wit: the 4th day of March, 1933; that the Court further finds that the agreement to pay interest on the said $25,000.00 is null and void and that no interest may be collected by plaintiff and no action maintained to recover interest in any sum thereon; that the sum of $1,250.00 has been paid to plaintiff on the principal sum of $25,000.00; that defendants are entitled to recover their costs herein expended."

Upon this appeal it is contended that the transaction was not usurious in its essence for the following reasons:

1. That delay occasioned by the borrower or otherwise which results in the transfer of the funds represented by a note at a date not long subsequent to the date of the note does not render the transaction embodied in the note usurious.

2. The escrow instructions merely call for a check and not for cash, and accordingly the check was accepted as payment on the day when the note was dated.

3. The maxim, "De minimis non curat lex," applies here because the amount of interest collected during the few days before the transaction was consummated is negligible.

4. The delivery out of escrow related back to the time of the delivery of the check into escrow.

5. The delay in consummating the present transaction is entirely due to the fault of the borrower.

6. In the present transaction there was no contract to pay a usurious rate of interest.

In support of his appeal, plaintiff cites many cases from foreign jurisdictions, but nothing from California. In this connection, we quote from the case of Haines v. Commercial Mortgage Company, 200 Cal. 609, at pages 626, 627, 254 P. 956, 255 P. 805, 807, 53 A. L. R. 725, on the subject of usury: "It should be stated here that on the conclusions above announced the authorities of the various

states are in conflict. No state has a statute identical with our own; hence we have had to rely upon practically an independent construction of the provisions of our statute itself. * * * Each particular statute under interpretation must furnish its own basis for decision upon a question of this character." Again, in Westman v. Dye, 214 Cal. 28, at page 33, 4 P.(2d) 134, 136: "Due to the fact that we have had no usury statute, except that governing pawnbrokers, until the act of 1919, the decisions in this state upon this subject have been extremely meager. The question now before us has never before been directly before this court. In other jurisdictions, however, the usury laws have furnished a most fruitful source of litigation. Almost every conceivable question arising under the laws of usury has been the subject of judicial determination on numerous and many occasions. There is no dearth of authorities upon these questions, but the great difficulty is in winnowing from the great mass of decisions those which appear to state the correct and proper rule, approved by the weight of authority. Upon almost every question of any importance arising under the usury laws we find the courts greatly divided, and well-considered authorities are to be found upon either side of such question."

In the case at bar, the borrower paid interest in accordance with the terms of the agreement, i. e., from March 5, 1928, but it had the use of the money only from March 21st, after the check was made good by a deposit made to cover same in the bank. In effect then, the contract called for a greater rate of interest than that permitted by the statute. As was said in Westman v. Dye, supra, at page 39 of 214 Cal., 4 P.(2d) 134, 138: "The usurious character of the contract is not determined by the amount of interest the borrower has paid thereon, but by the amount of interest he has agreed to pay on his said indebtedness. He may not have paid a dollar of interest on his indebtedness, yet, if the contract calls for a greater rate of interest than that permitted by the statute, the transaction is usurious, and no interest can be collected thereon."

The intention of the plaintiff to exact usurious interest was shown clear through the transaction up to and including the filing of the complaint herein, as he asks that interest be figured at the rate of one per cent. per month from the 5th day of March, 1928, instead of from the 21st day of March, 1928, when, under the terms of the escrow, his check was presented for payment.

The judgment appealed from is affirmed.

CONREY, Presiding Justice.

[1] I concur in the judgment. I do not agree with the opinion of Mr. Justice YORK wherein he sustains the contention of respondents that the note on which defendants were sued as guarantors was an usurious contract, or a contract in violation of the Usury Law (Gen. Laws, Act 3757). The lapse of a reasonable time in completing a loan and paying over the money after the time the papers are dated does not render the loan usurious, where the parties act in good faith and with no intent to evade the usury laws. Matthews v. Georgia State Savings Ass'n, 132 Ark. 219, 200 S. W. 130, 21 A. L. R. 789.

Delay in paying proceeds of loan to borrower if in good faith does not render transaction usurious. McDougall v. Hachmeister, 184 Ark. 28, 41 S.W.(2d) 1088, 76 A. L. R. 1463, and note.

[2] But I think that there was no contract of guaranty and therefore that there is no cause of action against respondents. Upon apparently sufficient evidence the court found that the defendants Ullman and Williams signed the instrument of guaranty in reliance upon certain escrow instructions wherein it appeared that the signature of Mrs. Harry Sebastian would be affixed thereto; that the defendants Ullman and Williams did not know at the time of such signature that the signature of Mrs. Sebastian was to be omitted from said guaranty, and did not know said fact until after the guaranty had been delivered to the plaintiff; that the guaranty was executed without valuable consideration and as an accommodation to the maker of the note.

[3] When at the trial defendants Ullman and Williams were asked whether they signed the guaranty in reliance upon the fact that the escrow instructions called for the signature of Mrs. Sebastian, the plaintiff objected that this was not a part of the defense in this case. The witnesses answered that they did so rely. The objection was properly overruled. Those escrow instructions had been exhibited to these defendants before they signed. The answer of defendant Williams alleged the fact that there were to have been guarantors other than the ones appearing upon the guaranty contract, "but that some of the guarantors had been changed to the prejudice of this defendant." At the opening of the trial it was stipulated that whatever defense was pleaded in behalf of any one defendant should be considered as pleaded and available to all other defendants in the action. From the evidence it appears that the only contract which the defendants executed or intended to execute was a contract in which Mrs. Sebastian was to join. With this understanding and preliminary agreement in force, in the absence of her signature there was no contract of guaranty. For the foregoing reasons it is my conclusion that the plaintiff failed to establish any cause of action against the respondents Ullman and Williams. As noted in the opinion of Mr. Justice YORK, supra, the appeal as against the defendant Horton has been dis-

missed. There were two other defendants named in the complaint, as to whom there was no appearance, nor any service of summons.

I concur: HOUSER, J.

135 Cal.App. 380

ANDERSON v. WALTERS et al.

Civ. 4899.

District Court of Appeal, Third District, California.

Nov. 21, 1933.

Hearing Denied by Supreme Court Jan. 18, 1934.

1. Negligence ⇐85(2).

Ten year old child need only exercise care which children of same age and under similar circumstances ordinarily exercise.

2. Automobiles ⇐245(74).

Whether ten year old boy was contributorily negligent when struck by truck while crossing highway *held* for jury.

3. Automobiles ⇐244(36).

Evidence *held* to show that driver's negligence proximately caused death of ten year old boy struck by truck while crossing highway.

4. Automobiles ⇐162(5).

Driver of truck upon highway and ten year old boy crossing highway had equal and reciprocal rights thereon, but driver was chargeable with greater care because in control of dangerous instrumentality.

Appeal from Superior Court, Colusa County; R. M. Rankin, Judge.

Action by Oscar C. Anderson, the father of Donald Anderson, deceased, against M. J. Walters and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Rutledge & Rutledge, of Colusa, and Rich, Weis & Carlin, of Marysville, for appellants.

Alva A. King and E. Vayne Miller, both of Colusa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

A jury awarded to plaintiff damages for the death of his minor son. From the judgment thereon this appeal is prosecuted. The record discloses that the deceased, a boy of ten years of age, in company with his mother, brother, sister, and uncle were, in the month of August, 1931, traveling by automobile from Berkeley to Corning. The deceased and his mother were seated in the rear of the automobile. The deceased expressed a wish to stop at a service station, and as they reached a point about two miles south of Arbuckle, it then being about 7 o'clock in the morning, the driver of the car stopped some twelve or fifteen feet off the easterly paved portion of the highway across from the service station and in the middle of an intersecting county road. After the car had come to a complete stop, Donald, the deceased boy, stepped out of the car on the side nearest the highway and started to trot or skip diagonally across the highway toward the service station. At this moment defendant Walters was proceeding south along the highway driving a Ford truck loaded with approximately two tons of rice. He was traveling about a foot or two from the westerly edge of the paved portion of the highway at a speed of from twenty to twenty-five miles an hour. When the boy had reached a point beyond the center of the highway he was struck by the southbound truck, receiving injuries which caused his death.

The driver of the truck, Walters, testified he saw the car parked at the side of the road when he was approximately one hundred and fifty yards north and that he was from eighty to ninety feet away when he saw the boy start across the road. He further testified his brakes were in good condition and that he could stop his truck in twenty-five feet going at a speed of twenty-five miles per hour.

A witness for plaintiff testified that immediately after the accident defendant Walters admitted to him he was at fault. That he saw the boy when he was eighty or ninety feet away, but did not sound his horn at all and did not apply his brakes until after the accident. This conversation, however, was stoutly denied by defendant, but it was for the jury to determine that conflict.

Defendant urged as grounds for reversal that the deceased was guilty of contributory negligence as a matter of law, that the mother of the boy was likewise guilty of contributory negligence, and that there was no showing of negligence on the part of defendant.

[1] Here we are weighing the acts and conduct of a boy of ten years and it is well established that "a child is required to exercise only that measure of care which children of the same age and under similar circumstances ordinarily exercise" and "the law has fixed no precise age at which it may be stated as a matter of law that an infant is accountable for his actions to the same extent as one of full age." 19 Cal. Jur. 605.

[2] Whether a person is guilty of contributory negligence in attempting to cross a roadway in front of an approaching automobile depends upon the circumstances and is a

question for the jury to determine. Flach v. Fikes, 204 Cal. 329, 267 P. 1079.

In Hunt v. Los Angeles Railway Corp., 110 Cal. App. 456, 294 P. 745, 747, a father sued for the death of his minor son who was struck by a bus of defendant while riding a bicycle.

In speaking of contributory negligence, the court there said: "The defense of contributory negligence may be invoked in an action by a parent to recover damages for the death of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury. Studer v. Southern Pacific Co., 121 Cal. 400, 66 Am. St. Rep. 39, 53 P. 942. But a child is not held to the same degree of care as an adult, and is only required to exercise the degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age. The question as to the capacity of a particular child at the time to exercise care to avoid a particular danger is one of fact falling within the province of the jury to determine. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712, 717. The rule has been applied in cases where the age of children sought to be charged with contributory negligence varied from twelve to fourteen years."

To the same effect is Moore v. Bishop, 113 Cal. App. 25, 297 P. 580, Graham v. Consolidated M. T. Co., 112 Cal. App. 648, 297 P. 617, Moreno v. Rossi, 107 Cal. App. 569, 290 P. 481, and Mize v. Duffy, 106 Cal. App. 15, 288 P. 798. So, also, the question of whether a minor was guilty of contributory negligence was for the jury. Carrisosa v. Southern Service Co., 128 Cal. App. 160, 16 P.(2d) 1032; Seperman v. Lyon, etc., Co., 97 Cal. App. 655, 275 P. 980; G. W. Woo v. Low Chew, 128 Cal. App. 235, 16 P.(2d) 1001; Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A. L. R. 401; Patania v. Yellow-Checker Cab Co., 102 Cal. App. 600, 283 P. 295.

The evidence as disclosed in the record was, if believed by the jury, ample to support the findings that neither the deceased nor his mother were guilty of contributory negligence.

[3] Appellant also maintains that the evidence is insufficient to support the finding that Walters was negligent or that his negligence, if any, was the proximate cause of the accident; but we believe that ample evidence was shown to justify the conclusions of the jury.

[4] Defendant Walters was operating a truck upon a highway whereon he had no right of way superior to that of a pedestrian, but each had equal and reciprocal rights (Park v. Orbison, 43 Cal. App. 74, 184 P. 428; Brown v. Brashear, 22 Cal. App. 135, 133 P. 505), but the driver of a truck being in control of a dangerous instrumentality capable of inflicting fatal injuries is charged with a greater amount of care than a pedestrian in order that he may be bound to the same standards of ordinary care. Raymond v. Hill, 168 Cal. 473, 143 P. 743; Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 P. 287.

Therefore, when we realize that the driver of the truck approached an intersection of a county road with the main highway, saw a car parked at the side of the road when some one hundred and fifty yards away and when within eighty or ninety feet saw a child start across the highway and took no measure to slacken the speed of the truck nor sound any warning, we cannot say he was free from negligence.

The judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

135 Cal.App. 385

MAY v. AMERICAN TRUST CO.

Civ. 4867.

District Court of Appeal, Third District, California.

Nov. 21, 1933.

1. Appeal and error ⇐1010(1).

Judgment must be affirmed, in absence of other error, if findings find support in evidence.

2. Customs and usages ⇐15(1).

Evidence of custom or usage is admissible to explain contract only where contract is ambiguous.

3. Customs and usages ⇐15(1).

Trial court generally determines whether uncertainty exists in contract which will permit introduction of evidence of usage as aid in interpretation.

4. Customs and usages ⇐15(2).

Where farm lease specifically provided for rights of parties respecting summer fallowing in case of termination of lease, court properly refused to consider usage and custom regarding summer fallowing of leased lands.

The word "fallow" means simply barren or unproductive, while the term "summer fallow" refers to practice of alternating acreage of land devoted to grain, whereby one portion of land will be har-

vested and remaining portion left fallow for particular year, the area to remain uncultivated being plowed, disked, and left barren to restore its fertility.

[Ed. Note.—For other definitions of "Summer Fallow," see Words & Phrases.]

5. Evidence ⇐588.

When case is submitted on merits, testimony of witness both direct and on cross-examination is taken as a whole.

6. Customs and usages ⇐19(3).

In action by farm lessee under lease for term of years, evidence sustained finding that usage of giving lessee lands in summer fallow as personal property was inapplicable.

7. Customs and usages ⇐19(2).

Letter written by holder of trust deed stating wish to protect farm lessee in summer fallowing *held* not admissible as acknowledging or establishing custom respecting summer fallowing, in action involving subsequent farm lease given after foreclosure.

8. Appeal and error ⇐1056(1).

Error in excluding letter relevant on collateral issue of amount of summer fallow on ranch when lessee took possession *held* harmless as to lessee, in action for work done in summer fallowing.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Jesse May against the American Trust Company. From an adverse judgment, plaintiff appeals.

Affirmed.

James R. McHenry and Edward Bickmore, both of Merced, for appellant.

F. M. Ostrander, of Merced, and Brobeck, Phleger & Harrison, of San Francisco (Moses Lasky, of San Francisco, of counsel), for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The action was to recover money alleged due from defendant to plaintiff arising out of certain transactions between the parties, of which more detail hereinafter.

The case was tried by the court sitting without a jury, and judgment went for defendant, by the terms of which judgment plaintiff recovered nothing. From this judgment plaintiff appeals.

Appellant, to use his own language, raises only one point, and that is as follows: That the evidence received by the court and the evidence improperly excluded by the court, if the latter evidence had been received, established, or would have established, conclusively that plaintiff is entitled to the relief demanded in his complaint, and that the findings and judgment of the court in favor of defendant are not sustained by the evidence so admitted, and that should have been admitted. This one point is all-embracing and leaves little else to be said about the judgment and the ground of appeal.

The record presents what might be called an argumentative appeal. In the opening brief of appellant there is not one single citation of authority, and in the final brief one authority is cited upon a point not disputed, as a matter of law.

The plaintiff, in the year 1925, leased certain lands from one Law. This land, it seems admitted, was of an area totaling in excess of 1,000 acres, though the lease in evidence refers to the demised premises as being in extent 400 acres, more or less. This lease was for the period of one year, and was renewed through riders and other agreements up to September, 1928.

These premises owned by Law were impressed with a trust deed given to secure certain indebtedness to the defendant, In 1928, the defendant, through appropriate proceedings, caused the lands to be sold under the trust deed, and thereafter, on May 7, 1928, defendant became the owner of the lands.

It might be here noted that, as is usual in such cases, the defendant, for some time prior to the actual foreclosure on the indebtedness, anticipated that such foreclosure would be necessary, and the testimony in some particulars indicates that it made and was making preparations that would forestall neglect or waste.

On September 25, 1928, plaintiff and defendant entered into a lease agreement by the terms of which defendant leased to plaintiff approximately 1,000 acres of land for farming purposes for the period of three years ending August 31, 1931. This lease contained many detailed provisions for the farming and cultivating of the area and was a rather lengthy document. When presented to plaintiff the first time it was not agreeable to him, and he suggested certain changes, which were made before he signed. No question of fraud, mistake, or misunderstanding enters into the case.

For the purposes of the present action, and the appeal here being considered, we may concern ourselves with but two provisions of the lease. Paragraph 17 of the lease reads as follows: "The lessee shall seed during the fall of 1928, the six hundred acres, more or less, of said demised premises which are now in summer fallow, and the lessee further agrees to summer fallow the remaining acreage of the demised premises in the spring of 1929,

excepting the 50 acres of the demised premises formerly in alfalfa, which the lessee may either plow and seed in the fall of 1928 or summer fallow in the spring of 1929, as he may desire. Thereafter the lessee shall, during his occupancy of the demised premises, seed and fallow such portions of said premises in rotation." Paragraph 19 reads: "In the event that the above described premises hereby leased and demised shall be sold at any time during the term hereby created, then at the expiration of 30 days after the date of mailing by the lessor to the lessee of a notice of such sale, this lease and the term created thereby shall be terminated without further acts or proceedings on the part of the lessor; provided, however, that if the lessee's tenancy of the demised premises shall be so terminated as in this paragraph provided after harvest season but before seeding in the fall of any year of the term hereof, then the lessee shall be entitled to receive, and the lessor shall pay to the lessee the going wage in the vicinity for the summer fallowing which the lessee may then have done in accordance with the terms of this lease; and further provided that if this lease be so terminated as herein set forth, after the seeding shall have been done in any year of the term hereof, then the lessee shall be permitted to remain upon the premises and to mature and harvest the crop which shall have thus been seeded, and shall summer fallow a portion of the premises as in paragraph 17 provided. Upon the completion of such harvesting, but in no event later than September first of any year of the term hereof, the lessee shall immediately vacate the premises."

Under this lease plaintiff entered into possession of the demised premises and remained thereon throughout the entire period of the lease, vacating the premises at the conclusion of the term. Though some suggestion is made that plaintiff did not fully comply with the terms of the lease, we do not consider this point is necessary to the decision, and we proceed upon the assumption that in all respects plaintiff fully complied with the requirements of the lease, and at the termination thereof surrendered possession to the lessor. The date of surrender was in September, 1931.

When plaintiff left the premises, upon surrender of possession, there were 340 acres of the lands in summer fallow. Defendant took possession of the entire leased premises, including the acreage in summer fallow.

It is the claim of the plaintiff that he is entitled to compensation for the work and labor performed in summer fallowing these 340 acres, and his claimed cause of action in the instant controversy is to recover the sum of $1,530 alleged to be the ordinary and reasonable value of the said work and labor.

The contention of plaintiff is that in the county of Merced, where the lands are situate, and in the farming community adjacent thereto, there is a usage and custom in regard to the summer fallowing of lands under lease, which custom is pleaded by plaintiff as follows: "In the absence of express provisions to the contrary: Where a lessee of grain farming lands, farming such lands under provisions for summer fallowing of portions thereof, shall summer fallow portions of said lands during the last year of the term of his lease, such summer fallow shall constitute personal property, and such lessee shall have an ownership therein to the extent that he has the right to seed the same and grow and harvest a crop thereon subject to the terms of his lease; said right of said lessee to seed such summer fallow being subordinate to the right of the lessor to buy such summer fallow from said lessee at the end of the term of his lease, and to pay the said lessee the reasonable and customary value thereof. Further, that upon failure of the lessor to buy said summer fallow from the lessee, the lessee has the right, at his option, to either seed the said summer fallow, or to sell the same to parties other than the lessor, and such other purchaser shall have the right to seed the same and grow and harvest a crop thereon, subject to the terms of the lease."

It may be well, at this point, to consider the terms "summer fallow" and "summer fallowing." The first term includes the second. In other words, summer fallow is the result of summer fallowing. The word is of common derivation coming primarily from the word "fallow." This latter word means simply barren or unproductive. When land is left barren and without seed, it is said to be fallow. The practice has arisen in certain sections of the state devoted to grain of alternating the acreage. That is, one portion of the lands will be harvested and the remaining portion left fallow for that year. The procedure is to plow and disc the area to remain uncultivated, and then leave it barren throughout the summer, with the plan and in the hope that the soil will again be renewed, and its fertility, impaired to some extent through the previous planting, will be restored. It is this scheme of plowing and disking that is called summer fallowing, and lands thus uncultivated beyond the plowing and disking are said to be in summer fallow. It will thus be noted that summer fallow is not a thing but a condition, and it will be further noted that it is rather an unusual custom that would impart to land the character of personal property simply by reason of an altered condition. In any event, issue was joined and the defendant stood upon the terms of the lease, as far as the trial went and as far as we are interested on the appeal.

After hearing all of the evidence adduced and admitted, the trial court found that the lease between the parties, which we have

hereinbefore noted, was the only lease or contract or agreement entered into by and between the parties in regard to the rental of said lands. That under the terms of said lease the summer fallow was and is the property of defendant. The court further found that it was not true that said lease was made and entered into by the parties in contemplation of any custom or in contemplation of any usage alleged to exist and practiced in the community relative to summer fallowing of grain farming lands and the respective rights of the parties in regard to such summer fallowing, and in this respect the court found that the lease contained all of the terms and conditions contemplated by the parties, and that the lease was not uncertain and not ambiguous, and fully stated the intentions of the parties, and that the summer fallowing of the lands during 1931 was done under the terms of the said lease.

[1-4] For good measure the court further found that there was no usage or custom, as alleged by the plaintiff, applicable to a lease for a term of years, and that any usage or custom in regard to property rights in summer fallow was applicable only to lands rented from year to year. If these findings, or any of them, find support in the evidence, the judgment must be affirmed, in the absence of other error. It is a well-settled principle of law that custom or usage may be shown when the parties have not incorporated into an instrument all of the terms of their contract, and that evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of a contract. Buckner v. Leon & Co., 204 Cal. 225, 267 P. 693. Usage, however, is only admissible as an aid to the interpretation of an ambiguous or uncertain contract; and it is never admissible to vary the terms of a clear and unambiguous contract. See title Usages and Custom, vol. 24, New California Digest, p. 302 et seq., for a collection of authorities on this subject. And it is generally the province of the trial court to construe a contract in question and first determine whether any uncertainty or ambiguity exists. As noted, the trial court found that in the lease before it there was no ambiguity and no uncertainty. A mere reading of the lease will demonstrate the correctness of the court's conclusion.

The lease sets forth that it is entered into upon certain terms and conditions. The evidence shows beyond dispute, and indeed it is admitted, that plaintiff examined the lease carefully before execution, and demanded certain changes before signing. The lease takes up this subject of summer fallow. The lessee agreed that he would summer fallow throughout the period of the lease, as a condition of his possession. To obviate any possible uncertainty on the subject the lease went further and specifically provided what the rights of the parties should be in case the lease was terminated before the expiration of the term. According to these provisions, if the lessor terminated the lease after summer fallowing, the lessee should either have the benefit of the crop, or should receive the going wage for the work done. If, however, the lease was terminated after the land was seeded, the lessee should have the benefit of the crop, but was required, in that event, to summer fallow the portion provided by the terms of the lease. Almost every contingency was provided for with regard to the summer fallow. Under the clear terms of the lease the lessee assumed the obligation of summer fallowing and nothing was left for interpretation.

[5, 6] The next finding of the trial court that the custom and usage claimed did not exist finds ample support in the evidence. All of the witnesses, save one, called by the plaintiff, and even plaintiff himself, limited the custom to cases where the lease was either oral or for just one crop. Appellant urges that the testimony thus given should not be given much weight, for the one reason that such testimony was elicited from plaintiff's own witnesses on cross-examination. In other words, the contention seems to be that a court is bound by the direct testimony and must not consider the cross-examination. The testimony of a witness, both direct and cross, is to be taken as a whole and considered as one narrative. Of course, we are aware of the rule that this does not apply in cases of nonsuit or directed verdict, but the reasoning there applied has no application when the case is submitted on its merits and the court is called upon to determine any conflicts. There is no need to dwell at any length on this point for the obvious reason that whatever view we take, we reach the same result. If the cross-examination of plaintiff's witnesses did not establish the fact as claimed by defendant and found by the court, then it did serve to overcome the force of the testimony given on direct examination, and the issue was then without support. This would leave, then, but one witness whose testimony stood up a little better on cross-examination. As against this was the testimony of the defendant and its agents, to the effect that they had never heard of such a custom, and that no such custom was in mind when the lease was given. The testimony of the plaintiff's witness on this question of custom seemed confined to his own experience and his personal construction as to the practice, and on the whole was vague and indefinite.

From this situation we think the trial court correctly found against the custom claimed. Authorities collected in Ruling Case Law, vol. 27, p. 155, support the rule announced, as follows: "A custom must be certain and uniform in order that it may be recognized as valid

and enforceable in a court of law. It must be so uniform in its operation that the parties must be presumed to have known it and acted in reference to it. Lack of definiteness is fatal to the existence of a custom, and a loose usage for an indefinite period, limited to a few persons in one particular locality is not a sufficient showing in a court of law."

Plaintiff and appellant lays much stress upon a certain letter written by defendant to plaintiff in August, 1930, when the lease had still another year to run. In this letter the defendant used the following language: "Your brother stated that there is not sufficient acreage for you to farm now, that Mr. Hise has bought the ranch where you live, and that you would probably look for a larger tract. If you find one that suits your requirements, I believe we can make arrangements to buy your summer fallow." Appellant reads much into this language and construes it as being almost determinative of his contention. In a way it is so determinative, but against the contention rather than in its favor.

In the first place, the letter indicates that the question of summer fallow was not left to any indefinite or unknown custom, or to any custom or usage, but was to be the subject of a distinct understanding between the parties. In the second place, the lease itself distinctly provided that in the event the lessor terminated the lease before the expiration of the term, then the lessee should be paid for the summer fallow. By no stretch of the language could we hold, against the trial court's finding, that this letter tended to establish the existence of any custom.

[7, 8] Appellant urges the error of the trial court in excluding from evidence a certain letter written by defendant to plaintiff. This letter was dated September, 1926, a date preceding by almost 18 months the acquisition of the property by defendant, but at a time when defendant held a trust deed against the property, with some likelihood of the necessity of foreclosure. The letter reads: "You should go along and put in the crop this fall on the summer fallowed land in accordance with your lease with Harry Law and his wife, all of which has our approval. We are not the owners of the property, and any further arrangements in this respect, we wish you would take up direct with Mr. Law. When I am next in your vicinity, I shall look you up and have a further discussion of matters with you, but in the meantime we wish you to put in the crop in the best farmerlike manner that same can be done as we wish to protect you in the harvesting of the crop during 1927, as well as summer fallowing of the lands next spring." As is usually the case, the mere fact that this testimony was excluded seems to give it a value far beyond what it could have had if admitted. It is apparent that at the time of the writing of this letter there was no privity of relationship between the parties, and the writer particularly requested that any arrangements concerning the land be taken up with the then owners. By no construction could the letter be deemed the acknowledgment or the establishment of any custom. The defendant, perhaps even then realizing that the property would have to be taken over was interested in maintaining the same as a cultivated and going proposition, rather than as an abandoned property. The defendant wished "to protect" plaintiff in the summer fallowing to be done in the spring of 1927. Just what form of protection was contemplated does not appear. Under plaintiff's lease with Law, the lessee was already obligated to conduct his operations in a diligent and farmerlike manner, and under the Law lease provided that the lessee should, at the option of lessor, leave all lands not sown to crops summer fallowed, and the lessor should pay for the summer fallowing.

The fact that defendant might desire to protect plaintiff on this part of the lease was in no wise binding as far as the question of custom may have gone. There was a collateral issue on the question of how much summer fallow was on the ranch at the time plaintiff took possession under the lease, the point being that even if a custom were proved as claimed by plaintiff, then he would owe for the amount that was summer fallowed when he went on. It is barely possible that the letter would have had some relevancy on this issue, and therefore its exclusion was erroneous.

However, as the judgment is most fully supported by the findings on other material issues, no harm could have resulted in the court's ruling.

The judgment is affirmed.

We concur: THOMPSON, J.; PULLEN, P. J.

MIRABITO v. SAN FRANCISCO DAIRY CO. et al.*

Civ. 8906.

District Court of Appeal, First District, Division 2, California.

Nov. 13, 1933.

Rehearing Denied Dec. 13, 1933.

Hearing Granted by Supreme Court Jan. 12, 1934.

1. New trial ⇐52.

Parties to civil action are entitled to verdict of nine jurors arrived at by considering evidence and exercising their judgments thereon.

2. New trial ⇐52.

Generally, where jury arrives at verdict by agreeing to accept result of majority vote, it will constitute ground for new trial; test being whether jury agreed to be bound beforehand by result of majority vote.

3. New trial ⇐143(5).

Statute providing that whenever jurors have been induced to assent to verdict by resorting to chance, such misconduct may be proved by affidavit of any juror, *held* exclusive; no other type of misconduct being permitted to be shown by affidavits (Code Civ. Proc. § 657, subd. 2).

4. New trial ⇐143(5).

Where jurors agreed in advance to be bound by majority vote on one of two verdicts and ninth juror assented to final verdict only because of such agreement, verdict *held* "chance" verdict within statute admitting jurors' affidavits to show that verdict was reached by resorting to chance, and hence required granting new trial (Code Civ. Proc. § 657, subd. 2).

"Chance" may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces.

[Ed. Note.—For other definitions of "Chance," see Words & Phrases.]

5. Automobiles ⇐244(26).

Evidence *held* to support finding that truck driver was acting for defendant at time of accident.

Evidence disclosed that name of defendant company appeared on truck which had been regularly used by truck driver in milk deliveries; that truck was kept with many other similar trucks bearing similar signs at the place where defendant maintained its office where another company maintained an office; and that officers of both companies were identical.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Edmond Mirabito, a minor, by his guardian ad litem, Katherine Mirabito, against the San Francisco Dairy Company and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Pillsbury, Madison & Sutro and Eugene M. Prince, all of San Francisco (Norbert Korte, of San Francisco, of counsel), for appellants.

Sol Silverman and George Olshausen, both of San Francisco, for respondent.

SPENCE, Justice.

This action was brought to recover damages for personal injuries sustained by plaintiff, a boy seven years of age. A jury trial was had and a judgment for $5,000 was entered in favor of plaintiff and against the defendants San Francisco Dairy Company and Ray Vogel. Said defendants appeal from said judgment.

On this appeal it is urged: (1) That a new trial should have been granted because of misconduct on the part of the jury "in resorting to the determination of chance"; (2) that the evidence was insufficient to sustain a judgment against the defendant San Francisco Dairy Company; and (3) that the damages awarded were excessive.

Due to the nature of appellants' contentions, a detailed statement of the facts surrounding the happening of the accident is not required. Suffice it to state that a milk truck driven by the defendant Vogel and bearing the name of the San Francisco Delivery Company struck the rear end of another automobile, which, in turn, struck a wooden barricade erected around an excavation. Some of the planks of the barricade were broken by the impact and one of said planks was thrown against respondent, thereby causing his injuries.

During the trial one of the jurors was excused. The parties stipulated that the trial might proceed with eleven jurors, and further stipulated that it should require nine of the eleven jurors to return a verdict. Upon the motion for a new trial appellants presented numerous affidavits for the purpose of showing misconduct. It appears therefrom that after nine of the jurors had agreed to return a verdict in favor of plaintiff, the question of the amount of the verdict was discussed at length. The amounts proposed ranged from $1,500 to $10,000, but the affidavits do not show what amounts were proposed between these two sums or how many jurors were agreed upon any particular sum. The affidavits of three of the jurors then continued as follows: "After considerable discussion the jurors could not agree upon a definite and certain sum as their verdict and it was apparent that it would be difficult to arrive at an amount upon which nine of the

jurors would agree and that a deadlock might result; thereupon it was proposed and the jurors agreed that the jury would proceed and arrive at its verdict as follows: A single vote should be taken on two amounts, one for $5,000 and the other for $2,000, and the amount for which a majority of the jurors should vote would be considered and returned as the unanimous verdict of the jury. Thereafter, and pursuant to said agreement, a ballot on said two amounts was taken and the vote recorded thereon was eight jurors for $5,000 and three jurors for $2,000. Thereupon, pursuant to said previous agreement and not otherwise, and without further deliberation, discussion, balloting or assent on the part of or by any of the jurors, said sum of $5,000 was entered by the foreman in the form of verdict prepared by the court, and no further ballot was taken or assent given to said verdict other than as hereinabove set forth. Thereupon said verdict for $5,000, without further discussion, ballot or assent, was returned to the court pursuant to said agreement and not otherwise as the unanimous verdict of the jury. Affiant is one of the jurors who voted for the sum of $2,000 and affiant did not thereafter change his said vote while in the jury room, and upon the poll of the jury in court after said verdict had been so returned affiant stated that said verdict was his verdict solely because of said agreement to abide by the vote of the majority." Some of the affidavits were not so definite as those of the three jurors mentioned above, but none of the affidavits denied the existence of said agreement nor the fact that said agreement was carried out.

[1-4] It is therefore apparent that the jurors arrived at the verdict in the sum of $5,000 as the result of an agreement to be bound by a majority vote, and that at least three of the eleven jurors permitted said verdict of $5,000 to be returned as the verdict of the jury solely because of said agreement. There can be no doubt that the procedure adopted was irregular. The parties to a civil action are entitled to a verdict of nine jurors arrived at by considering the evidence and exercising their judgments thereon, and if any agreement is made in advance by the jurors to abide by the decision of a smaller number of jurors, and such agreement is thereafter carried out, the litigants are deprived of the type of verdict to which they are entitled. The rule is stated in 20 Ruling Case Law, at pages 243 and 244, as follows: "It is the general rule that if the jury arrive at a verdict by chance or lot, by agreeing to accept the result of a majority vote, or by any method other than of weighing the evidence and exercising the judgment, it will constitute ground for a new trial. * * * The test in such case is: Did the jury agree to be bound beforehand by the result of such proceedings?" See, also, Dixon v. Pluns, 98 Cal. 384, 33 P. 268, 20 L. R. A. 698, 35 Am. St. Rep. 180; Levy v. Brannan, 39 Cal. 485; Donner v. Palmer, 23 Cal. 40; Kirby Lumber Co. v. Consolidated Underwriters (Tex. Civ. App.) 289 S. W. 134; Houk v. Allen, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706; I. C. R. R. Co. v. Able, 59 Ill. 131; Merseve v. Shine, 37 Iowa, 253; Benjamin v. Helena Light & Ry. Co., 79 Mont. 144, 255 P. 20, 52 A. L. R. 33; Johnson v. Husband, 22 Kan. 277. The foregoing authorities lead to the conclusion that a new trial should have been granted herein if the affidavits of the jurors were competent evidence to show the facts under the provisions of section 657, subdivision 2, of the Code of Civil Procedure. That section provides: "And whenever any one or more of the jurors have been induced to assent to any general or special verdict * * * by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." It is conceded that this provision is exclusive and that no other type of misconduct can be shown by the affidavits of the jurors. People v. Ferguson, 124 Cal. App. 221, 12 P.(2d) 158, 960; People v. De Voe, 123 Cal. App. 233, 11 P.(2d) 26; Kimic v. San Jose-Los Gatos Interurban Ry. Co., 156 Cal. 379, 104 P. 986. The question therefore arises as to whether the procedure adopted by the jury as shown by the affidavits constituted "a resort to the determination of chance." Appellants contend that it did and that the affidavits of the jurors were competent. In our opinion this contention must be sustained.

While we find no authority directly in point upon the precise question before us, the language of the court in Dixon v. Pluns, 98 Cal. 384, 33 P. 268, 269, 20 L. R. A. 698, 35 Am. St. Rep. 180, would seem to be controlling. In that case the validity of a so-called quotient verdict was considered. The court there said on page 387 of 98 Cal., 33 P. 268, 269: "'Chance' may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces, and the facts here developed bring the case clearly within such definition." Where an issue before a jury is determined by means of an agreement to abide the result of the flipping of a coin or the casting of a die, there is obviously a resort to chance, but these methods are not the only ones which fall within the meaning of the section. Whenever the jurors agree beforehand to abide by the unknown and uncertain result of dividing by twelve the sum total of twelve unknown figures, as was done in Dixon v. Pluns, supra, or agree beforehand to abide by the unknown and uncertain vote of a majority of their number, it is likewise a resort to chance depriving the parties of a verdict which can be said to be the verdict of nine of their number arrived at by the exercise of the judgment of said jurors. In such cases the jurors wrongfully agree be-

forehand to forego their independent judgments and to hazard their individual verdicts upon conditions which are then unknown and uncertain. The affidavits in the present case showed that the three jurors who had voted for a verdict of $2,000 on the ballot in question, did not thereafter change their votes in the exercise of their judgments, but that upon the polling of the jury in the courtroom they assented to the verdict of $5,000 "solely because of said agreement to abide by the vote of the majority." We are of the opinion that a verdict assented to under the compulsion of such an agreement is a chance verdict within the meaning of said section 657, and that the affidavits of the jurors were competent. It follows that the motion for new trial should have been granted.

[5] Counsel for respondent cites and relies upon People v. Kromphold, 172 Cal. 512, 157 P. 599, but the authority cited is not in point. In that case there was no agreement whatever between the jurors, but the single juror who was holding out for life imprisonment finally decided to change his vote. The court said at page 525 of 172 Cal., 157 P. 599, 604: "This juror finally concluded that, if on the subsequent ballot all the other jurors adhered to their former vote for death, he would yield and change his vote from life imprisonment to death." Obviously, no resort to chance was shown in that case. If, on the other hand, the jurors in that case had agreed in advance to abide by the decision of a majority and if the affidavits had shown that five of the jurors, who had voted for the lesser penalty, had joined in returning a verdict carrying the death penalty solely by reason of such agreement, we have no doubt that a verdict so returned would have been declared invalid as a chance verdict.

Appellant San Francisco Dairy Company makes the further contention that the evidence was insufficient to sustain the judgment against it. In our opinion this contention is without merit. It is based solely upon the claim that there was no evidence to show that appellant Vogel was the agent or employee of appellant San Francisco Dairy Company or that he was acting within the scope of his employment at the time of the accident. It may be noted that the name of appellant San Francisco Dairy Company indicated that said company was engaged in the dairy business. The truck in question was a milk truck which had been regularly used by Vogel for some time for the purpose of delivering milk over his route. His testimony relating to the time of the accident was: "I was driving on my route." The truck bore signs on both sides thereof with the name "San Francisco Dairy Company" thereon. It was kept with many other similar trucks bearing similar signs at the place where appellant San Francisco Dairy Company maintained its office. At this place the names "San Francisco Dairy Company" and "Riverdale Dairy Company" appeared at the entrance. Vogel reported there each morning, started from there on his route with said truck and returned there at the end of the day. There was other testimony in the nature of hearsay evidence relating to the ownership of the truck and the employment of Vogel, but the parties are not agreed upon whether this particular testimony is available to respondent on this issue. We need not discuss this question, for we believe that the testimony above mentioned amply supported the inference that Vogel was acting for appellant San Francisco Dairy Company at the time the accident occurred. Hartig v. American Ice Co., 290 Pa. 21, 137 A. 867; Holzheimer v. Lit Bros., 262 Pa. 150, 105 A. 73; Williams v. Ludwig Floral Co., 252 Pa. 140, 97 A. 206; Klusman v. Harper, 221 Mo. App. 1110, 298 S. W. 121; Mann v. Stewart Sand Co., 211 Mo. App. 256, 243 S. W. 406; Fleishman v. Polar Wave Ice & Fuel Co., 148 Mo. App. 117, 127 S. W. 660; Robeson v. Greyhound Lines, 257 Ill. App. 278; Breen v. Dedham Water Co., 241 Mass. 217, 135 N. E. 130; Berry on Automobiles (6th Ed.) § 1360. The appellant corporation calls our attention to Vogel's testimony to the effect that he was not working for appellant San Francisco Dairy Company, but for the Dairy Delivery Company. They also refer to the evidence to the effect that the truck was not owned by the appellant San Francisco Dairy Company, but by the Dairy Delivery Company, and the further evidence that Vogel was paid by the last-named company. We believe, however, that such testimony merely created a conflict with the inference which might be drawn from the other testimony to which reference has been made. Furthermore, the president of appellant San Francisco Dairy Company, who was also the president of the Dairy Delivery Company, made the following statement in explanation of his testimony: "The San Francisco Dairy Company is a non-operating corporation. In other words, it is a part and subsidiary of the Dairy Delivery Company. The name of the San Francisco Dairy Company is used as a business name, and the corporation kept as is for that purpose, recognition of the name of the San Francisco Dairy." He did not deny having made the statement that "all these companies were one." It further appeared that the vice president of San Francisco Dairy Company was also the vice president of the Dairy Delivery Company. The same situation existed with respect to the office of secretary. Upon all the testimony taken together, the only logical conclusion to be drawn was that appellant San Francisco Dairy Company was merely the alter ego of the Dairy Delivery Company. We are therefore of the opinion that the evidence was sufficient to sustain the verdict

against appellant San Francisco Dairy Company.

In view of the conclusions we have reached, a new trial must be had, and it becomes unnecessary to discuss the question of whether the damages were excessive in the light of the evidence now before us.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

FULLER v. BERKELEY SCHOOL DIST. OF ALAMEDA COUNTY et al.*

Civ. 9093.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1933.

Hearing Granted by Supreme Court Jan. 4, 1934.

1. Appeal and error ⇐1010(1).

Findings of trial court supported by some evidence will not be disturbed.

2. Schools and school districts ⇐141(4).

Dismissal of part time assistant and associate kindergarten directors at close of school year and employment of directors only *held* within statute authorizing decrease of number of employees on account of discontinuance of "particular kind of service" (School Code § 5.710).

A teacher who teaches a particular subject, or who teaches only part time, is one who renders a "particular kind of service."

[Ed. Note.—For other definitions of "Particular Services," see Words & Phrases.]

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Mandamus by Ida Clare Fuller against Berkeley School District of Alameda County, State of California, etc., and others to compel defendants to reinstate plaintiff as a kindergarten teacher. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frank M. Carr, of Oakland (W. W. Laidley, of Oakland, of counsel), for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for respondents.

STURTEVANT, Justice.

From a judgment refusing to her a writ of mandate the plaintiff has appealed. From 1923 down to the end of the school year June, 1932, the plaintiff was a teacher in the defendant district. At that time the defendant board, claiming to act under the statute, made certain changes regarding the teachers. By virtue of that change the plaintiff and all others holding the same status were dismissed. The plaintiff contends that the change was wrongful. These conflicting contentions arise out of the following facts: During the entire period of plaintiff's employment by the district there were three classes of teachers teaching in the kindergartens of the Berkeley school district: Directors, assistant directors, and associate directors. Each kindergarten class was in the independent charge of a kindergarten director who was responsible to the principal of her school and to the superintendent of schools of the city of Berkeley for the conduct of the kindergarten in her charge. The assistant and associate kindergarten directors took orders from the directors and were responsible only to the director under whom they taught. The assistant and associate kindergarten directors were employed to assist the kindergarten directors when the number of children in any one kindergarten exceeded a specified number. If the number of children was over thirty and under fifty-six, an assistant kindergarten director was employed to assist the director, and if the number was fifty-six and over, an associate kindergarten director was employed to assist the director. Kindergarten directors, assistant kindergarten directors, and associate kindergarten directors rendered only a half day's service during the entire period of plaintiff's employment until the second term of the year 1931–1932.

The rate of compensation of each of the three classes of kindergarten teachers was different. A kindergarten director received seven-eighths of the amount fixed in the salary schedule for a full-time teacher and this amount increased automatically with the length of service in accordance with the salary schedule. The salaries of assistant directors remained at $4 per day, and the salaries of associate directors remained at $5 per day, regardless of the length of service. The director in each case determined the program and activities for each week and day.

The director, in addition to teaching, performed the following duties which the assistant and associate directors were not required or permitted to perform: Kept the state school register; made and swore to the correctness of the annual report to the county superintendent of schools; prepared and signed the requisitions for supplies needed to conduct the kindergarten in her charge; gave directions to her assistant and associate directors as to the duties they were to perform; prepared monthly reports required by the

Berkeley board of education; received orders from the principal; and determined the weekly and daily programs and activities for the kindergarten in her charge.

The record of the plaintiff shows that she entered the employment of the Berkeley school district in August, 1923, and served during the school year 1923–1924 as an assistant kindergarten director; that during the first term of the school year 1925–1926 she served as a kindergarten director, substituting for the regular teacher; that during the second term of the school year 1925–1926 she served as an associate kindergarten director; that during the school year 1926–1927 she served as an acting kindergarten director; that during the school years 1927–1928, 1928–1929, 1929–1930, and 1930–1931 she served as an assistant kindergarten director; that during the first term of the school year 1931–1932 she served as an assistant kindergarten director; and that during the second term of the school year 1931–1932 she served as an associate kindergarten director.

From the time plaintiff became an employee of the Berkeley school district until March 9, 1925, she held a kindergarten primary certificate, qualifying her to teach kindergarten and the first grade. Later she obtained a kindergarten, first, second, and third grade certificate, and, at the time of her dismissal at the close of the school year 1931–1932, she held a life certificate qualifying her to teach kindergarten and the first, second, and third grades.

During the school year 1931–1932, the board of education of the Berkeley school district reorganized the administration of the kindergartens of the district, effective July 1, 1932. The kindergarten directors, as a result of this change, taught one class in the morning and one in the afternoon, instead of one class only in the morning. On April 25, 1932, the board of education of the city of Berkeley and of Berkeley school district of Alameda county resolved and ordered that on account of the reorganization of the kindergartens during the school year 1931–1932, that the kind of service rendered by assistant and associate kindergarten directors be discontinued at the close of the school year 1931–1932, and that all assistant and associate kindergarten directors be dismissed at the close of the school year 1931–1932. Plaintiff was given a written notice of dismissal in accordance with this resolution, which was dated April 29, 1932, and was received by plaintiff on or about May 1, 1932.

All other assistant and associate kindergarten directors of the Berkeley school district were also dismissed at the close of the school year 1931–1932, and since that time the only kindergarten teachers in the district are kindergarten directors.

On June 30, 1932, the particular kind of service rendered by assistant and associate kindergarten directors was discontinued.

[1] It may be conceded that there was some evidence in conflict with some of the foregoing statements. However, it must also be conceded that there was some evidence supporting each of said statements and that all of said statements are substantially in the language of the findings of the trial court. Under these circumstances the findings may not be ignored by this court.

[2] The plaintiff asserts that she was wrongfully dismissed and she cites and relies on Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, and other cases following the doctrine of that case. However, both parties concede that the exact question before us has never been decided. The defendants claim they acted within the clear terms of the statute. School Code, § 5.710. They quote as follows: "It is hereby provided that whenever it becomes necessary to decrease the number of permanent employees in a school district * * * on account of the *discontinuance of a particular kind of service* in such district, the governing board may dismiss such employee at the close of the school year." The defendants call attention to the words which we have italicized. They claim that what they did was clearly within the terms of the statute. They specially call to our attention the ordinary meanings of each of the words as defined in Webster's Dictionary. We think their argument is sound. Furthermore, other provisions of the statute throw much light on the subject. The maintenance of a kindergarten department is optional in every district. To some extent the teaching of certain subjects is mandatory, the teaching of other subjects is optional. "Part-time teaching or supervision" is also recognized by the statute. School Code, § 5.880. "Discontinuance" of services or teaching is also recognized by the statute. School Code, §§ 3.140 and 5.710. The word "serve" and the word "service" are used many times in the statute. Sections 3.32, 5.710, 5.712, 5.730, 5.731, 5.772, 5.734, 5.744, 5.890, 5.900, 5.773, 5.800, 5.801, 5.810, 5.811, 5.812, 5.814, 5.820, 5.831, 5.832, 5.840, 5.882, 5.892, 5.893, 5.895, 5.902, 5.903, 5.904, 5.885. An examination of such passages shows that "to teach" is "to serve" and vice versa, and that "services" of a teacher are "teaching" and "teaching" is "services." In the light of all of these statutory provisions it is quite clear that a teacher who teaches only part time is one who renders "a particular kind of service." A teacher who teaches a particular subject may also be so classified. So may a teacher who teaches by the hour. Under the facts recited above it is plain that the plaintiff was a helper only and acting under the direction of certain superiors. At the end of the school year, having complied

with the other provisions of the law, the defendants were clearly within their rights in limiting their employees to directors each teaching a full day instead of employing associates or assistants who taught only a half day and then under the direction of a director. The result of the action of the defendant board was to reduce the number of employees and thus effect an economy and also to bring the pupils under the teaching of teachers fully equipped and not needing direction or supervision. We think it may not be said that the acts of the defendants were wrongful.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

DAVIS v. BERKELEY SCHOOL DIST. OF ALAMEDA COUNTY et al. *

Civ. 9146.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1933.

Schools and school districts ⇐141(2).

Dismissal at close of school year of expert art teacher, who traveled from school to school teaching pupils and classroom teachers, pursuant to arrangement to have art taught by departmental teachers under supervisor, *held* within powers of school directors.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Mandamus by Mary Stewart Davis against Berkeley School District of Alameda County, State of California, etc., and others to compel defendants to reinstate plaintiff as an expert art teacher. From a judgment for defendants, plaintiff appeals.

Affirmed.

Frank M. Carr, of Oakland (W. W. Laidley, of Oakland, of counsel), for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for respondents.

STURTEVANT, Justice.

This action is closely related to Fuller v. Berkeley School District of Alameda County, State of California, etc., et al. (Cal. App.) 26 P.(2d) 109, this day filed. In the instant case the plaintiff had served as an expert art teacher traveling from school to school giving helping lessons for the benefit of pupils and classroom teachers. At the end of the school year 1931–32, that service was discontinued and the subject of art was thereafter taught by departmental teachers and the supervisor of art who had theretofore taught that subject and whose services were continued. The legal principles involved are the same as in the Fuller Case. For the reasons there stated the defendants did not act wrongfully.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 40 P.2d 835.

GERDES et al. v. PACIFIC GAS & ELECTRIC CO. et al.

S. F. 14763.

Supreme Court of California.

Dec. 1, 1933.

Rehearing Denied Dec. 30, 1933.

1. Gas ⇐20(4).

Spouses injured by gas explosion in their residence *held* not contributorily negligent as matter of law in failing to leave premises before explosion.

There was evidence that spouses knew that gas was escaping in basement of their home and is dangerous substance, but that all windows and doors were opened by firemen and left open continuously until explosion; that husband sought advice of fire department captain and called latter's attention to workmen smoking in street, whereupon captain instructed them not to smoke or bring lighted lanterns near basement; that firemen went to house to assist wife therefrom after street caved in because of broken water mains, without knowledge of gas leak or instructions from any official, on request of wife's friend outside; that fire department captain, who examined leak made no suggestion that spouses leave premises because of gas and entered house several times to telephone; and that wife, who was partially paralyzed, experienced no discomfort from gas before swooning while sitting in house.

2. Gas ⇐20(4).

Spouses injured by gas explosion in their residence *held* not contributorily negligent as matter of law in failing to notify gas company of leak before officers of fire and police departments in charge of situation did so.

3. Appeal and error ⇐999(3).

Jury's verdict and judgment on issue of plaintiffs' contributory negligence cannot be disturbed on appeal, where reasonable persons would disagree on such question.

4. Gas ⇐20(2).

Evidence in action for injuries by gas explosion in plaintiffs' residence *held* sufficient to warrant jury's finding that defendant gas company's employees, receiving telephone reports of street cave-in, were negligent in failing to perceive that gas pipes might be affected and in notifying company's electrical, instead of gas, department.

5. Gas ⇐20(5).

Res ipsa loquitur instruction *held* erroneous as to defendant gas company in action for injuries by gas explosion in plaintiffs' residence following street cave-in caused by water pipes breaking.

6. Appeal and error ⇐1064(1).

Res ipsa loquitur instruction in action for injuries by gas explosion in plaintiffs' residence *held* not sufficiently prejudicial to defendant gas company to constitute reversible error.

Evidence showed that gas company was free from negligence, except in failing to send man to repair damage to its pipes or remove danger therefrom within reasonable time after being informed of street cave-in caused by water pipes breaking.

7. Waters and water courses ⇐209.

Evidence in action for injuries by gas explosion following street cave-in caused by water pipes breaking *held* sufficient to sustain jury's finding of defendant water company's negligence in failing to repair defective main or promptly shut off water.

8. Appeal and error ⇐1068(3).

Res ipsa loquitur instruction as to defendant water company in action for injuries by gas explosion following street cave-in, caused by water mains breaking, *held* not reversible error, in view of evidence sustaining finding of water company's negligence.

The jury found against water company on issue, submitted by instructions, as to whether its main broke, without its negligence, as result of forces set in motion by previous break in city's water pipes.

In Bank.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Consolidated actions by H. A. Gerdes, Barbara Gerdes, and both of them, with others, against the Pacific Gas & Electric Company and others. From a judgment against defendants Gas Company and another, they appeal.

Affirmed.

Prior opinion, 21 P.(2d) 571.

Thomas J. Straub, Clinton F. Stanley, and Cullinan & Hickey, all of San Francisco, for appellant Pacific Gas & Electric Co.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant Olympic Salt Water Co.

Fletcher A. Cutler and Ford & Johnson, all of San Francisco, for respondents.

SEAWELL, Justice.

Plaintiffs H. A. Gerdes and Barbara Gerdes, his wife, received personal injuries in an explosion and fire which almost completely demolished their residence. The husband brought an action to recover for personal injuries sustained by him and a separate action to recover for loss of services of his wife and for her medical, hospital, and other ex-

penses. Mrs. Gerdes brought an action to recover for personal injuries sustained by her, and Mr. and Mrs. Gerdes, together with the two companies carrying insurance on the Gerdes' residence and furnishings, filed a fourth suit to recover for the destruction thereof. The actions were consolidated for trial. The court granted a nonsuit as to defendant Spring Valley Company by consent of all parties. The case as to the other three defendants went to the jury, which returned a verdict in favor of plaintiffs against the Pacific Gas & Electric Company and the Olympic Salt Water Company, but exonerated the city and county of San Francisco. By said verdict damages were assessed in the total sum of $40,000, apportioned as follows: Personal injuries to Mrs. Gerdes, $15,000; personal injuries to Mr. Gerdes, $7,500; to Mr. Gerdes for loss of services of his wife and for her hospital and medical expenses, $5,000; loss of residence and furnishings, $12,500. In denying defendants' motion for a new trial, the court reduced the total damages to $25,000, without allocating the deduction to the several items included in the verdict. From the judgment thus reduced, defendants Pacific Gas & Electric Company and Olympic Salt Water Company prosecute this appeal.

The plaintiffs' residence is situate in the city of San Francisco on the east side of Forty-seventh avenue, in the block bounded by Balboa street on the south and Sutro Heights avenue on the north. A 16-inch salt water main of the Olympic Salt Water Company is laid beneath the pavement on Forty-seventh avenue on the easterly side of the street near the curb line. About a foot and a half west of this 16-inch main is a 4-inch fresh water main, which at the date of the explosion, March 18, 1930, constituted a part of the water distribution system acquired by the city and county of San Francisco by transfer from Spring Valley Company about fifteen days before the accident. Next in position is an 8-inch high pressure gas main of the Pacific Gas & Electric Company, and finally a 6-inch low-pressure pipe line of said company, from which run service pipes supplying gas to the residences along Forty-seventh avenue and passing above the 8-inch gas main and the two water mains. A telegraph cable line is also laid in the street, but is not involved in the accident herein.

Forty-seventh avenue between Balboa street and Sutro Heights avenue has a relatively steep grade of 18 per cent., running uphill from Balboa north to Sutro Heights avenue. The Gerdes' home is the second house from the southeast corner of Forty-seventh and Sutro Heights avenue. The location is within a few blocks of the ocean beach and Cliff House, and, consequently, the ground upon which the district is built consists of sand washed up from the ocean.

On the date of the accident the pavement of Forty-seventh avenue broke open at a point approximately opposite the northerly line of the Gerdes' lot at about 4:45 o'clock in the afternoon, releasing a strong force of water. The sand beneath the pavement washed away very rapidly. The pavement caved in, creating an excavation 150 feet long, 25 feet wide, and about 20 feet deep, which revealed that both the salt water main of the Olympic Salt Water Company and the fresh water main of the city and county had broken. The question of which main broke first was an important issue in the case. The jury, by returning a verdict for the city and county, upheld its contention that the salt water main of the Olympic Salt Water Company broke first, and that the weight from the pavement and street as it caved in caused the city's 4-inch main to break. Neither the 6-inch or 8-inch gas mains broke. The sidewalk on the easterly side of the street in front of the Gerdes' home fell into the excavation. The gas service pipe leading from the 6-inch low pressure main to the meter in the basement of the Gerdes' home was within this excavation. It appears without conflict that the weight of the pavement and sidewalk, as it caved in, had bent down said service pipe, causing it to partially separate from its connection with the riser, a perpendicular pipe which runs from the horizontal service pipe to the meter, with the result that gas escaped into the Gerdes' basement. A few minutes before 8 o'clock p. m., the gas was ignited in an unexplained manner and the explosion and fire followed in which Mr. and Mrs. Gerdes were injured and their home destroyed.

The plaintiffs sought to prove upon the trial that the gas company was negligent in failing to turn off the gas passing into this service pipe or to plug up the leak within a reasonable time after receiving notice of the street cave-in. Both said company and the Olympic Salt Water Company contend on this appeal that plaintiffs' recovery for their personal injuries is barred by their contributory negligence as a matter of law in failing to remove from their home before the explosion took place.

The fire department responded to an alarm received at 4:54 p. m. The firemen found a hole in the street approximately 6 feet by 10 feet, by 8 feet deep. Lieutenant Shade got into this hole and observed water gushing from the 16-inch main of the Olympic Salt Water Company. He observed no other broken pipe at that time. As he stood in the hole, the street suddenly commenced to cave in rapidly and he hurriedly climbed out. Within a few minutes the automobile of the witness Capener, a coffee, tea, and spice salesman, fell into the cavity. Capener had moved his automobile after observing the fissure in the street, but the washout was progressing

so rapidly to the place to which he had moved it that he dared not approach it again. Lieutenant Shade went into one of the houses on the block and called the number of the Spring Valley Company, thinking that the 16-inch main was the property of that company. He reached the city water department which had taken over the telephone number of the Spring Valley Company upon transfer of the water system to the city. A repairman arrived from the water department, but he did not know where to shut off either the city's main or the 16-inch main. Shade also telephoned to the Pacific Gas & Electric Company. His conversation with that company will be gone into more fully when we come to consider the question of that company's liability. Officer Dolan of the police department was one of the first persons to observe the break. He notified his station and immediately returned to the scene and roped off the street.

Mrs. Gerdes was in her home at the time of the break and her attention was not attracted until after the automobile had fallen into the excavation. She went down her front steps and observed the catastrophe. She testified that she felt very frightened, as it appeared to her as if the outer line of the excavation would move towards the property line, and that her home would slide into it. She immediately telephoned to her husband and said to him, "Come home immediately, something terrible has happened out here. I cannot quite explain it." She estimated the time when she called her husband as 5:15. She had detected a slight odor of gas as she went up the front steps into the house. She inspected her gas range and found no gas escaping there. After she had telephoned to her husband, Firemen Jensen and Harrigan appeared at her front door. She testified that the firemen said to her that they had been sent to take her out of the house, and she told them she had telephoned her husband and would wait for him. There is evidence that Mrs. Jenkins, a neighbor and close friend of Mrs. Gerdes, had requested the firemen to ask Mrs. Gerdes to leave the premises and come to Mrs. Jenkins' home on Forty-eighth avenue, away from the cave-in. There is no evidence that any person in an official position had instructed the two firemen to remove Mrs. Gerdes from the house. Mrs. Gerdes testified that she and the two firemen opened all the windows and doors in the house. Before the windows were opened, there was a slight odor of gas, "but nothing you would hardly notice." It was most noticeable in the front part of the house, but in some parts it was not noticeable at all. After the windows and doors had been opened, there "was no odor of gas that one would notice at all."

Fireman Jensen testified that as he entered the Gerdes' home he detected the odor of gas, but not in very great quantities. After looking at the gas stove, he and Fireman Harrigan went down into the basement, and heard a "roar" of gas. The point of connection of the riser and service pipe, which had partially separated to cause the leak, was not visible, as cement or concrete had been placed around the connection. He put his hand down and could feel the flow of escaping gas. As the break occurred before the pipe reached the meter, it could not be remedied by turning off the gas at the meter. When the doors and windows had all been opened, there was practically no smell in the floor above the basement. He informed Mrs. Gerdes of the location of the leak and cautioned her not to light any matches. He told Mrs. Gerdes that as long as her husband was coming home so soon, the proper thing would be to wait until he arrived, that "he didn't think there would be any immediate danger at that particular time."

Fireman Jensen further testified that as Mrs. Gerdes seemed to be in a weakened condition and did not seem strong, he thought it would be best for her husband to take care of her. Mrs. Gerdes had suffered a paralytic stroke on her left side six years previously, and was lame as a result thereof, although she was able to walk without a crutch or cane.

The testimony of Fireman Harrigan, who accompanied Jensen into the house, was substantially to the same effect as Jensen's testimony. Harrigan detected a slight odor of gas as he entered the house. When the windows had been opened, there was only a very slight odor from the gas, and there was no danger at the time they left.

Mr. Gerdes arrived home between 5:30 and 5:40, just as the two firemen left. Harrigan told him to be careful, as the pavement in front of the house, except for one section, had washed away. Mr. Gerdes also noticed a faint odor of gas as he entered the house. At about 6 o'clock the Gerdes ate a cold supper in their breakfast room at the back of the house. Mr. Gerdes frequently went to the front of the house to observe conditions in the street. After finishing supper, Mrs. Gerdes put on her hat and coat. Mr. Gerdes went to Forty-sixth avenue to the home of Captain Wilson, a member of the fire department and a friend of Mr. Gerdes. Captain Wilson, although not connected with the company on duty at the scene of the accident, seems to have interested himself in it. He first observed conditions at 5:20 and attempted to locate the valve where the water could be turned off. The company with which Firemen Shade, Jensen, and Harrigan were connected returned to the firehouse before 5:48, at which time they went out at the request of Captain Wilson, who believed he had found the valve to shut off the water at Forty-sixth avenue and Anza street. This valve failed to shut off the flow from the

16-inch pipe, and the company returned to the firehouse and was not again at the scene until it responded to the alarm at 8:01 after the explosion.

Captain Wilson returned with Mr. Gerdes to the Gerdes' home, and together they went into the basement, where Captain Wilson located the leak. Mr. Gerdes had not previously gone into the basement. Captain Wilson went outside and warned the workmen in the street not to smoke or light matches, and also warned them against bringing the lighted lanterns which he observed near the premises. He went upstairs and notified the Pacific Gas & Electric Company of the leak. As he was about to leave, he observed that Mrs. Gerdes had swooned on the sofa in the living room. He called Mr. Gerdes and together they placed her in a chair just inside the front door and in a few minutes moved her onto the porch just outside the door. Just as a representative from the gas company arrived the explosion occurred. We will discuss the evidence of earlier calls to the gas company hereafter when we consider the liability of said company.

[1, 2] Appellants contend that as a matter of law plaintiffs were guilty of contributory negligence in failing to leave the premises before the explosion, which negligence bars their recovery for personal injuries. Both Mr. and Mrs. Gerdes knew that gas was escaping into the basement of their home, but were they bound to anticipate that the probability of an explosion occurring under the circumstances of which they had knowledge was so great that it can be said, as a matter of law, that in the exercise of reasonable care for their own safety they should have left their home before the explosion occurred? That both plaintiffs knew that gas is a dangerous substance is indicated by the precautionary measures in which they participated. All windows and doors in the house were opened by Firemen Jensen and Harrigan and Mrs. Gerdes and left open continuously after Mr. Gerdes reached home about 5:30. Mr. Gerdes sought the advice of Captain Wilson, a member of the fire department, as to what should be done about the gas. When Mr. Gerdes observed workmen smoking in the street, he called Captain Wilson's attention to the fact, and Captain Wilson explained the situation to the workmen and instructed them not to smoke or bring lighted lanterns near the Gerdes' basement. Among the men to whom he spoke was Commissioner Myers of the board of public works, to whom he pointed out the gas leak. The jury may have concluded that in view of the fact that all windows and doors had been opened to insure a thorough circulation through the building, and warnings had been given against bringing any fire near the gas leak, plaintiffs believed that their safety was reasonably assured. The street had been roped off by the police to keep bystanders away.

Appellants rely strongly on the remarks made to Mrs. Gerdes by Firemen Jensen and Harrigan, and communicated by her to Mr. Gerdes, as warnings of the danger of an explosion. Although the firemen went to the Gerdes' front door with the object of assisting Mrs. Gerdes from the house, they had not set out with the purpose of removing her because of the gas leak, as they were not aware that gas was leaking until just as they entered the house, and then the odor was not so pronounced that it would cause any alarm. The firemen testified that a lady outside (Mrs. Jenkins) wanted to bring Mrs. Gerdes into her home, and that they informed Mrs. Gerdes of this, but she said she preferred to stay until her husband came home. As noted above, there is no showing that any person in an official position had instructed the firemen to remove Mrs. Gerdes. The jury may have concluded from the testimony as a whole that had it not been for the request of Mrs. Jenkins, the firemen would not have suggested that Mrs. Gerdes leave. They both testified that after the windows and doors had been opened, there was practically no odor of gas except in the basement, and that there was no danger at that time from the gas exploding.

It does not appear that the firemen clearly and definitely impressed on Mrs. Gerdes the necessity for leaving immediately on her husband's arrival. Although in response to leading questions put to him on cross-examination as to whether he told Mrs. Gerdes that it would be well to leave when her husband reached home, and as to whether he wished to move her because of the gas, Fireman Jensen gave affirmative replies, this portion of his testimony is not conclusive, since it clearly appears from other portions of his testimony that he had gone to assist Mrs. Gerdes at the request of her friend and before he was aware of the gas leak. Notwithstanding Fireman Harrigan met Mr. Gerdes just as Mr. Gerdes was about to enter his home, and warned him to step carefully because of the collapse of the sidewalk, there is no evidence that he gave any direction or suggestion whatsoever to Mr. Gerdes to leave the house on account of the gas. Fireman Harrigan told Mrs. Gerdes to remain in the rear of the house, but he testified that this was not because of the escaping gas, but because at the time he saw her he feared that the front part of the house would be undermined by the washout.

Although Firemen Jensen, Harrigan, and Wilson all described the noise made by the escaping gas in the basement as a "roar," the jury may have inferred that they used this term for want of a more apt word to describe the characteristic sound made by gas escaping from a pipe, rather than that

the noise was particularly loud. There is no evidence that it was loud enough to be heard in the rooms above the basement.

One of the strongest circumstances in favor of plaintiffs is the fact that Captain Wilson of the fire department, who examined the gas leak some time after 7 o'clock, made no suggestion that the Gerdes leave the premises because of the gas, and himself went in and out of the house several times to telephone, and was at the 'phone at the time of the explosion. Captain Wilson had assisted in moving Mrs. Gerdes out onto the front porch into the open air. Although if plaintiffs as a matter of law were guilty of contributory negligence, their conduct would not be excused because Captain Wilson was also negligent, the fact that Captain Wilson, upon whom plaintiffs no doubt relied as having greater knowledge of the propensities of escaping gas than plaintiffs, was in and out of the house several times to make telephone calls, including the call to the Pacific Gas & Electric Company, is some evidence that plaintiffs' conduct in remaining on the premises was not unreasonable. It would have been a simple matter for Captain Wilson to have telephoned from some other house had he apprehended any danger of explosion. Captain Wilson had been aware of the conditions in the street since 5:20 in the afternoon and doubtless realized that the gas had been escaping for some time. It cannot be said that plaintiffs were guilty of contributory negligence as a matter of law in failing to notify the gas company themselves earlier in the evening. The fire department and police department had taken charge of the situation, and the jury may have inferred that plaintiffs believed that all necessary steps were being taken to protect their lives and property.

Appellants also rely on the fact that Mrs. Gerdes had become stupefied and dazed from the gas while she sat in the front room of the house with her hat and coat on as indicating that she must have known that gas was present in dangerous quantities. She testified that she had previously experienced no discomfort from the gas. The jury may have concluded that the effect of the gas was so gradual that before Mrs. Gerdes realized what was happening she was partially overcome by it. The jury may also have concluded that her swooning was due in part at least to the strain and fright of the events of the afternoon operating upon her paralytic condition. Doubtless timidity and knowledge of her weakened condition and lameness made her hesitate to remove to unaccustomed quarters. After swooning, she was removed to the front porch, where she was not likely to be overcome by gas. We cannot say that as a matter of law Mrs. Gerdes' conduct indicated a callousness or disregard for her own safety, or that having been partially overcome by the gas she should have anticipated an explosion. In weighing the evidence the jury no doubt took into consideration that the Gerdes were in their own home. A home is traditionally regarded as a place of safety, security, and comfort, especially by persons who are in weakened health or aged, and a greater degree of danger should be present to raise an inference of contributory negligence under such circumstances than in other situations.

[3] If reasonable persons would disagree as to whether plaintiffs were negligent under all the facts and circumstances presented in this case, then the judgment of the trial court must be affirmed. We are of the view that this is a case wherein reasonable persons would disagree on the issue of contributory negligence, and therefore the verdict of the jury and judgment on this issue cannot be disturbed by this court on appeal.

[4] There remain to be considered the questions which arise with regard to the negligence of the appealing defendants. Mr. English, superintendent of construction for the Pacific Gas & Electric Company, arrived in front of the Gerdes' residence just as the explosion occurred in response to Captain Wilson's report to the gas company. The written records of the gas company show that Captain Wilson's call was received at 7:50, and that Mr. English was sent out at 7:52. The alarm immediately after the explosion was received by the fire department at 8:01. Although Captain Wilson fixed the time when he called the gas company as some time before 7:30, he was merely computing the time by reference to what he did between the time when he left his own home to go to the Gerdes' residence and the time of the explosion. We think it must be conceded from the record that the gas company responded promptly to Captain Wilson's notification. However, there is evidence that several persons, including a member of the fire department and a police officer, acting in the line of their duty, telephoned the gas company soon after the street commenced to cave in. Lieutenant Shade, a member of the fire company which responded to the alarm at 4:54, called the gas company at 5:20, and explained that there had been a cave-in and the street was entirely washed out. Mrs. Purcell, who lived on Anza street near the cave-in, also called the gas company. The witness Kirhan, who lived a few doors south of the Gerdes on Forty-seventh avenue, and Police Officer Oliver L. Hassing, on duty at the Richmond Station, also testified that they reported the condition of the street at about 5 o'clock or soon thereafter. These witnesses all feared that the poles on the easterly side of the street, which carried electric wires, would fall, and so reported to the gas company. All, however, testified that they explicitly described the caved-in and washed-out condition of the street.

The gas company produced written records only of Lieutenant Shade's complaint, received at 5:20, and of Captain Wilson's communication at 7:50. The failure of the gas company to arrive upon the scene sooner would appear to be due to the fact that the person or persons who received Lieutenant Shade's complaint at the special service board maintained by the gas company assigned it only to the electrical plant of the company as a complaint concerning the poles, without notifying the gas department. Although Lieutenant Shade asked the operator who received his call for the electric trouble department, this should have made no difference since the receiving operator transferred all complaints, whether concerning gas or electric service, to the service switchboard, and the persons in charge of that board received the complaints and thereafter notified the gas or electric department, depending on the nature of the complaint. The poles on the easterly side of the street were known by the electrical plant to be poles of the Great Western Power Company, and the Pacific Gas & Electric Company therefore made no sufficient investigation of the conditions in the street. It also seems likely that the reports not noted by the company in its records may have been regarded as duplicates of the complaint made by Lieutenant Shade, and not entered for that reason. The superintendent of the service bureau for the gas company testified that it was the duty of employees to keep a record of duplicate complaints, but one of the night operators testified that he received a complaint after 8 o'clock, but made no entry of it because men had already been dispatched to the scene upon the earlier complaint. This indicates that a record was not always made of duplicate complaints. It was the special duty of persons assigned to the service switchboard to handle complaints. The jury may well have concluded that the persons who received the complaints were highly negligent in failing to perceive from the description received of the conditions in the street that the gas pipes were most likely to be affected, and the lives and property of the residents in the district endangered, and that said persons on the service switchboard plainly should have notified the gas department of the company. Foley v. Power Co., 14 Cal. App. 401, 406, 112 P. 467.

[5, 6] The court gave a res ipsa loquitur instruction as to defendant gas company. We are of the view that the criticized instruction should not have been given. However, we think said instruction was not sufficiently prejudicial to said company to constitute reversible error. The effect of said instruction as to the gas company would be to raise an inference of negligence against it which it would be required to rebut by evidence tending to show its freedom from negligence. We think that upon the record said company demonstrated that it was free from negligence except in reporting to the scene of the accident to repair whatever damage had resulted to its pipes, or to remove the danger therefrom, within a reasonable time after it had been informed of the caving in and washing out of the street. In this situation the verdict of the jury must be held to be a finding against the gas company as to negligence in this particular respect. It cannot be presumed that the jury may have believed that said company was free from negligence in this particular, but nevertheless returned a verdict against it, although the evidence as a matter of law clearly showed the company to be free from negligence in all other respects.

[7] We are further of the view that the evidence is sufficient to sustain a finding of negligence against defendant Olympic Salt Water Company. The 16-inch salt water main of said company was of cast iron and had been in the ground between thirty and thirty-five years. The break in this pipe was jagged and irregular, and part of the broken surface appeared to be rusted and corroded, while another section was bright. There were cracks on the side of the pipe, running back from the broken edge, which some of the witnesses testified were old cracks. The city's 4-inch fresh water main had been installed in 1921. The break in this pipe was several feet north of the break in the larger pipe, and was a clean, even break. Lieutenant Shade testified that when he got down into the hole when he first arrived he observed no broken pipe except the 16-inch salt water main. Although there were two small blow holes in the city's pipe near the point of break, developed in the process of manufacture, there was abundant testimony that these holes would not materially affect the strength of the pipe. The termination of the city's pipe line was on Sutro Heights avenue, 200 feet east of the southeast corner of Forty-seventh avenue and Sutro Heights avenue. Several witnesses testified that the salt water main was rusted and corroded. There was testimony that the salt water, by setting up an electrolytic process as it comes in contact with the metal, tends to weaken and soften the pipe. Several witnesses testified that the section of broken pipe had been softened to such an extent that they had been able to cut into it with a pocket knife. The jury was taken to the plant to which the broken 16-inch main had been removed and inspected the pipe. There was a sharp conflict in the extensive expert testimony as to the condition and strength of the two water mains. Without reviewing the evidence in further detail, it is sufficient to say that it will sustain the conclusion that the 16-inch main, which had been in use for a long period of years, was in a defective condition, and that the likelihood of the existence of such condition should have been known to the salt water company,

and, further, there was evidence that the machinery maintained by the company at its pumping plant should have indicated the break in time for the company to have shut off the water before extensive damage had been done.

[8] The giving of the res ipsa loquitur instruction as to this defendant did not constitute reversible error. There was evidence from which the jury could have concluded that the city's pipe broke first, and that the Olympic Salt Water Company's pipe broke without its negligence, as a result of forces set in motion by a break in the city's pipe. However, the jury was instructed that if it found that the city's main broke first, and the salt water company's main broke as a result of the break in the city's main, the verdict should be in favor of the Olympic Salt Water Company. The jury found against the Olympic Salt Water Company, and it must be inferred that the Olympic main broke first. There being evidence amply sufficient to sustain a verdict of negligence against said company, we are of the view that in the circumstances of this case the judgment should not be reversed because of said res ipsa loquitur instruction. Edwards v. Gullick, 213 Cal. 86, 1 P.(2d) 11; Gonzalez v. Nichols, 110 Cal. App. 738, 294 P. 758. We find no other errors which require a reversal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.

PRESTON and LANGDON, JJ., being disqualified, do not participate herein.

219 Cal. 435

ROMA MACARONI FACTORY et al. v. GIAMBASTIANI et al.

S. F. 14874.

Supreme Court of California.

Nov. 28, 1933.

Rehearing Denied Dec. 28, 1933.

1. Courts ⇨209(2).

Applications for writs of mandamus, certiorari, prohibition, or procedendo should ordinarily be made first to superior court, unless directed to court itself (Supreme Court Rule 26).

2. Courts ⇨207(1, 2, 4, 5).

In granting writs of mandamus, certiorari, prohibition, or procedendo, Supreme Court and Courts of Appeal will exercise jurisdiction where some emergency exists or public welfare is involved (Supreme Court Rule 26).

3. Courts ⇨209(2).

Application for mandamus to compel respondents to deliver books and records of factory would not be considered in first instance by Supreme Court (Supreme Court Rule 26).

4. Courts ⇨209(1).

Cases which must be decided by Supreme Court because no other court has jurisdiction are so numerous that it cannot ordinarily take up original proceedings of which there is concurrent jurisdiction with another court.

CURTIS, J., dissenting.

In Bank.

Application by Roma Macaroni Factory and others for a writ of mandate directed to E. Giambastiani and another, to compel them to deliver to petitioners the books and records of Roma Macaroni Factory.

Writ denied without prejudice.

Rehearing denied; CURTIS, J., dissenting.

Daniel A. Ryan, Thomas C. Ryan, George F. Snyder, and Aaron Cohen, all of San Francisco, for petitioners.

Edgar C. Levey and Leon Samuels, both of San Francisco, for respondents.

IRA F. THOMPSON, Justice.

In this matter the petitioners filed in this court a verified petition, asking that a peremptory writ of mandate issue to respondents directing and compelling them to deliver to petitioners the books and records of the Roma Macaroni Factory, a corporation. No alternative writ was sought, but, without extending to the court in the first instance an opportunity of declining to assume jurisdiction by the denial of the alternative writ, brought the matter on for hearing by a notice of motion to the respondents. We quote from the petition as follows: "This application is made to this court in the first instance because the corporation laws of this state contemplate that a new board of directors shall be elected annually and enter upon their duties immediately after their election. Only by a judgment of this court can the petitioners enter upon such duties within the time for which they have been elected." The foregoing is the only reason assigned for making the application here. It appears, however, that there is, and was pending at the time, an action in the superior court in and for the city and county of San Francisco, and numbered therein 241972, wherein the petitioners here are plaintiffs and the respondents here are defendants, and wherein the plaintiffs allege that they are in possession of the books and records of the corporate plaintiff, and ask that the defendants be restrained from interfering with the possession thereof. It also appears that a

temporary restraining order restraining defendants from interfering with the possession of plaintiffs was issued by the superior court on March 10, 1933, which was just fourteen days before the petition was filed here. From an inspection of the pleadings in that case it is plain that it was sought to determine the validity of the same election as is involved in this proceeding.

[1-4] Rule XXVI of this court reads in part as follows: "Section 1. When an application is made to the Supreme Court or a District Court of Appeal, for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and such application might have been lawfully made to a lower court in the first instance, the affidavit, or petition, in addition to the necessary matter requisite by the rules of law to support the application, shall also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from the Appellate court to which such application is made, and not from the lower court."

It is apparent from the nature of the jurisdiction of the respective tribunals, as indicated by the foregoing rule, that ordinarily applications for the writs there mentioned should first be made to the superior court, unless, of course, they are to be directed to the court itself. As an exception to the general rule, it has been the practice for the District Courts of Appeal and this court to exercise jurisdiction where some emergency exists or the public welfare is involved. We do not think that this is such a case. The superior courts have full authority in the premises, and are in a much better position to determine questions of fact than are the appellate tribunals. Being able to readily determine the facts they are enabled to act expeditiously without impairing the rights of other litigants. It was very properly said in Imperial Land Co. v. Imperial Irr. District, 166 Cal. 491, 137 P. 234: "The cases which must be decided by this court because no other court has jurisdiction are so numerous that we are unable to take up original proceedings of which there is concurrent jurisdiction, where it is possible to present them to some other competent court." And in Brougher v. Board of Public Works, 205 Cal. 426–440, 271 P. 487, 493, the petition was dismissed after the respondents were required to show cause why the alternative writ should not issue, it being there said: "It has never been the policy of this court to encourage the institution of proceedings herein, particularly where there is a dispute as to the facts involved, when such proceedings could as well have been instituted in the first instance in the superior court of the county where the controversy arose." And again in Brougher v. Board of Public Works, 107 Cal. App. 15–20, 290 P. 140, 143, in a case in which we denied a rehearing, the rule was reaffirmed in pertinent language as follows: "The Constitution (article 6, § 5) likewise gives to the superior court jurisdiction to grant writs of mandamus, and since these courts are constituted especially for the purpose of the ascertainment of facts and the trial of cases upon facts, it is quite proper for the Supreme Court to adopt a rule governing the discretionary action of the court in passing upon an application for a prerogative writ, that such application will not be entertained where there is no sufficient reason shown why the application was not made in the superior court." Authority for the proposition that the matters to be litigated should be of a public nature before an exception should be made is Clark v. Shepherd, 46 Cal. App. 677, 189 P. 725.

The motion for a peremptory writ of mandamus is denied, which order is without prejudice to the right of petitioners to seek such relief as they may be advised they are entitled to in the proper tribunal.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

CURTIS, Justice (dissenting).

I dissent.

The present action is an aftermath of the action of Vannucci v. Pedrini (Cal. Sup.) 17 P.(2d) 706. That action involved the right to some seventy-one shares of stock of the Roma Macaroni Factory, a corporation organized and doing business in San Francisco. Plaintiffs in that action claimed that under an agreement entered into by all the stockholders of said company they had the prior right over the defendants to purchase said seventy-one shares of stock. The trial court sustained a general demurrer to plaintiffs' complaint in that action. The plaintiffs appealed, and we reversed the case, and held that said complaint stated a good cause of action. On the going down of the remittitur in that case, the superior court issued an injunction against the defendants in that case restraining them from voting said seventy-one shares of stock until the final determination of that case. Pending this injunction, the annual meeting of the Roma Macaroni Factory was held. The seventy-one shares of stock were not voted at this meeting for the election of directors. The defendants in said former action withdrew from the meeting, leaving the plaintiff stockholders as the sole stockholders present at said meeting. The plaintiff stockholders, exclusive of the seventy-one shares, owned one hundred and ninety-four shares of said stock and a majority of the shares entitled to vote at said meeting. They proceeded with the election of a board of directors,

which board thereafter organized and made demand upon the defendants in this action, who were the former president and secretary of the company, for the possession of the office, the factory, and the books and records of the company. The defendants refused said demand, and this proceeding was brought to compel them to deliver to the plaintiffs said property.

This proceeding is precisely like that involved in the case of Consumers Salt Co. v. Riggins, 208 Cal. 537, 282 P. 954, which was instituted originally in the District Court of Appeals and transferred to this court. Upon a hearing here, we held that the plaintiffs in said action were entitled to a writ of mandamus, directed to the defendant therein, the former secretary of the Consumers' Salt Company, requiring him to turn over to the plaintiffs the office and the property then in his possession. The object of the two proceedings are precisely alike in principle, and I see no reason why we should grant relief in one and deny it in the other.

219 Cal. 422

Ex parte MAAS.

Cr. 3662.

Supreme Court of California.

Nov. 22, 1933.

1. Waters and water courses ⇐101.

Legislation respecting water affects public welfare, and right to legislate regarding its use and conservation is referable to state's police power, but is not to be exercised exclusively by state Legislature (Const. art. 11, § 11).

2. Waters and water courses ⇐101.

County ordinance prohibiting waste of water pumped from wells and seeking to conserve subterranean waters *held* not unlawful or invasion of state's police power, or without jurisdiction of county board of supervisors (Const. art. 11, § 11).

3. Waters and water courses ⇐101.

County ordinance prohibiting impounding of waters unless thereafter used for irrigation, domestic use, or for propagation of fish, and declaring escape of more than 5 per cent. of water received on land for such purposes to constitute waste, *held* not unreasonable (Const. art. 11, § 11).

4. Waters and water courses ⇐101.

Use of pumped water to flood lands for attracting wild game and aquatic birds *held* not "beneficial use of land and water" within county ordinance prohibiting impounding of water unless used thereafter for beneficial purposes (Const. art. 11, § 11).

[Ed. Note.—For other definitions of "Beneficial Use," see Words & Phrases.]

5. Waters and water courses ⇐101.

Use of pumped water to flood lands for attracting wild game and aquatic birds *held* not beneficial use of land because tending to free lands from alkali, in absence of showing lands flooded were impregnated by alkali.

In Bank.

Application by Harold A. Maas for a writ of habeas corpus to be directed to the Sheriff of the County of Orange.

Writ discharged, and petitioner remanded.

George P. Adams, of Los Angeles, and West & McKinney, of Santa Ana, for petitioner.

S. B. Kaufman, Dist. Atty., W. F. Menton, Asst. Dist. Atty., and James L. Davis, Deputy Dist. Atty., all of Santa Ana, for respondent.

WASTE, Chief Justice.

This is an application for a writ of habeas corpus wherein petitioner alleges that he is restrained of his liberty by the sheriff of the county of Orange under a commitment issued upon default in payment of a fine assessed against him for a violation of an ordinance adopted by the board of supervisors of said county, entitled "An ordinance regulating the use of water from pumping wells and to prevent the waste and flow thereof and the defining of waste of such water."

Section 1 of the ordinance under consideration provides that it shall be unlawful for any person, firm, etc., to cause, permit, or suffer any water well or wells under the control or management of such person, firm, etc., to be pumped and used in such manner as to cause, suffer, or permit the water to unnecessarily flow therefrom. Section 2 defines a "pumping well" to be any well from which water is obtained by means of a pump or other mechanical device. Section 3 defines "waste" to be "the causing, suffering or permitting any water pumped from any well to run into any river, creek, or other natural water course or channel or into any bay or pond (unless used thereafter for the beneficial purpose of irrigation of land or domestic use), or into any street, road or highway, or upon the land of any person, or upon the public lands of the United States, or of the State of California, unless it be used thereon for the beneficial purposes of irrigation thereof, or for domestic use, or the propagation of fish. The use of any water produced from any such well for irrigation of land whenever over five per cent. of the water received on such land for such purposes

is allowed to escape therefrom, is also hereby declared to be waste within the meaning of this Ordinance; provided, that nothing herein shall prevent the running of water pumped from such wells into an artificial pond, or storage reservoir, for use thereafter for a beneficial use; provided, such beneficial use shall not exceed one-fifth of one miner's inch of water per acre, perpetual flow, but such user of water shall have the right to accumulate the said amount within any period of each year." Section 4 makes each day's violation of such ordinance a separate offense. Section 5 prescribes the penalty (fine or fine and imprisonment in the county jail) for a violation of such ordinance.

It is the petitioner's principal contention that this ordinance represents an invasion of the police power of the state and that it is without the authority and jurisdiction of boards of supervisors to so legislate. In other words, it is the petitioner's theory that all water within the state is the property of the people and that the enactment of legislation with respect thereto is exclusively within the province of the state Legislature.

[1] Legislation with respect to water affects the public welfare and the right to legislate in regard to its use and conservation is referable to the police power of the state. Ex parte Elam, 6 Cal. App. 233, 237, 91 P. 811. This does not mean, however, that this phase of the police power is to be exercised exclusively by the state Legislature. Section 11 of article 11 of the state Constitution provides that: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." This constitutional provision received the attention of this court in Re Isch, 174 Cal. 180, 181, 162 P. 1026. It is there declared: "As was said in Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 226, 231, 73 P. 987, 988: 'The power conferred by the Constitution in this respect, subject to the two exceptions, that it is local to the city, and that it is subject to general laws, is as broad as that of the Legislature itself'—and the board was vested with the right to exercise within the limits of its jurisdiction, to use the words of the case just cited, 'the entire police power of the state, subject only to the control of general laws.' Necessarily this constitutional provision gives to a county 'the right to determine what police regulations it will prescribe, and the only limitation upon the exercise of the power is that such regulations shall not be in conflict with the general laws of this state.' Ex parte Cheney, 90 Cal. 617, 620, 27 P. 436, 437."

In People v. Velarde, 45 Cal. App. 520, 524, 188 P. 59, 60, the following appears: "Thus there is vested in every county police power by direct grant under the Constitution. The power thus conferred is as broad as that vested in the Legislature itself, subject to these two exceptions: That it is local to the county or municipality, as the case may be, and is subject to general laws. The board of supervisors * * * [is] therefore vested with the right to exercise within its jurisdiction 'the entire police power of the state, subject only to the control of the general laws.' "

[2] The ordinance here involved satisfies all of these requirements. It has for its purpose the conservation of subterranean waters, a legitimate field for the exercise of the police power. Ex parte Elam, supra. It is purely local in character and operation, for it seeks to prevent the undue waste of the percolating waters within the county of Orange, thereby conserving said waters and materially benefiting the public welfare. The ordinance does no violence to any general law of the state to which our attention has been directed.

[3] We find no merit in the contention that the ordinance is unreasonable. Petitioner directs this assault particularly at section 3 of the ordinance wherein waste of water from "pumping wells" is defined. In Ex parte Elam, supra, a substantially identical limitation on the waste of water was approved as a reasonable and proper exercise of the police power. The fact that the cited case was dealing with an act (Stats. 1907, p. 122), having to do with the conservation of artesian well water, as distinguished from pumping well water, is of no material consequence.

[4] The charge against petitioner arose out of the flooding of the lands occupied by the West Coast Rod and Gun Club, Limited, of which organization petitioner was secretary. These lands were flooded with well water pumped thereon for the purpose of attracting wild game and aquatic birds. Petitioner urges that this constitutes a beneficial use of land and water. This contention is sufficiently answered in Ex parte Elam, supra, page 238, of 6 Cal. App., 91 P. 811, 813, wherein it is said: "It may also be conceded that an exclusive right to hunt upon such preserves has also been held to be a species of property, and injunctions have been issued to prevent interference with the full exercise of such rights. * * * But, while the maintenance of such duck ponds no doubt contributes greatly to the enjoyment of the owner of the hunting privilege, it will scarcely be contended that this is a use of the water which is beneficial to the land. Neither does it follow that because the courts have recognized such exclusive hunting privileges they must support the owners thereof in an encroachment upon another more necessary common right of the public, that of the conservation of the subterranean waters of the state for domestic uses and purposes of irrigation."

[5] It is urged that the flooding of the lands in question had a tendency to free them of

alkali. From this it is concluded that the water was used for a beneficial purpose. The record fails to support the contention. We have nothing before us showing that the lands so flooded were impregnated by alkali.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff of the county of Orange.

We concur: THOMPSON, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

219 Cal. 451

GEORGE et al. v. RAILROAD COMMISSION et al.

S. F. 14872.

Supreme Court of California.

Nov. 29, 1933.

Automobiles ⇐107(2).

Evidence sustained finding of Railroad Commission that autotruck freight haulers who issued freight bills and standard bills of lading were operating as common carriers between fixed termini over regular route contrary to law, warranting order requiring haulers to cease such operations (Gen. Laws 1931, Act 5129, § 1(c).

In Bank.

Application for certiorari by Frank P. George and Tony P. George, individually and as a copartnership, doing business sometimes under the name and style of George Bros., and sometimes under the name and style of the Associated Contract Freight Haulers, against the Railroad Commission of the State of California and others, to annul an order of the Railroad Commission requiring petitioners to cease and desist from common carrier operations.

Order affirmed.

Gwyn H. Baker, of San Francisco, for petitioners.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondents.

IRA F. THOMPSON, Justice.

On October 21, 1932, the California Transportation Company, Sacramento Navigation Company, Fay Transportation Company, the Western Pacific Company, and the Sacramento Northern Railway filed a complaint before the Railroad Commission of the state of California charging that Frank P. George and Tony P. George, a copartnership doing business sometimes under the name of George Bros. and sometimes as Associated Contract Freight Haulers, were conducting a business as common carriers of freight between San Francisco and Sacramento and intermediate points, and praying for an order of the commission requiring them to cease and desist from such common carrier operations. The defense interposed by the petitioners was to the effect that they were not acting as a common carrier, but only as a private or contract carrier, and were not operating between fixed termini or over a regular route. On January 6, 1933, the respondent commission made its order requiring the petitioners to cease and desist. We are asked, in this proceeding in certiorari, to annul the order on the ground that there is no evidence to sustain the finding of the commission that petitioners were operating as a common carrier between fixed termini and over a regular route.

It thus becomes necessary to set down and examine the testimony adduced for the purpose of ascertaining if there be any substantial evidence to justify the finding mentioned. A representative of the Public Food Stores testified that, between August 29, 1932, and December 12 of the same year, they shipped sixteen loads of freight from San Francisco to Sacramento, consigned to themselves. By agreement with petitioners the rate was fixed at 20 cents for 100 pounds when the tonnage was five tons or less, and at a lesser rate when over that weight. It was understood that petitioners should, and they did, between the dates mentioned, call at the Public Food Stores in San Francisco every Monday morning for goods to be delivered to the Sacramento store on Tuesday. These sixteen shipments were evidenced by freight bills issued by the Associated Contract Freight Haulers, subject to certain provisions on the reverse side thereof, reading as follows:

"(1) All freight bills will be sent immediately with a signature of consignee upon return of truck.

"(2) All accounts must be paid weekly upon receipt of statement.

"(3) The carrier will make a reasonable charge for the detention of any truck for loading and unloading and may add such charge to all other charges hereinafter and hold such property subject to a lien thereon.

"(4) The carrier may make a reasonable charge for a second delivery of all property which has been previously offered for delivery and returned through no fault of the carrier.

"(5) The carrier will not be liable for any damage or loss of goods after being transferred to any company for delivery.

"(6) The carrier will not be liable for any claim of any description unless said claim is filed within ten (10) days from date of shipment. This freight bill must accompany any claim for overcharge, loss or damage.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

"(7) No carrier is bound to transport said property in time for any particular market, or otherwise than with reasonable dispatch unless by special agreement.

"(8) Every party, whether principal or agent, shipping explosives or dangerous goods without previous full written disclosure to the character of their nature shall be liable for all damage caused thereby and such goods may be warehoused at owners risk and expense, or destroyed without compensation.

"(9) This carrier shall not be held liable for any amount on goods not properly packed, nor on Fragile Fabrics, unless plainly marked as such: nor on articles consisting of or containing glass, unless so marked and packed so as to insure safe transportation by express with ordinary care and the shipper agrees that the Company shall not be liable in any event for more than Fifty ($50.00) Dollars for any shipment unless a greater value is stated herein and so billed.

"(10) Associated Contract Freight Haulers have the right to refuse any load at any time.

"(11) Upon arrival of truck at shippers destination. (,) truck failing to pick up load through fault of shipper, shipper must pay at the rate of 25c per mile from place of pick up to destination of consignee." The freight bills issued for the first seven shipments did not contain the eleventh provision.

A shipping clerk for Wellman, Peck & Co. testified that the petitioners had done the hauling of groceries to their plant in Sacramento for something over a year, calling for loads on Monday and Tuesday of each week. He said it was agreed that each load should be not less than ten tons and that the parties should have the right to terminate the arrangement "at their pleasure." Included in the exhibits explaining the method of handling the freight of the Wellman, Peck & Co. are two "agreements for transportation by private contract carrier" describing the weight, rate, time of pick-up and delivery, and covering the loads of May 16 and May 19, 1932. The other exhibits referring to the transactions with this firm are freight bills such as those used in the instance of the Public Food Stores and copies of the usual uniform bills of lading. The two firms above mentioned had no freight to be transported from Sacramento to San Francisco.

However, it appears from other testimony that during the year 1932, the petitioners hauled from Sacramento to San Francisco approximately fifty loads of beans and rice for the Trinidad Bean & Elevator Company, S. M. Sorensen & Co., the Capitol Rice Company, the Phillips Milling Company, Sinsheimer & Co. and the Lompoc Produce & Real Estate Company. Among the exhibits evidencing these loads there are a few private contract carrier agreements, but the exhibits consist, for the most part, of freight bills such as those already described. It also appears from the exhibits that petitioners hauled produce for most of these firms between points other than Sacramento and San Francisco, for example, to San Francisco from Oakland, Marysville, Soledad, Lodi, Stockton, and from as far south as Lompoc. The shipping documents issued in connection with these hauls also consist mainly of freight bills.

Without setting down in detail the testimony regarding other features of these transactions, we can properly say that, except as to Wellman, Peck & Co. and the Public Food Stores, it discloses that special arrangements were made for petitioners to secure a load at a particular time and transport it to its destination and that the business had been largely solicited by one or the other of the petitioners. The petitioners testified, and there was some other testimony supporting them, that they reserved the right to refuse to haul for any of their customers or for any one else, and had, in fact, discontinued hauling for some of the firms mentioned. This testimony is weakened to some extent by other testimony showing they had practically all the tonnage they could haul conveniently.

Subsection (c) of section 1 of the Auto Stage and Truck Transportation Act (Deering's Gen. Laws 1931, p. 2534, Act 5129) defines a transportation company subject to the regulatory power of the respondent commission as follows:

"The term 'transportation company' when used in this act means every corporation or person, * * * owning, controlling, operating or managing, any autotruck used in the business of transportation of property, or as a common carrier of property, for compensation, over any public highway in this state between fixed termini or over a regular route. * * *" It cannot be doubted, from the evidence recited, that the respondent commission was fully justified in concluding that petitioners operated between Sacramento and San Francisco, or between fixed termini and over a regular route. In this connection it is to be noted that the order to cease and desist did not attempt to compel the petitioners to cease operations except between these cities and intermediate points. With respect to this latter part of the definition then, there can be no question. The other half concerns itself with the problem of whether petitioners were doing business as a common carrier within the meaning of the Auto Stage and Truck Transportation Act, supra. In Haynes v. MacFarlane, 207 Cal. 529, 279 P. 436, 437, this court said: "Whether the status of a freight autotruck operator is public or private in character is primarily a question of fact in each case." The respondent commission attached considerable importance to the fact that petitioners issued, during all of the latter part of 1932, the freight bills heretofore discussed and uniform or standard bills of

lading. In its opinion it directs attention to the fact that, while petitioners claim they reserved the right to refuse shipments, there is no showing that they refused any freight to be carried over the route in question and, as has already been noted, they had all the freight they could conveniently handle. Under these circumstances it is impossible for us to hold that the commission was not justified in its conclusion. The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

219 Cal. 456

ARON v. LEAVY, Controller.

S. F. 14482.

Supreme Court of California.

Dec. 1, 1933.

1. Municipal corporations ⇐217(3).

Alien employees retained when city of San Francisco acquired water company's properties *held* "appointed" within charter provision that all persons appointed to employment under city must be citizens (St. 1913, p. 1616, art. 16, § 2).

2. Municipal corporations ⇐217(3).

Provision in San Francisco charter that employees in operating service of public utility acquired by city shall be preferred for appointment *held* not to modify provision that all persons appointed to employment under city must be citizens (St. 1913, p. 1613, art. 13, § 11(B); p. 1616, art. 16, § 2).

3. Estoppel ⇐62(4).

That alien employees who failed to disclose their ineligibility were not discharged when city of San Francisco acquired water company's properties did not estop city to refuse payment for their services (St. 1913, p. 1616, art. 16, § 2).

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Maurice E. Aron against Leonard Leavy, Controller, the City and County of San Francisco, substituted for Benning Wentworth, deceased, auditor. From a judgment in favor of plaintiff, defendant appeals.

Affirmed. Prior opinions 18 P.(2d) 428, 19 P.(2d) 251.

John J. O'Toole, City Atty., Frank L. Fenton, Vincent W. Hallinan, C. K. Bonestell, W. Earl Shafer, and Jas. J. Roach, all of San Francisco (Michael Riordan, of San Francisco, of counsel), for appellant.

M. James McGranahan, of San Francisco, for respondent.

M. James McGranahan, of San Francisco, amicus curiæ for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2. Upon further consideration, we conclude that the decision is correct, and we adopt the opinion of Mr. Justice SPENCE as the opinion of this court. The said opinion reads as follows:

Plaintiff, a taxpayer, sought to enjoin the defendant auditor from allowing the demands of certain persons against the city and county of San Francisco. From a judgment in favor of plaintiff, defendant appeals.

From the agreed statement of facts it appears that on March 3, 1930, said city and county of San Francisco acquired all of the operative properties of the Spring Valley Water Company; that at said time the persons referred to were in the employ of said Spring Valley Water Company; that upon taking over the properties of said company said persons were taken into the employ of said city and county of San Francisco and continued in said employment during the period in question; and that said persons were not and are not citizens of the United States.

The question here presented arises under the provisions of article 16, § 2, of the Charter of San Francisco, as amended in 1913 (Stats. 1913, pp. 1602, 1616). We quote only the following pertinent portion: "All persons appointed to office, position or employment under the city and county must be citizens of the United States. * * *"

[1, 2] Appellant contends that said charter provision had no application to the persons named in the complaint as said persons were not "appointed" to any employment under the said city and county. In our opinion this contention is without merit. The obvious purpose of the section was to prohibit the employment of aliens by the city and county. The retention of said persons in their former employment was in effect an appointment within the meaning of the section and the city and county could not do indirectly that which it could not do directly. Appellant urges that the charter should be considered as a whole and refers to article 13, § 11, subd. B thereof (St. 1913, p. 1613), reading: "The following persons securing standing on the eligible list in examinations shall be preferred for appointment: * * * 2. Persons employed in the operating service of any pub-

lic utility acquired by the city. * * *" But the last-quoted portion of the charter does not in any way purport to modify the provisions of article 16, § 2, and cannot be construed to have that effect.

[3] Appellant further contends that as said persons were not discharged, the city and county were estopped to refuse payment for their services. We believe that this contention is likewise without merit. The aliens formerly employed by the water company could not claim the benefit of the doctrine of estoppel by failing to disclose their ineligibility and continuing in the employment.

The judgment is affirmed.

219 Cal. 477

HENDERSON et al. v. JACOBS et al.

S. F. 14704.

Supreme Court of California.

Dec. 1, 1933.

Rehearing Denied Dec. 29, 1933.

1. Appeal and error ⇐931(1).

Appellate court should sustain trial court's judgment if it can reasonably do so.

2. Election of remedies ⇐7(3).

Materialman's filing of claim against deceased member of syndicate for material furnished for golf club of which deceased was member *held* not alone to bar materialman's right as creditor of syndicate, which constructed golf course, or of corporation subsequently organized by syndicate.

3. Clubs ⇐8.

Finding of creditors' committee that certain claimant had valid claim against golf corporation for material furnished to one of promoters and actually used in improving property, and that claimant was entitled to stock in corporation to amount of claim, *held* sustained by evidence.

4. Clubs ⇐8.

Evidence sustained finding that director's purchase of corporation's property at execution sale was not part of fraudulent conspiracy to purchase property for benefit of other directors and to relieve them from liability on notes to damage of other stockholders and in violation of statute (Civ. Code, §§ 2230–2234).

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by E. F. Henderson and others against M. Jacobs and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Charles C. Boynton and John T. Boynton both of San Francisco, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland for respondents.

SEAWELL, Justice.

This action was brought by plaintiffs, owners of stock of the Fairmede Golf & Country Club, a corporation, in their representative capacity against the defendants. The gravamen of the complaint consists of allegations of fraud and conspiracy on the part of a majority of the directors of said corporation. Plaintiffs sought by the action to impress a trust upon certain real property formerly held by the defendant corporation and prayed for an accounting and for general relief. Judgment went for the defendants, and plaintiffs are before the court on an appeal from the judgment.

[1] It may be stated at the outset that it is the duty of appellate courts to sustain the judgments of trial court if they can, with reason, do so. This rule, of course, must control us in our consideration of the instant case.

The transactions which give rise to the action are unusual. That the project which all the parties to the suit were engaged in promoting was purely speculative in its inception, and was without substantial financial support or backing, will appear from a brief review of its organization and methods resorted to in an effort to promote the enterprise.

In the month of November, 1924, Gertrude H. Collins, a wife of Robert Collins, was the owner of a large tract of land situate in the county of Contra Costa, of which the land involved in this action was a part, all of which was covered by a blanket mortgage held by the Oakland Bank. A portion of the above acreage was sought as a golf course and clubhouse site. A syndicate or association was formed, consisting of Robert Collins, husband of Gertrude H. Collins, J. M. Ough, Gwynn Officer, Charles M. Woods, E. F. Henderson (a plaintiff herein), McClymonds and Wells (attorneys at law), and other persons whose names do not appear in the pleadings, to promote the enterprise and devise ways and means by which a portion of Mrs. Collins' said real property might be purchased and the clubhouse constructed and the golf course and grounds put in order in consummation of the purpose of said syndicate. By the terms of the syndicate agreement, it was provided that a corporation should be organized at a later and more propitious season. In furtherance of the plan, Robert Collins, manager and agent for his wife, was to cause to be conveyed approximately 151 acres of his wife's said acreage for the use and benefit of said enterprise, in consideration of a $37,500 cash pay-

ment, plus stock of the par value of $37,500, to be issued to the Collins by the corporation when it should become organized. Henderson was to contribute the clubhouse; Ough was to dig the wells for the water supply; Woods was to furnish and install a fairway sprinkling system. Others were to contribute to the enterprise by furnishing materials, equipment, or services which were definitely specified in the syndicate agreement.

The promoters of the undertaking and those associated with them were from the first without available funds necessary to finance an enterprise which would require a large outlay of moneys. The plan of the syndicate agreement providing for the raising of funds with which to pay the purchase price of the land and make the improvements necessary to put the property in shape for a golf course and country club from cash subscriptions realized from persons not members of the syndicate failed to bring in any funds. No money was forthcoming from that anticipated source. The syndicate was therefore without the $37,500 cash to pay Mrs. Collins, but in the meantime the members of the syndicate or association continued to lay out a golf course, build a clubhouse, install a water supply and fairway sprinkling system, and otherwise improved the 151 acres which it had negotiated to purchase, but the title to which was still in Mrs. Collins. Henderson had built the clubhouse of the estimated value of $56,200; Woods had furnished the sprinking system, of the appraised value of $20,000. Claims held by other members of the syndicate who had furnished materials, fixtures, furnishings, or equipment, or who had performed services in the improvement of said golf course, swelled the above sums to an aggregate approximating $140,000. In addition to the sum last named, creditors of the syndicate who were not members of it held claims against said syndicate in sums aggregating $40,000 for and on account of services rendered or materials furnished in the construction or improvement of said golf course.

On or about July 15, 1926, through the negotiations of a creditors' committee selected by the creditors and members of the syndicate at a meeting called for that purpose, said Gertrude H. Collins, in consideration of $45,000, granted said 151 acres of land to Joseph M. Ough, as trustee for the plaintiffs and for all creditors and members of said syndicate and said corporation Fairmede Golf & Country Club. No money passed, but a joint and several promissory note in the sum of $45,000, secured by a mortgage on said golf course and country club, was executed in her favor by Joseph M. Ough, E. F. Henderson, plaintiff herein, Vance McClymonds, Gwynn Officer, H. Pickard, and M. Jacobs. In December of that year said Gertrude H. Collins assigned and transferred said note and mortgage to the Oakland Bank.

At the sale of said real property made on October 5, 1929, under foreclosure proceedings, said M. Jacobs, a director of the Fairmede Golf and Country Club, and a joint and several maker of the note upon which the foreclosure suit was brought, and who was liable for a deficiency judgment, bid in the property for $54,327.01; this being the amount of the foreclosure judgment and costs. The court found the value of the land and improvements on the day of sale and for the following year to be $56,764, subject to $2,490 for taxes, aggregating a sum slightly above the value of the property as found by the court.

Some time after the creditors' meeting held in July, 1926, an agreement was entered into between the numerous creditors of said syndicate and the Fairmede Golf and Country Club and the members of said syndicate to incorporate said Fairmede Golf and Country Club with a capital stock of $300,000, consisting of 30,000 shares of the par value of $10 each, 20,000 of said shares to be common and 10,000 shares to be preferred stock. It was agreed that J. M. Ough should deed said land to the corporation in consideration of said corporation issuing to the creditors of said syndicate and corporation preferred stock at par equal to the face amount of their respective claims, aggregating 4,383 shares, and issuing to the members of said syndicate in lieu of their claims common stock of said corporation at par equal to the face value of their claims, aggregating 11,017 shares. Said creditors' committee, representing all persons holding claims against the syndicate or corporation, directed said corporation to sell 2400 shares of the corporation's preferred stock for cash for the purpose of raising money wherewith to conduct the business of the corporation. It was found and stipulated by said creditors' agreement that the Pacific Pipe Company was a creditor of said syndicate and of the Fairmede Golf Course in the sum of $16,990.85, and that said Pacific Pipe Company should receive 1,699 shares of preferred stock in satisfaction of its claim.

Plaintiffs attack the allowance of this single claim on the ground that it was procured through fraudulent misrepresentations practiced by M. Jacobs, aided by the connivance of his accomplice, Sherman, and that the creditors' committee would not have allowed the same had it been truthfully informed as to its origin. The claim has its origin in the C. M. Woods pipe furnishing transaction. Said Woods, who was a member of the original syndicate group, agreed to furnish, and he did furnish, the pipe for the sprinkling system for which he was to receive stock in the sum of $20,000. Woods died June 25, 1925, a few months after the project was inaugurated. At the time of his death he was indebted to the estate of one Jacob Pantoskey, the predecessor of Pacific Pipe Company, in the sum of

$17,043.40 for the pipe furnished to him by Pantoskey, and which material Woods furnished to the syndicate in the performance of his agreement with said syndicate. Pantoskey in his lifetime conducted his business under the name of Pacific Pipe Company. M. Jacobs was his son-in-law. Upon Pantoskey's death, Jacobs caused the Pacific Pipe Company to be incorporated. He became the president and manager of said corporation, as the successor of the estate of Jacob Pantoskey, and claimed to be the owner of said $17,043.40 claim on account of the pipe and material furnished by Woods to said syndicate. No question seems to have been raised by plaintiffs as to the right of the Pacific Pipe Company to succeed to the estate of Pantoskey, including said $17,043.40 claim, but it is contended that said claim was a charge against the estate of Charles M. Woods solely, and that it was allowed and assumed by the creditors' committee as being a proper charge against the syndicate group by reason of false and fraudulent representations made to the creditors' committee by M. Jacobs, to the effect that said Jacob Pantoskey, doing business under the name of Pacific Pipe Company, was an original creditor of said syndicate, whereas in fact and in truth said Woods was the original creditor of said syndicate. A claim for the value of the pipe material was presented to the estate of Woods and allowed, but, the estate being practically insolvent, only 5 per cent. of the entire amount was paid, leaving a balance of $16,990 on account of the materials so furnished.

[2, 3] Plaintiffs' contention is that the insolvent estate of Woods is the debtor of the Pacific Pipe Company, and it must look alone to that estate for payment. The fact that it filed a claim against said estate would not of itself bar its right as a creditor of the syndicate group, or corporation, as found by the creditors' committee. The pipe company was entitled to have its claim paid in full by either the Woods estate or by the syndicate, which received the benefit of the materials. There can be no doubt, so far as anything appearing to the contrary in the briefs, but that Pantoskey or the pipe company could have filed a materialmen's lien and protected itself against loss. Whether or not a waiver of the lien was the consideration for the allowance of the claim by the creditors' committee is not discussed in the briefs. But, whether that is so or not, it is very clear that it was the plan, understanding, and agreement of the committee with all the persons in interest that all persons who had furnished labor, services, or materials of any kind in aid of the project should, in lieu of money, receive stock of the corporation equal in par value to the materials furnished or services rendered. To accomplish this end, the committee met and canvassed each claim and made its decision as to the merits of each claim. The claim of the Pacific Pipe Company was for materials actually in place and which formed a substantial part of the improvement and added to its value at least $16,990. Said committee which investigated the merits of each claim was appointed for that specific purpose by common consent, and it was beneficially interested with all the other creditors in rejecting spurious claims. It is not likely that it was blind as to the facts, which must have been patent upon a most casual examination by the committee in the performance of its duty. This court would not be justified in setting aside the committee's findings that the Pacific Pipe Company was a creditor of the syndicate, which was but a forerunner of the corporation. It was stipulated by all the creditors as a fact that said pipe company was a creditor and was entitled to be so listed. The allegations of fraud and collusion on the part of Jacobs and Sherman were found by the trial court to be untrue upon a consideration of all the evidence, and no sufficient reasons appear that would justify this court in reversing the trial court's finding. The enterprise seems to have existed in a somewhat disorganized fashion under the joint supervision of its creditors and the syndicate members until June, 1928, at which time, with the consent of the creditors, the Fairmede Golf and Country Club was incorporated. In February, 1929, Trustee Ough transferred the land held by him in trust to said corporation. At a directors' meeting held on February 21, 1929, a resolution was passed authorizing the sale of said land for a sum not less than $125,000. No sale was or could be made. The bank was pressing for its money. Taxes, interest, and costs of upkeep were not being met. The bank threatened foreclosure and a deficiency judgment against the four defendant directors and the others who had signed the note, unless all sums past due and a portion of the principal was paid. Ough had paid out some $3,000 or $4,000 on account of interest and accruing costs. No one seemed able or willing to come to the rescue of the corporation, and proceedings were commenced which resulted in a foreclosure. Summons was served on the defendants therein, including the corporation. Notice of the proceedings was served upon each of the creditors, stockholders, and persons in anywise interested in the enterprise.

[4] Appellants in their brief say: "We are not questioning the legality of the purchase at the judicial sale. The point that we are stressing is the utter illegality of subsequent acquisition by these defendants, who were and continued to be in control of the corporation as the majority of its directors, of the corporation's equity of redemption in this property. Jacobs bid in the property at the foreclosure sale for a sum sufficient to pay the mortgage, interest and costs. Thereupon and thereafter the defendants who had been on the note were

relieved of all liability for any deficiency. By reason of the equity of redemption in this property that remained in the corporation for one year following this foreclosure sale, these purchasing directors became affected with an interest adverse to their corporation. The interest of these defendant directors was to acquire from the corporation its equity of redemption in this property without paying the corporation any consideration therefor. There was just one way to do this with any semblance of legality in the transaction. That was to conceal the fact that the majority of the directors of this corporation were interested in the purchase of the property. This was done by leaving the title stand in the defendant Jacobs alone. As has been noted and cited above, this deceit was carried down into the verified answer of the defendants."

It is true that the answer contains the denial that in purchasing the property at execution sale director Jacobs was acting for others than himself. The court found on this issue that he was acting in said purchase on behalf of himself and all of the other defendant directors, who were parties to the foreclosure action, except Fairmede Golf and Country Club. This inaccuracy was explained by the fact that Jacobs had urged his fellow directors to assist him to raise an amount to fully discharge the mortgage and thereby prevent a deficiency, but that they failed to do so until some time after the purchase, when they raised a small portion of the amount of the bid made by Jacobs. None of said directors and obligors upon the note was disqualified from protecting himself against a deficiency judgment. There does not seem to be any reason why it was necessary to resort to subterfuge, notwithstanding plaintiffs' suspicions to the contrary, in order to conceal the identity of the purchaser at execution sale.

Appellants lean heavily upon the provisions of sections 2230–2234, Civil Code, which forbid a trustee from taking part in any transaction in which he has an interest adverse to his beneficiary. Section 2233 is especially stressed as supporting the rule upon which appellants rely as a bar to director Jacobs' right to retain the land by reason of adverse interest. It provides: "If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed."

Appellants invoke the wholesome principle announced in San Diego v. S. D. & L. A. R. R. Co., 44 Cal. 106, and which has found expression in a long list of cases, that, where a trustee violates any of the provisions of sections 2230–2234, Civil Code, or violates any provision of law designed to secure fidelity in the agent, the court will not permit any inquiry into the question of the honesty or fairness of the transaction, but will vitiate it as soon as an inconsistent relation between trustee and beneficiary is disclosed. The rule is quite inflexible in its application, and we would be compelled to respect it in this case if it was applicable to the facts in the instant case, as it was to the facts in the cited cases.

In Snediker v. Ayers, 146 Cal. 407, 80 P. 511, 512, this court, in construing section 2230, Civil Code, and kindred sections, said:

"The above section applies to the directors of a corporation, but it was not intended thereby to make, nor is there anything in any other provision of the law which makes, a transaction between a director and his corporation in which the former has a personal interest ipso facto void. Such a transaction is subject to rigid scrutiny, and is voidable for any fraud or violation of the duties of their trust on the part of the directors. But it will not be held void where it is shown that the directors' actions were open and above board, and taken in good faith without any purpose of fraud. Schnittger v. Old Home, etc., Min. Co., 144 Cal. 603, 78 P. 9, and cases therein cited.

"The plaintiff alleged fraud and collusion on the part of the directors, and the burden was on him to establish these allegations. The findings show the contrary." See, also, Kleinsasser v. McNamara, 129 Cal. App. 49, 18 P.(2d) 423; Ballantine, Manual of Corporation Law and Practice (1930 Ed.) 300.

Further decisions might be cited, but the equitable principle is so sound as not to require further citations. That the creditors and stockholders were fully informed as to the filing of the foreclosure suit and the purchasing of the property by Jacobs at the execution sale, and that the director defendants were not guilty of concealing matters from the creditors or stockholders of which they were entitled to be informed, were matters for the Chancellor's determination, and it cannot be said that he abused his powers in finding in respondent's favor upon the controlling issues of the cause.

The foreclosure sale occurred on October 5, 1929, and the action herein was filed October 6, 1930, one year later. Notwithstanding the equitable nature of the action, it may be noted that none of the plaintiffs or stockholders or creditors have offered or expressed a desire to redeem said property, nor have they offered to repay to the defendants any sum whatsoever expended by them.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

219 Cal. 430

SUNDER v. COLLINS, Registrar (MATHESON, Intervener).

S. F. 15008.

Supreme Court of California.

Nov. 28, 1933.

Municipal corporations ⇐138.

San Francisco retired police officer who relinquished his right to retirement allowance *held* not prohibited from running for office of treasurer by 1932 charter provision that no person retired and in receipt of retirement allowance shall serve in any elective or appointive position, where old charter under which officer was retired contained no such provision.

In Bank.

Original application by Frank C. Sunder for writ of prohibition prayed to be directed to Charles J. Collins, as Registrar of Voters of the City and County of San Francisco, to require him to omit from the general election ballot the name of Duncan C. Matheson as candidate for office of treasurer, wherein Duncan C. Matheson intervened.

Writ denied.

Henry B. Lister, of San Francisco, for petitioner.

John J. O'Toole, City Atty., of San Francisco, for respondent.

John J. Dailey and Nat Schmulowitz, both of San Francisco, for intervener.

PRESTON, Justice.

By this proceeding the petitioner, a taxpayer of the city and county of San Francisco, prays for a writ of prohibition directed to respondent as registrar of voters of said city and county. The petition is sufficient in form to be treated as an application in mandate to compel said respondent to omit from the ballot for the coming November election in said city and county the name of Duncan C. Matheson as a candidate for the office of treasurer. Donham v. Gross, 210 Cal. 190, 290 P. 884.

The petition rests upon the sole ground that said Matheson is ineligible to hold said office because of the fact that he is now, and for some years last past has been, a beneficiary under the retirement system of said city and county, to wit, a pensioner thereunder. Duncan C. Matheson has intervened herein and denies that any provision of the charter of said city and county forbids him the right to seek and hold said public office under said city government. Moreover, he alleges that he is now an incumbent of said office and has consistently and continuously since January 8, 1932, caused to be deposited in the treasury to the credit of the city and county all sums received by him as a pension from said city and county, to wit, the sum of $208.35 delivered to him monthly. Furthermore, he alleges that on September 18, 1933, he duly executed in writing a waiver and relinquishment of his right to receive said allowance as long as he may hold the said office, both during his present term and during any future term or terms to which he may be elected, and duly filed it with the retirement board of said city and county, and, about the same time, filed duplicates thereof with respondent and the mayor of said city.

The city and county of San Francisco on said January 8, 1932, adopted a new charter for its government and set up thereunder what is known as a retirement system. The pertinent provisions of the charter are as follows:

"No person retired for service or disability and in receipt of a retirement allowance under the retirement system shall serve in any elective or appointive position in the city and county service * * * nor shall such person receive any payment for service rendered to the city and county upon retirement * * *" Section 163.

"Officers and employees of the city and county, except members of the police and fire departments, shall become members of the retirement system subject only to the following provisions, in addition to the provisions contained in sections 158 to 164 of this charter, both inclusive:" Section 165.

"Persons who are members of the police department on the 8th day of January, 1932, shall become members of the Retirement System on that date, subject only to the following provisions in addition to the provisions contained in sections 158 to 163, both inclusive, of this charter:" Section 166.

"Any member of the police department who shall have been retired and shall be receiving a pension on the 8th day of January, 1932, * * * shall continue to receive such pension, subject to the provisions of section 166 governing the payment of pensions. Such pension shall be paid by the retirement system, but no other benefits shall be provided for such retired members, widows, children, or parents." Section 167.

The intervener herein, after a long and honorable career as a member of the police department of said city and county, was, while acting as captain of detectives, and on September 3, 1929, retired from service pursuant to the then existing charter of said city and county (chapter 10, art. VIII); the ground of retirement being injury and disability suffered while in the performance of official duty. Under these facts petitioner urges that section 163 of said new charter is applicable to the intervener and as a consequence there-

of he is ineligible to hold office of any kind under the government of said city and county. Respondent and the intervener urge two or three plausible reasons why said inhibition is inapplicable. We need here discuss but one of them, as we are content to rest our conclusion upon the proper interpretation of the charter provision invoked.

Reading section 163 in connection with sections 165, 166, and 167, it will be readily observed that existing police officers will be members of said system only if they were in active service as such on January 8, 1932. Then to make it plainer that those police officers theretofore retired were not to become members of the new retirement system, section 167 was made to provide for their continued receipt of the allowance theretofore made for them, and no more, especially mentioning that further benefits to themselves, their widows, children, or parents would not be recognized. Under section 168 of said charter, the status of incoming members of the police department is declared and defined. In other words, under the present retirement system a police officer is under different restrictions and burdens and may receive greater benefits than a police officer retired under the old charter. In fact, the classification for retirement under the new charter is different in many respects from that obtaining under the old. It is clear, therefore, that the legislative intent is not to make the inhibition found in section 163 applicable to any other persons than those members of the retirement system declared such by the new charter; hence by its very terms this section excludes the intervener.

The peremptory writ is denied, and the petition dismissed.

We concur: WASTE, C. J.; SEAWELL, J.

THOMPSON, Justice (concurring).

I concur in the decision, but not in the reasoning by which the result is reached. It is to be observed that the intervener in this case is not, in so many words, declared to be disqualified from being a candidate, but only from serving or receiving pay for service while retired and in receipt of a retirement allowance. It is plain to me that the purpose to be served by the section of the charter is to prevent one who is in receipt of an allowance from also claiming a salary for public service with the city and county. If we may think of a retirement allowance as a salary, it is to remove the possibility of the taxpayers being compelled to pay a double salary. Therefore, until it is established that he is in receipt of such allowance, the intervener is not disqualified from serving, to say nothing about being a candidate. The petitioner has not only failed to establish such disqualification, but it is in evidence that the intervener has waived his allowance for the period covered by his occupancy of the office of treasurer. No persuasive reason has been suggested which prohibits him from waiving his right to an allowance, either at the time of his retirement from service or subsequently.

This construction of the section is re-enforced by the fundamental principle that every elector is ineligible to be a candidate for an office, unless disqualified by a clear and unambiguous statute founded upon a substantial and sound reason.

CURTIS, Justice (concurring).

I concur in the decision on the ground that the intervener was granted his pension under the old charter of the city and county of San Francisco, which placed no limitations nor restrictions upon his right to receive and enjoy said pension, like or similar to those contained in section 163 of the present charter. This was a vested right, and the municipality could not by subsequent action, either through a charter provision or otherwise, divest him of this right, nor attach any burden thereto not provided for by the charter in effect at the time said pension was granted. Kavanagh v. Board of Police P. F. Com'rs, 134 Cal. 50, 66 P. 36; 20 Cal. Jur. 999.

135 Cal.App. 314

TURNER et ux. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 1069.

District Court of Appeal, Fourth District, California.

Nov. 14, 1933.

Hearing Denied by Supreme Court Jan. 12, 1934.

1. Judgment ⇐743(2).

Judgment for plaintiff, in action to quiet title to one-half of property as against mortgagee claiming lien on entire property, *held* not adjudication of mortgagee's right to lien against other half of property.

2. Lis pendens ⇐24(1).

Filing of notice of lis pendens in partition action constituted constructive notice to party who subsequently accepted mortgage on property described in notice, that action had been commenced which directly affected title to property described (Code Civ. Proc. § 755).

3. Lis pendens ⇐22(4).

Mortgagee accepting mortgage on property involved in partition suit, wherein notice

of lis pendens was filed, was put on notice of previous interlocutory decree adjudicating title and of final decree ordering premises sold and proceeds distributed, notwithstanding final decree was appealed and limitation as to price in order for sale was stricken and part of decree fixing attorney's fees was remanded (Code Civ. Proc. § 755).

4. Partition ⇐51.

Requirement for service of notice, in partition action, on outstanding lienholders, applies only to lienholders whose liens were of record at time of commencement of action (Code Civ. Proc. §§ 761, 762).

Requirement for service of notice so applies in view that Code Civ. Proc. § 762, requiring plaintiff in partition proceeding to cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed as provided in section 761, on each person having outstanding liens of record, who is not a party, to appear before the referee to make proof of amount due or to become due, must be construed with section 761, which provides that, when it appears to court that there are outstanding liens which existed and were of record "at the time of the commencement of the action," and the persons holding such liens are not made parties to the action, court must either order such persons to be made parties or appoint referee to ascertain whether such liens have been paid, etc.

5. Quieting title ⇐1.

Scope of action to quiet title is limited to determination of conflicting claims to property in controversy (Code Civ. Proc. § 738).

6. Quieting title ⇐46.

In action to quiet title as against mortgage lien claimant, court *held* not required to adjudicate claimant's cross-complaint for personal judgment against mortgagor not made party to original action (Code Civ. Proc. § 738).

Appeal from Superior Court, San Diego County; Harry R. Archbald, Judge.

Action by Val A. Turner and wife against the Bank of America National Trust & Savings Association and others, including Theolinda Margaretta Deacon, who filed a cross-complaint to which plaintiffs and another were made cross-defendants. Judgment for plaintiffs, and cross-complainant appeals.

Affirmed.

Henry C. Gardiner and Wright & McKee, all of San Diego, for appellant.

Joseph H. Egermayer and D. L. Ault, both of San Diego, for respondents.

JENNINGS, Justice.

Plaintiffs instituted this action for the purpose of quieting their title to certain real property in the city of San Diego which they had purchased at a commissioner's sale made in accordance with a court decree rendered in a partition action. For the sake of convenience, the property, the title to which is the subject of the present litigation, will hereafter be called the Ivy Apartments. Upon the conclusion of the trial of the issues presented by the pleadings, the court rendered judgment in favor of plaintiffs adjudging that the adverse claims of the defendants were invalid and declaring plaintiffs to be the true and lawful owners of the property. From the judgment thus rendered, the defendant Theolinda Margaretta Deacon has prosecuted this appeal. For its proper consideration a statement of the undisputed facts which were developed during the trial is required.

D. A. Deacon and Clara E. Deacon were at some time prior to the year 1925 husband and wife. This marital relation was dissolved. After its dissolution Clara E. Deacon brought an action in which her former husband was named as a defendant whereby she sought to obtain a partition and division of certain real property described in the complaint filed in said action among the owners thereof, according to their respective rights. Included in the real property sought to be partitioned was the property known as the Ivy Apartments. On June 11, 1925, a notice of lis pendens in the aforesaid action was duly recorded in the office of the county recorder of San Diego county. This notice stated that the partition action had been commenced and contained a legal description of the property affected thereby which it was declared was located in San Diego county. Included in the property described in said notice was the property known as the Ivy Apartments. The partition suit was duly tried, and on April 1, 1926, the trial court made an interlocutory decree which determined the ownership of the various parties to the action in the property described in the pleadings. On June 29, 1926, a decree in partition based on the interlocutory decree theretofore made was signed by the court. This decree adjudged that D. A. Deacon and Clara E. Deacon were the owners of an undivided one-half interest in the Ivy Apartments and that A. T. Roark was the owner of the remaining undivided one-half interest, which latter interest was subject to an indebtedness of $6,500, secured by a mortgage in such amount thereon, which indebtedness had been assumed by A. T. Roark and was then due and unpaid by him. It was further adjudged that the Ivy Apartments should be sold and the proceeds divided among the above-named owners as directed in the decree. It was, however, provided that the aforesaid property should not be sold unless a specified

price could be obtained therefor. The decree contained a further provision for the payment of specified attorney's fees to designated attorneys. The defendant D. A. Deacon appealed from the decree thus rendered. The appeal resulted in a partial affirmation of the judgment. The single particular in which a reversal was ordered related to the provision fixing attorney's fees, which was alone remanded to the trial court for further proceedings. The provision limiting the sale price was ordered stricken from the decree, but it was expressly decided that the presence of this limitation did not constitute sufficient reason for the reversal of the judgment. Deacon v. Deacon, 101 Cal. App. 195, 203, 281 P. 533.

Upon the filing of the remittitur, the trial court took further proceedings in conformity with the opinion rendered on appeal, and thereafter made its supplemental decree wherein it was recited that, in accordance with the prior decree in partition, a sale of the property had been made by the commissioner appointed for the purpose, at which sale Val Turner was the purchaser, and that said purchaser moved that the sale be vacated and the plaintiff Clara E. Deacon and the intervener, A. T. Roark, consented to the granting of the motion and the defendant Daniel A. Deacon submitted the motion without argument. It was then ordered that the prior sale be vacated, and a commissioner was appointed to make a sale of the property. An order confirming the sale of the Ivy Apartments was thereafter duly made by the court. This order recites that at the sale Val A. Turner submitted the highest bid for the said property, and the property was accordingly sold to him for the price of $8,000, subject to confirmation by the court. The court's order approved the sale and ordered the commissioner to execute a deed to th property upon payment of the full purchase price and that the purchaser be given possession of the premises. A deed was thereupon executed by the commissioner in which Val A. Turner was named as the grantee.

In the meantime on February 18, 1925, D. A. Deacon was married to Theolinda Margaretta Deacon (appellant herein), and on August 26, 1926, he executed and delivered to his wife a promissory note made payable to her in the amount of $8,000, and as security for its payment he executed a real property mortgage on the Ivy Apartments. This mortgage was duly recorded on the date of its execution.

On October 29, 1926, A. T. Roark, who had formerly been adjudged to be the equitable owner of an undivided one-half interest in the Ivy Apartments by a decree which had become final and who had paid the indebtedness secured by a mortgage on said property, executed a grant deed whereby he conveyed an undivided one-half interest in the said property to Val A. Turner. Turner and his wife thereupon instituted an action against Theolinda Margaretta Deacon, whereby they sought to quiet their title to an undivided one-half interest in said property. The defendant in said action contended that the mortgage which was executed by D. A. Deacon on August 26, 1926, to secure payment of the note for $8,000 in which she was named as payee, constituted a valid lien upon the whole property, including the one-half interest therein claimed by the plaintiffs in said action. This contention did not prevail, and the trial court made its decree quieting the title of the Turners to an undivided one-half interest in the property. The defendant in said action, Theolinda Margaretta Deacon, appealed from the judgment thus rendered. Her appeal was unsuccessful, and the judgment was affirmed. Turner v. Deacon, 103 Cal. App. 329, 289 P. 179.

[1] The principal contention advanced by the appellant in support of her appeal in the instant action is that it was adjudged in the prior action in which she was the defendant (Turner v. Deacon, supra) that her mortgage constituted a valid lien upon an undivided one-half interest in the Ivy Apartments, and therefore that the judgment from which this appeal has been taken which quiets the title of respondents to the whole of said property and adjudges that her claim based on the aforesaid mortgage is invalid is erroneous. The contention is entirely lacking in merit. This is obviously true because the fundamental premise upon which the whole contention rests is incorrect. This basic premise is that it was decided in Turner v. Deacon, supra, that the lien of her mortgage was valid as to an undivided one-half interest in the property. It was not there so decided. The opinion in that case states clearly that the action had been brought by the plaintiffs therein to quiet their title to "an undivided one-half interest" in the property and that the defendant therein, who is the appellant in this action, contended that her mortgage was a valid lien upon the whole property. It was decided that her mortgage was not a valid lien upon the interest claimed by plaintiffs in said action, and consequently that the judgment of the trial court quieting the title of the plaintiffs against her claim was correct. There is nowhere to be found in the opinion any suggestion that appellant's mortgage was valid as to the remaining one-half interest in the property. It was not discussed, since it was neither necessary nor proper to the question there involved. The judgment in this former action cannot therefore be relied upon as an adjudication of appellant's rights, nor can it be urged as an estoppel to the claims of respondents.

[2, 3] The elimination of appellant's claim that the judgment in the former quiet title action instituted by respondents against ap-

pellant constituted an adjudication that her mortgage was a valid lien upon an undivided half interest in the property leaves slight basis for her complaint that the trial court erred in failing to mention her mortgage in its decree in the present action. As hereinabove noted, when the partition suit was filed by Clara E. Deacon, a notice was duly recorded which stated that such an action had been commenced and that one of the parcels of property affected thereby was the very property upon which appellant subsequently accepted a mortgage. The filing of the lis pendens constituted constructive notice to all the world in the manner expressly provided by statute (Code Civ. Proc. § 755) that an action had been commenced which directly affected the title to the property described in the notice. Moore v. Schneider, 196 Cal. 380, 392, 238 P. 81. When appellant accepted the mortgage, therefore, she did so with notice that a partition suit seeking division of the very property covered by the mortgage had been instituted. More than this, the partition action had proceeded to trial, and, more than four months prior to the execution of the mortgage, an interlocutory decree determining the ownership of the various parties to the action in the very property covered by the mortgage had been made by the court. This interlocutory decree, though preliminary to the final judgment of confirmation, was conclusive as to the matters therein determined. Pista v. Resetar, 205 Cal. 197, 270 P. 453. One of the matters which was certainly determined by the interlocutory decree in the partition suit was title to the Ivy Apartments. It was thereby adjudged that A. T. Roark was entitled to a one-half interest in the property subject to a specified contingency, and that Clara E. Deacon and Daniel A. Deacon were owners as tenants in common of the remaining one-half interest therein. When appellant accepted the mortgage, therefore, she did so with full notice that the mortgagor was not the owner of the fee title to the whole of the property covered by the mortgage, but that he was merely an owner as tenant in common with his former wife of an undivided one-half interest in the property. Furthermore, almost two months prior to the execution of the mortgage upon which appellant relies, a final decree in the partition suit had been entered wherein it was expressly adjudged that the premises known as the Ivy Apartments could not be divided equitably in kind, and it was accordingly ordered that the property be sold and the proceeds distributed as provided in the decree. When appellant accepted the mortgage upon the Ivy Apartments, therefore, she did so with full notice of the fact that it had been judicially determined that the very property covered by the mortgage should be sold and the proceeds applied as specified in the final decree in the partition suit. There can be no pretense that any prejudice resulted to the appellant by the proceedings taken in the partition action, since at no time during its pendency did she have any claim or interest of any character in the property nor did she at any time assert any. It is, however, stated that, since an appeal was taken from the final decree in the partition suit, the judgment therein did not become final until the determination of the appeal, and it is further declared that the judgment was reversed on appeal. This latter declaration is by no means correct. As hereinabove noted, the judgment was in all respects affirmed, except that the limitation as to the price for which the property could be sold was ordered stricken from the decree; it being expressly stated that this limitation, though improper, did not constitute sufficient ground for reversal of the judgment. The only part of the judgment which was reversed was the purely incidental provision which fixed attorney's fees in a specified amount to be paid to designated attorneys. This portion only of the judgment was remanded for further proceedings in the trial court. Upon affirmation, therefore, the judgment in the partition suit became final as to the adjudication that the property be sold and the proceeds distributed as ordered. The record further shows that during the pendency of the appeal a sale of the property was made in conformity with the final decree in the partition action, and that the respondent Val A. Turner had become the purchaser of the property at such sale. Upon the filing of the remittitur, the aforesaid purchaser moved the court that the sale be vacated and a new sale ordered, which motion was granted. This action on the part of the trial court afforded to appellant ample opportunity to protect whatever equity she had in the property.

It is said that the fact that respondents who owned a half interest in the property and who submitted a bid of $14,000 at the first partition sale consented that this sale be vacated and that a second sale be made at which they bid only $8,000, for the same property is almost conclusive evidence that respondents knew that appellant's mortgage was a valid lien against the property. No argument is advanced in support of this rather naive statement. The fact of the validity or invalidity of a lien claimed to exist by virtue of the execution of the mortgage could not possibly be affected by respondents' knowledge that the mortgage constituted a valid lien. In other words, if the lien was in fact invalid, it can hardly be maintained that respondents knew it was valid.

[4] It is also said that respondents failed to obey the mandate of section 762 of the Code of Civil Procedure whereby they are now estopped from claiming that they purchased the property free from the lien of appellant's mortgage. Section 762 is one of the

sections included in chapter 4 of title 10 of the Code. The subject of the chapter is "Actions for Partition of Real Property," and in it is set forth the procedure by which the division of real property among cotenants may be effected. Section 761 provides that, when it appears to the court "that there are outstanding liens * * * which existed and were of record *at the time of the commencement of the action*, and the persons holding such liens are not made parties to the action" (italics ours), the court must either order such persons to be made parties or appoint a referee to ascertain whether such liens have been paid, etc. Section 762 then provides that: "The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due, or to become due, contingently or absolutely thereon. * * *" It is obvious that the latter section is to be construed and read with the former, and that the lienholders who are to be given notice are the holders of liens "which existed and were of record at the time of the commencement of the action." Appellant was not such a lienholder, and was not therefore entitled to notification. The referee mentioned in the above-mentioned sections of the Code is an individual who is appointed to ascertain certain facts and to report his findings to the court. The record herein shows that such a referee was appointed and that he made and reported his findings, which were expressly approved as modified and amended by the court and adopted by the court in its final decree in the partition action almost two months before the mortgage was executed upon which appellant relies. When the referee made his investigation, therefore, the mortgage was not in existence and appellant was not then claiming to be the holder of a lien upon the property.

[5, 6] One further point remains to be considered. Appellant contends that in her cross-complaint in the present action she demanded a personal judgment against her husband, D. A. Deacon, for the amount of the note and for attorney's fees as therein provided, and that the failure of the court to include in the judgment rendered in the present action an adjudication that she is entitled to recover the amount demanded, D. A. Deacon having been served with summons upon the filing of her cross-complaint and having defaulted, necessitates a reversal of the judgment. It is urged that this must be so because the note provided for the payment of reasonable attorney fees and the determination of reasonable attorney fees requires the taking of additional evidence.

This contention is also lacking in merit. It is true that the statute (Code Civ. Proc. § 738), by virtue of which the present action was instituted, is most comprehensive, and that it has been held that the object of an action to quiet title is finally to settle and determine, as between the parties, all conflicting claims to the property in controversy and to decree to each such interest or estate as he may be entitled to have. Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, 109 Am. St. Rep. 107. Nevertheless, the scope of the action is limited to a determination of conflicting claims to the very property in controversy, and, when this determination as been achieved, the object of the action is consummated. It is our opinion that the court is not required in such an action to adjudicate a demand for a personal judgment made by the cross-complaint of a defendant against an individual who was not made a party to the original action.

The defendant Theolinda Margaretta Deacon has also attempted to appeal from an order of the trial court denying her motion for a new trial. Since this is not an appealable order, the attempted appeal therefrom is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

135 Cal.App. 426

BAXLEY v. WESTERN LOAN & BUILDING CO.

Civ. 9104.

District Court of Appeal, First District, Division 2, California.

Nov. 24, 1933.

Rehearing Denied Dec. 23, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

1. Forcible entry and detainer ⇨29(3).

Vendor's peaceable entry of apartment when manager of vendee's assignee placed vendor's representative in possession and accepted employment as manager under vendor *held* not "forcible entry," so as to render evidence of sale contract and defaults thereunder inadmissible in assignee's forcible entry and detainer action (Code Civ. Proc. § 1159, subds. 1, 2).

[Ed Note.—For other definitions of "Forcible Entry," see Words & Phrases.]

2. Forcible entry and detainer ⇨6(2).

Where contractual relations between parties give right to possession to one taking it by peaceable entry, neither entry nor detainer is unlawful so as to preclude question of title and right of possession in forcible entry and detainer action (Code Civ. Proc. §§ 1159, 1160).

3. Vendor and purchaser ⊂⊃297.

Vendor entitled to possession upon default under sale contract for realty could take possession if obtainable peaceably.

4. Forcible entry and detainer ⊂⊃29(3).

Where vendor obtained possession of premises by peaceable entry under sale contract, entry and detention were not "unlawful" within statute regarding forcible entry so as to render evidence regarding sale contract and defaults inadmissible in forcible detainer action (Code Civ. Proc. §§ 1159, 1160).

[Ed Note.—For other definitions of "Unlawful," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Edward C. Baxley against the Western Loan & Building Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Norman H. Elkington, of San Francisco, for appellant.

Donahue, Hynes & Hamlin, of Oakland, and Charles V. Barfield, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff's complaint herein was entitled "Complaint in Forcible Entry and Detainer." The cause was tried by the court sitting without a jury, and from a judgment in favor of defendant, plaintiff appeals.

In 1930 the defendant corporation as vendor entered into a contract of sale with one Blaine as vendee covering the apartment house in question. It was an installment contract providing for monthly payments, giving the vendee the right of possession "until a breach or a default by the vendee" and giving the vendor the right upon any breach or default to "reenter upon the premises and resume possession thereof." The last regular monthly payment upon the contract was made in August, 1931. Following the default, various amounts were paid to defendant from time to time, but no payment was made after July 26, 1932. At that time the vendee was in arrears on several payments. Blaine had assigned the contract to one Puissegur, who in turn assigned it to plaintiff on August 24, 1932. Plaintiff took possession following the assignment of the contract to him, but, as above stated, no further payments were made. Plaintiff never resided upon the premises but engaged a Mrs. Roberts to act as manager. On September 13, 1932, one of the employees of defendant talked with Mrs. Roberts, told her that the defendant corporation was the owner of the premises, and told her that the vendee was in arrears in the payments. The following morning Mr. Campbell, another employee of defendant, went to the premises and advised Mrs. Roberts that he represented the defendant and was going to take possession and remain on the premises for defendant. Mrs. Roberts admitted Mr. Campbell, installed him in one of the vacant apartments, and agreed with Mr. Campbell that she would act as manager of the apartments for and on behalf of defendant. Mr. Campbell remained continuously on the premises thereafter. On the afternoon of September 14, plaintiff appeared at the apartment house and demanded that Mr. Campbell leave the premises. Mr. Campbell refused to do so. The evidence showed that either force or threats of force were used by both parties during the discussion which followed. Plaintiff left the premises and thereafter made written demand on defendant for the possession of the same. Defendant refused to surrender possession, and this action was subequently brought.

In drawing the complaint plaintiff intermingled in a single cause of action allegations in the words of both sections 1159 and 1160 of the Code of Civil Procedure. The first-mentioned section defines "forcible entry," while the second defines "forcible detainer." In proceeding with his proof, plaintiff showed that he went into possession under the "contract of sale by the Western Loan and Building Company to sell to the assignor of Alexander Puissegur" and that he went out of possession of the premises in the manner above described.

Taking the position that neither title nor right to possession of real property are ever issues in actions where either forcible entry or forcible detainer are charged, appellant contends that the trial court erred in admitting evidence of the contract of sale and the defaults thereunder, and further contends that the evidence was insufficient to sustain the findings and judgment as "both forcible entry and forcible detainer were proven." With these contentions we cannot agree. While appellant's argument finds support in the broad language employed in some of the decisions, we believe that the authorities fully sustain the proposition that the right of possession may be shown in certain cases where forcible detainer is charged, of which this is one.

[1] In our opinion the evidence in the present case did not show a forcible entry. The actual entry by respondent was not accompanied "by any kind of violence or circumstance of terror." Section 1159, Code Civ. Proc., subd. 1. The manager in charge of the premises did not offer any resistance of any kind to the entry, but, on the contrary, the manager assisted in placing respondent

in possession and accepted employment as manager of the premises under respondent. It is therefore apparent that there was no forcible entry within the meaning of the first subdivision of said section 1159. The second subdivision of that section makes a person guilty of forcible entry "who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession." We believe that this subdivision defining "forcible entry" was intended to cover situations where access may have been peaceably gained but the possession of the one making the peaceable entry was not complete until the occupant was evicted by force or the like. In other words, if the peaceable entry merely gave the one entering what has been termed a "scrambling possession" with the party then in possession of the premises, then the use of force in turning out the one in possession would make the otherwise peaceable entry a forcible entry within the meaning of said subdivision. Here respondent obtained complete possession of the premises in a peaceable manner and neither its entry nor its right of entry was actually disputed by any one during the time respondent was taking possession. We therefore conclude that there was no forcible entry under either subdivision of said section 1159. The case of Kerr v. O'Keefe, 138 Cal. 415, 71 P. 447, which is strongly relied upon by appellant to sustain his contention that there was a forcible entry, will be hereinafter discussed.

The more serious question is whether there was a forcible detainer. Section 1160 of the Code of Civil Procedure provides: "Every person is guilty of a forcible detainer who either—1. By force, or by menaces and threats of violence, *unlawfully* holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or, 2. Who, in the night-time, or during the absence of the occupant of any lands, *unlawfully* enters upon real property, and who, after demand made for the surrender thereof, for the period of five days, refuses to surrender the same to such former occupant. The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands." (Italics ours.) It will be seen that the word "unlawfully" is used in both subdivisions of said section relating to forcible detainer.

[2] In contending that there was a forcible detainer in the instant case, appellant calls our attention to certain decisions in which it is indicated that "all entries on the actual possession of another are unlawful" and that the questions of title and right of possession can never arise in actions charging forcible entry or forcible detainer. Kerr v. O'Keefe, 138 Cal. 415, 71 P. 447; Voll v. Hollis, 60 Cal. 569; McCauley v. Weller, 12 Cal. 500. This is undoubtedly true in actions charging forcible entry under section 1159 for "the peace and good order of society demand that an actual and peaceable occupation of real estate, however it may have been originally acquired, shall not be disturbed by violence." 12 Cal. Jur., p. 597. It is likewise generally true in actions charging forcible detainer under section 1160, for in such summary proceedings the law will not ordinarily permit the litigation of title and right to possession by the adverse claimants and therefore the entry, although peaceable, is treated as "unlawful." There is an exception, however, to the general rule in actions charging forcible detainer. When contractual relations exist between the parties whereby the right to possession has been given to the one taking possession by means of the peaceable entry, then neither the entry nor detention of the property is "unlawful" within the meaning of said section 1160 dealing with forcible detainer.

It may be freely conceded that neither the decisions nor the language employed therein are entirely harmonious, but the exception to the general rule is clearly indicated in Dutcher v. Sanders, 20 Cal. App. 549, 129 P. 809, 810, a case which is cited and relied upon by appellant. The parties there were adverse claimants in a contest before the United States Land Office involving land in the possession of plaintiff. The contest was decided against plaintiff and defendant took possession of the land in the absence of plaintiff. Thereafter defendant refused to relinquish possession on plaintiff's demand and plaintiff brought an action in forcible detainer under subdivision 2 of said section 1160. The court there held that defendant's peaceable entry was "unlawful" despite the fact that in the previous contest the commissioner of the General Land Office had canceled plaintiff's "previously existing desert land entry upon said land" and awarded "a preference right of entry" to defendant. The court there discusses certain earlier decisions and on page 553 of 20 Cal. App., 129 P. 809, 811, distinguishes said decisions upon the ground "that the questions there presented involved alleged contractual relations between the parties with respect to the entry made." On page 554 of 20 Cal. App., 129 P. 809, 811, the court said: "The word 'unlawful,' as used in the section, means unlawful with respect to the relations between plaintiff and defendant." In Carteri v. Roberts, 140 Cal. 164, at page 166, 73 P. 818, 819, another action in forcible detainer, the court said: "It is a necessary element to the cause of action here presented that the entry of the defendants upon the land should have been unlawful with respect to the relations between the defendants and the plaintiff." See, also, Goldstein v. Webster, 7 Cal. App. 705, 95 P. 677; Potter v. Mercer, 53 Cal. 667; 12 Cal. Jur. 611.

[3, 4] In the instant case there were contractual relations between appellant and respondent involving the right to possession of the premises. Under these circumstances the reason for the rule, which ordinarily prohibits the litigation of title and right to possession between adverse claimants in these summary proceedings, no longer exists. Appellant, as assignee of the vendee under the contract, could not question the title of respondent. Gervaise v. Brookins, 156 Cal. 103, 107, 103 P. 329. Upon default in the payments, respondent was entitled to possession under the contract between the parties and could take possession if it could be done peaceably. Francis v. West Virginia Oil Company, 174 Cal. 168, 170, 162 P. 394; 25 Cal. Jur., p. 696, at page 697. We are of the opinion that when respondent, acting under its right conferred upon it by the contract between the parties, obtained possession of the premises by means of a peaceable entry, neither the entry upon nor the detention of the premises was "unlawful" within the meaning of the subdivisions of said section 1160 relating to forcible detainer.

We now come to a further consideration of the case of Kerr v. O'Keefe, supra. In certain respects the facts in that case are somewhat analogous to those before us. Defendants were owners of a ranch and had leased it to plaintiff. The lease gave defendants the right to reenter and take possession in the event of default by plaintiff. Plaintiff did not reside on the ranch, but had his home a few miles away. Plaintiff defaulted and defendants entered upon the premises. At the time of the entry one Minaker was living on the ranch "looking after the place for plaintiff." Defendants arrived with blankets, provisions, and a shotgun. Although Minaker "forbade them from taking possession," they moved in "and occupied the house with Minaker." Defendants did not prevent Minaker from continuing with his work on the ranch, and Minaker continued to reside there for some time after defendants came. Plaintiff came to the ranch within a day or two after defendants' entry and an argument ensued. Shortly thereafter plaintiff came to harvest some crops and another argument followed during which one of the defendants told plaintiff "he would make him get off the place." Said defendant started for the house where the shotgun was kept and plaintiff "got out." A judgment for plaintiff was affirmed, the court holding that the evidence was sufficient to show a forcible entry. On its facts that case may be distinguished from the instant case in two particulars. Defendants' entry there was made with shotgun in hand and in defiance of the protest of the one "looking after the place for plaintiff." Furthermore, defendants never came into complete possession of the premises in a peaceable manner, but only obtained a "scrambling possession" disputed by the representative of plaintiff, who remained on the premises with defendants until after plaintiff was evicted by threats of force. While the court there said that "the entry of defendant was in fact peaceable," it nevertheless held that under the circumstances "the subsequent exclusion of plaintiff by force and threats constituted a forcible entry under the statute." The soundness of that decision on the facts there involved cannot be questioned, but as already indicated, those facts are clearly distinguishable from the facts before us.

It follows that the evidence relating to the contract between the parties and to the defaults thereunder was properly admitted and that the evidence was sufficient to support the findings and judgment in favor of the defendant.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

135 Cal.App. 469

PRESCOTT et al. v. FARQUHAR et al.

Civ. 1461.

District Court of Appeal, Fourth District, California.

Nov. 27, 1933.

Rehearing Denied Dec. 21, 1933.

1. Replevin ⇐134.

In action on redelivery bond, evidence *held* insufficient to support finding that deputy sheriff did not take possession of property involved.

2. Replevin ⇐134.

Evidence *held* insufficient to support finding that justification of sureties on redelivery bond in claim and delivery action was not waived (Code Civ. Proc. § 515).

3. Replevin ⇐130.

Sureties who executed redelivery bond, having secured redelivery of property by means of bond, cannot, in action on bond, assert that deputy sheriff did not take possession of property.

4. Replevin ⇐130.

Sureties on redelivery bond cannot escape liability on ground they themselves failed to justify (Code Civ. Proc. § 515).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by M. F. Prescott and another, copartners doing business under the fictitious firm name and style of the Home Oil Com-

pany, against W. C. Farquhar and another. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment reversed.

Burton E. Hales, of Redlands, for appellants.

Hert & Withington, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

The plaintiffs brought an action in claim and delivery against one Ray Dillingham for the purpose of recovering the possession of certain fixtures installed and used in operating a service station, consisting of pumps, storage tanks, and other accessories. A deputy sheriff served the papers in that action on Dillingham, took possession of the property, and, some hours later, redelivered the property to that defendant after receiving a bond executed by the defendants in this action. This bond recited that whereas the officer did on a day named "take from possession of the defendant or proceeded to take from the defendant" certain property which is described and, "whereas the said defendant desires to have the said property returned to him by the said J. A. Rivera. Now therefore, we, the undersigned, * * * in consideration of the premises and of the redelivery of said property to the defendant do hereby jointly and severally undertake * * * and promise to the effect that we are bound in the amount herein stated, for the delivery of said property to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant." Attached to the bond was an affidavit, signed by each of these defendants to the effect that he was worth the amount named in the bond over his debts and liabilities.

The plaintiffs recovered a judgment against Dillingham which was only partly satisfied and, after demand and refusal to pay, brought this action against the bondsmen to recover the unpaid balance. The court found in all respects in favor of the plaintiffs except that it was found that the deputy sheriff "never took or seized the personal property described in plaintiffs' amended complaint by virtue of said proceedings, or otherwise, but that J. A. Rivera, acting as such deputy, appeared at the place of business of Ray Dillingham for the purpose of taking possession of said property but that possession was never actually so taken, and that the defendants herein executed the bond set out in and marked Exhibit A in plaintiffs' Amended Complaint, and delivered the same to the said J. A. Rivera, but that the sureties on said undertaking, the defendants herein, did not give notice to the plaintiffs of their intention to justify upon said bond and the said defendants herein did not justify upon said bond as provided in section 515 of the Code of Civil Procedure of the State of California, or otherwise; and the Court further finds that the justification of the defendants as such sureties was not waived by the plaintiffs." The court thereupon drew the conclusion that the plaintiffs were entitled to take nothing in this action and entered judgment in favor of the defendants, from which judgment the plaintiffs have appealed.

The only questions requiring consideration are whether the findings that the deputy sheriff did not take possession of the property and that justification of the sureties on the bond was not waived by the plaintiffs, respectively, are supported by the evidence.

[1] With respect to the first of these matters the deputy sheriff testified that upon receiving the papers in the claim and delivery action he went to the service station operated by Dillingham for the purpose of serving the papers and taking possession of the property; that he took a truck with him; that he served the papers upon Dillingham and took possession of the property and was about to move it; that this was about 11 o'clock in the morning; that he took possession of the property and when Dillingham assured him that he was going to furnish a bond he waited there; that "I was in possession of the property until he told me that Mr. Farquhar and Mr. Hansen would sign. I gave him time then and they furnished the bond and I left the property. I was prepared to take the property away as in all such cases"; that he made a return of the papers as "executed" on that day; that he stayed there for an hour or more until Dillingham "proceeded to have the bonds ready"; that "I released it to him because Mr. Farquhar told me he would go on the bond and that was enough"; that he informed Dillingham what he was going to do by virtue of the process and that he would have carried this through if he had not been furnished the undertaking; that after he had been there an hour and a half Farquhar told him he would sign the bond and he sent the truck away; and that he went away before he got the bond but came back and got it late that afternoon. Dillingham testified that the deputy sheriff came to his place of business and handed him the papers, which he accepted; that the deputy told him he had come to take the property; that he was accompanied by two men in a truck; that he asked for time to put up a bond and the deputy sheriff told him he could have two or three hours or a reasonable length of time to get a bond before he dug the things up; that he told him he thought he could get a bond executed by these respondents which the deputy said would be all right; that he went away to see about the bond and left the deputy sheriff there; that an hour or two later he returned and the deputy sheriff was gone; that about 6 o'clock

the deputy sheriff returned and Farquhar was there with the bond; and that when they told him the bond was ready the deputy said it was all right. The respondent Farquhar testified that he was at the service station about 1 o'clock that day and remained for half an hour; that he told the deputy sheriff that he was going to sign a bond and that this was satisfactory to him; and that he returned to the service station that evening and delivered the bond to the deputy sheriff, who then went away.

The respondent contends that the evidence shows that this bond was given to prevent the taking of the property in a claim and delivery action and not to secure a return of property thus taken. However, the evidence to the effect that the papers were served and the deputy sheriff took possession is not disputed. Nor do we think it was necessary, under these circumstances, for the officer to dig up the tanks and disconnect the other equipment and physically take possession of the same in order to reduce the same to his possession. We know of no law requiring such an unreasonable action under the circumstances that here confronted the officer. Having served the papers and taken possession, and while still remaining on the premises in charge of the property, it was perfectly reasonable to give the defendant in the claim and delivery action an opportunity to provide a bond for the purpose of securing a redelivery of the property. The fact that the deputy sheriff left the premises for a time before the bond was actually delivered to him does not indicate that the officer had then redelivered the property to Dillingham for Dillingham was not there at the time he left. Farquhar met the officer there and delivered the bond. While the officer may have taken some chances in leaving the property before receiving the bond, no outside interests have intervened. Most of the evidence indicates the property was not redelivered until the bond was delivered. If, technically, the officer may be said to have redelivered it by leaving it for a time upon the agreement that a certain bond would be furnished, the legal result is the same. The bond was furnished as agreed for the purpose of securing a redelivery and the property was redelivered in consideration of the bond. Irrespective of when the technical redelivery took place, the entire evidence shows that the bond was given to secure such a redelivery and not to prevent the officer from serving the papers and taking possession of the property in the first place. In our opinion, the evidence fails to support the finding that the officer did not take possession of this property.

[2] Upon the question of justification, the uncontradicted evidence shows that after receiving the bond the officer asked the attorney for the plaintiff in the claim and delivery action if he wanted the sureties on the bond to justify and the attorney told him that he knew both men who had signed the bond and that he would waive justification. The officer testified that he did not require the sureties to justify because it was satisfactory to plaintiffs' attorney. We find no evidence to support the finding that justification was not waived. The respondent relies on the case of Bailey v. Baker, 28 Cal. App. 537, 153 P. 242. In that case, the sheriff still had possession of the property and had not redelivered it to the defendant in the action and it was held that under those circumstances the failure of the sureties on the bond to justify constituted an abandonment by the defendant in the action of his attempt to secure a return of the property. That case is not authority for the proposition that a defendant in a claim and delivery action can secure a redelivery of property taken by furnishing a redelivery bond and, while keeping the property, nullify the bond and release the sureties from liability by neglecting to have them justify, a duty which is affirmatively placed upon them by the statute, especially where justification has been waived by the plaintiff. There is no question of abandonment of an attempt to secure a return of the property in this case. The bond was executed and delivered for the purpose of having the property redelivered, which was done, and the defendant retained the property and continued to contest the action.

[3, 4] The respondents' main reliance seems to be based upon the fact that the bond in question, after reciting that the officer did on a certain day take certain property from the possession of the defendant, contains the additional clause "or proceeded to take from the defendant." We cannot see that this clause nullifies the recital that the officer took the property from the possession of the defendant. The bond goes on to recite that the defendant "desires to have the said property returned to him" and the obligation of the bond is expressly stated to be assumed in consideration "of the redelivery of said property to the defendant." The bond was delivered while the officer was upon the premises to which the fixtures were attached. The respondents are not only bound by their contract and estopped to deny the recitals therein, but the facts show a taking of possession and a redelivery which is sufficient under such circumstances. Having secured a redelivery by means of this bond, the respondents should neither be heard to say there was no taking of possession which necessitated a redelivery, nor should they be permitted to escape the plain obligation they have assumed by relying on the claim that they have themselves failed to justify in the manner required of them by the statute.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 433

LARSON v. DU BAIN et al.

Civ. 7741.

District Court of Appeal, Second District, Division 1, California.

Nov. 24, 1933.

Courts ⇐170.

Municipal court in Los Angeles county had exclusive jurisdiction of cause of action for $1,800 notwithstanding prayer for $600 attorney fees, which was unsupported by facts stated in complaint (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2; Const. art. 6, §§ 5, 13, as amended in 1928).

Appeal from Superior Court, Los Angeles County; C. W. Miller, Judge.

Action by W. E. Larson against E. B. Du Bain, Grace Remington, and others. From an adverse judgment, named defendants appeal.

Reversed.

John T. Mulligan, of Long Beach, and Gerard Remington, of Los Angeles, for appellants.

Cameron & Perkins, of Long Beach, for respondent.

YORK, Justice.

This is an appeal from a judgment rendered upon a complaint filed in the superior court of Los Angeles county for the sum of $1,800. The complaint alleges two causes of action for the identical sum of $1,800, one sounding in fraud and the other in contract, and in addition to the $1,800 prayed for $600 attorney fees. Evidently by reason of this addition of $600 to the sum of $1,800, the superior court took jurisdiction of the matter as being in excess of the jurisdictional amount of $2,000, but, after trial, rendered judgment for the sum of $1,800 and interest only. The complaint stated no facts which could sustain a claim for attorney fees.

The complaint upon its face shows that this cause of action was not brought in the proper court and that the superior court of Los Angeles county had no jurisdiction thereof. The amount involved was less than $2,000, and the transactions complained of in the complaint took place either in the city of Los Angeles or in the city of Long Beach, both being in Los Angeles county, and, as there are municipal courts in said county, the superior court was divested of jurisdiction of this action, and therefore, only the municipal court of either of said cities had jurisdiction to try the cause and render judgment thereon.

"Notwithstanding any provision contained in this article, the legislature may fix by law the jurisdiction of municipal courts and inferior courts in cities having municipal courts which may be established in pursuance of this article, and may fix by law the powers, duties, qualifications and responsibilities of judges thereof." Article 6, § 13, Constitution of California, as amended Nov. 6, 1928.

The Municipal Court Act, § 29, as amended in 1929 (Stats. 1929, p. 838, § 2), provides as follows:

"Sec. 29. Each municipal court shall have exclusive original jurisdiction of all civil cases and actions, arising within the city or city and county in which such municipal court is established, of the following classes:

"1. All cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars or less."

The jurisdiction thus vested in the municipal courts excludes such cases from the superior court. Article 6, § 5, Constitution of California, as amended in 1928.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; HOUSER, J.

135 Cal.App. 475

DALE CONSOLIDATED MINES v. WRIGHT et al.

Civ. 1489.

District Court of Appeal, Fourth District, California.

Nov. 27, 1933.

Appeal and error ⇐627(2).

Appeal will be dismissed where no record has been prepared or filed and time for such filing has expired (Rules of Supreme Court and District Courts of Appeal, rule 5, § 1; Code Civ. Proc. § 953a).

Appeal from Superior Court, San Bernardino County.

Action by the Dale Consolidated Mines against Esther E. Wright and another. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

Joseph L. Fainer and R. E. Parsons, both of Los Angeles, for appellant.

Duckworth & Harrison, of San Bernardino, for respondents.

MARKS, Justice.

This is a motion to dismiss an appeal. A certificate of the county clerk of San Bernardino county filed in support of the motion shows that judgment was rendered in the court below; that appellant's motion for new trial was denied on the 18th of July, 1933; that notice of denial of such motion was served on the 19th day of July, 1933; that notice of appeal was filed on the 16th day of August, 1933, together with a notice to prepare a typewritten transcript under the provisions of section 953a of the Code of Civil Procedure; that no undertaking or security for costs was given nor any private arrangements made with the clerk for the cost of the preparation of such transcript; that no bill of exceptions was filed, and that no proceedings are pending for a settlement of such bill; that no transcript on appeal has been prepared under section 953a of the Code of Civil Procedure.

As no record on appeal has been prepared or filed, and the time for such filing has expired, the appeal is dismissed. Section 1, rule V, Rules of the Supreme Court and District Courts of Appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

135 Cal.App. 517

PEOPLE ex rel. BOARTS v. CITY OF WESTMORELAND.

Civ. 1490.

District Court of Appeal, Fourth District, California.

Nov. 29, 1933.

Rehearing Denied Dec. 21, 1933.

Hearing Denied by Supreme Court Jan. 26, 1934.

1. Appeal and error ⇨458(2).

Writ of supersedeas pending appeal from self-executing judgment or order for enforcement of which no process is required, will not issue.

2. Appeal and error ⇨458(2).

Judgment in quo warranto proceeding, enjoining and prohibiting all acts under city's authority, *held* self-executing, so as to preclude supersedeas pending its appeal.

3. Appeal and error ⇨458(3).

Judgment, enjoining and prohibiting all acts under city's authority in quo warranto proceeding on ground that it was never lawfully incorporated, *held* not mandatory so as to authorize supersedeas pending its appeal (Code Civ. Proc. § 949).

4. Appeal and error ⇨458(3).

That contempt proceedings may be instituted pending city's appeal from judgment enjoining and prohibiting all acts under its authority *held* immaterial on question of its right to supersedeas.

Appeal from Superior Court, Imperial County.

Proceeding in quo warranto by the People, on the relation of C. F. Boarts, against the City of Westmoreland. Judgment for plaintiff, and defendant appeals. On appellant's petition for a writ of supersedeas.

Petition denied.

P. N. Myers, of Westmoreland, for appellant.

U. S. Webb, Atty. Gen., and Ernest R. Utley and Whitelaw & Whitelaw, all of El Centro, for respondent.

JENNINGS, Justice.

Petition for a writ of supersedeas. Petitioner city of Westmoreland has appealed to this court from a judgment of the superior court of Imperial county in the above-entitled action which is a proceeding in quo warranto instituted by the Attorney General for the purpose of testing the legality of the proceedings under which the said city was incorporated and seeking a decree declaring that the incorporation was illegal. The petition alleges that the city was incorporated as a municipal corporation of the sixth class on April 11, 1932; that the action in quo warranto was commenced on May 5, 1932; that thereafter said action was tried, and upon the conclusion of the trial a judgment was entered whereby it was decreed that petitioner had never been lawfully incorporated as a city of the sixth class or otherwise; that the rendition of said judgment tends to hinder and embarrass petitioner and its officers in the administration of municipal affairs and in the collection of revenue and in the payment of its obligations; that petitioner has been in existence as a municipal corporation since April 11, 1932, and has established its governmental machinery and has operated and is continuing to operate its municipal government without interruption, but that unless further proceedings in conformity with the judgment are stayed by the issuance of the writ of supersedeas pending the appeal, the opponents of incorporation threaten to and will take steps to nullify and abolish completely the city government before petitioner's rights can be established or the validity of the judgment can be determined.

That portion of the judgment which is pertinent to the problem here presented is in the following language: "Ordered, adjudged and decreed that the proposed city of Westmoreland, herein denominated as defendant,

has never been, nor is it now lawfully and properly incorporated as a city of the sixth class, or otherwise, and it is hereby declared and determined that said city has been, and is now, without authority of law exercising the rights and privileges of a city of the sixth class, and usurping the franchise of such city; and it is therefore further ordered, adjudged and decreed that all acts purporting to be under the authority of said city are, and each of them is, hereby enjoined and prohibited."

[1] It is settled that in certain cases an appellate court has inherent power to issue a writ of supersedeas to preserve the status quo of the subject of the litigation until final disposition of the matter on appeal. Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Rosenfeld v. Miller, 216 Cal. 560, 15 P.(2d) 161. However, it is equally well settled that, when the judgment or order from which an appeal has been taken is self-executing and no process is required for its enforcement, the writ of supersedeas will not issue. Tyler v. Presley, 72 Cal. 290, 13 P. 856; Imperial Water Co. v. Hall, 199 Cal. 556, 250 P. 394; Hulse v. Davis, 200 Cal. 316, 253 P. 136; Wood v. Board of Fire Commissioners, 50 Cal. App. 594, 195 P. 739; In re Graves, 62 Cal. App. 168, 216 P. 386; Erickson v. Municipal Court (Cal. App.) 21 P.(2d) 480.

[2] We entertain the opinion that the judgment whose effect is sought to be stayed by the issuance of the writ of supersedeas is self-executing and that no process is required for its enforcement and that the rule announced by the authorities last cited is therefore applicable. As was aptly declared in Tyler v. Presley, supra: "When the judgment is rendered, and no process is required to be issued for its enforcement, no supersedeas is allowed. In fact, there is no necessity for such a writ. There is nothing to stay or supersede. * * *"

[3] Petitioner, however, contends that the judgment rendered by the trial court in the quo warranto action, although prohibitory in form, is mandatory in substance, and that petitioner is entitled to the issuance of the writ in accordance with the provisions of section 949 of the Code of Civil Procedure. It is further contended that petitioner is entitled to the issuance of the writ although no undertaking on appeal has been filed, since petitioner is a city and is therefore relieved by statute from the necessity of filing any undertaking on appeal. Section 1058, Code Civ. Proc.

It is conceded by respondent that, if the judgment, though framed in the language of prohibition, is in reality mandatory, requiring petitioner to take some affirmative action, petitioner's contention is well based and the application may properly be granted. It is, however, urged that the judgment is purely prohibitory in substance as well as in form.

Petitioner's argument in support of its contention that the judgment is mandatory in substance is that the decree effectually changes the status which was enjoyed by petitioner at the time the judgment was rendered. It is said that, at this time, petitioner was an established municipality, fully equipped with the necessary governmental machinery required for its maintenance, and that the judgment, if permitted to continue in effect, pending the appeal, has so seriously disturbed the status quo of petitioner that every act of the municipal officers is thereby rendered nugatory and that the effect of the judgment is to destroy petitioner's very existence as a municipality. It is urged that this effect necessarily flowing from the judgment conclusively establishes the mandatory character of the decree, for a purely prohibitory judgment looks to the future and does not disturb the relative position or rights of the parties.

The answer to this contention is that respondent has never conceded nor has it been established that petitioner ever enjoyed the status of a legally constituted municipality. Within 30 days after petitioner's incorporation the proceedings in quo warranto were instituted. These proceedings challenged the creation of petitioner from its inception and sought the rendition of a judgment that petitioner had never legally come into existence. Such a decree has been rendered adjudging that petitioner was not legally created and has never enjoyed a lawful existence. The judgment necessarily relates back to the date of incorporation, and petitioner's status which is affected by the judgment is its status on the date on which it claimed that it came into existence as a municipality. If, at the time of its alleged incorporation, it was not legally incorporated, its legal status subsequent to that time has not been changed by the judgment. For the purposes of this decision, it must be assumed that the trial court was justified in arriving at the conclusion that petitioner was never legally created.

In support of the contention that the judgment is mandatory in substance, it is urged that the language of the decree necessarily contemplates further action by the court in winding up the affairs of the municipality. The answer to this argument is that whatever affirmative action may be required to effect final disposition of the municipality and its affairs will necessitate the institution of some independent proceeding. The quo warranto action sought nothing more than the rendition of a judgment establishing that petitioner had never been lawfully incorporated. Such a judgment has been

rendered and its effect is essentially negative in character.

[4] It may be observed, in conclusion, that the fact that contempt proceedings may be instituted pending the appeal from the judgment is not material to the problem which is here presented. Wolf v. Gall, 174 Cal. 140, 162 P. 115; In re Graves, 62 Cal. App. 168, 216 P. 386.

For the foregoing reasons the petition is denied.

We concur: BARNARD, P. J.; MARKS, J.

135 Cal.App. 476

PEOPLE v. WARWICK.

Cr. 1747.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1933.

1. Burglary ⇐6.

Tire store which defendant entered at 8:30 p. m. and which had closed at 6 p. m. *held* not, when entered, an "inhabited building" within first degree burglary statute (Pen. Code, § 460).

[Ed. Note.—For other definitions of "Inhabited Building," see Words & Phrases.]

2. Burglary ⇐6.

Store which was closed at time of entry was not an "inhabited building" within first degree burglary statute, though part of building was occupied as hotel, where store and hotel were wholly disconnected (Pen. Code, § 460).

3. Criminal law ⇐1184.

Where conviction of first degree burglary was unwarranted, since building entered was not inhabited building, District Court of Appeal would modify judgment by reducing crime to burglary of second degree (Pen. Code §§ 460, 1181, subd. 6).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Joseph Warwick was convicted of burglary in the first degree and of having suffered a prior conviction of felony, and he appeals.

Judgment modified, and, as modified, affirmed.

Walter H. Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

Appellant was found guilty by a jury of burglary in the first degree and of having suffered a prior conviction of felony, for which he was sentenced to imprisonment in the state prison. This appeal was taken from the judgment of conviction and the order denying his motion for new trial. The single point urged is that the evidence is legally insufficient to sustain a verdict of first degree burglary.

[1] Section 460 of the Penal Code provides in part that "every burglary of an inhabited dwelling house or building committed in the night time * * *" is burglary of the first degree. The place burglarized in the present case was an automobile tire store conducted by John McKean at 616 Van Ness avenue, San Francisco, and it is conceded that the place was entered at 8:30 o'clock in the evening. Appellant contends, however, that at the time the store was entered it was not an "inhabited" building within the meaning of said Code section, and that consequently the crime established was only burglary of the second degree. In this regard the evidence shows that the business hours of said store were from 8 in the morning to 6 at night; that after 6 at night there was no one in or around the store; and that after 6 o'clock on this particular night there was no one in or around the store. Under these facts it cannot he held that the store, at the time it was entered, was an "inhabited" building. People v. Clinton, 70 Cal. App. 262, 233 P. 78. In the case cited the evidence showed that a haberdasher's store was burglarized in the nighttime, and it was held that the same was not an inhabited building within the meaning of said Code section. There are cases holding that a "dwelling house" does not cease to be "inhabited" within the meaning of said section, even though the occupants be temporarily absent therefrom when the burglary was committed (People v. Manes, 104 Cal. App. 493, 285 P. 1073; People v. Allard, 99 Cal. App. 591, 279 P. 182); but we are not dealing here with the case of a dwelling house or any other kind of a building which is customarily occupied at all times. The rule relating to dwelling houses, therefore, is not applicable to a case such as we have here.

[2] The premises wherein the store was conducted were part of a larger building, the upper portion of which was occupied as a hotel, having an entrance on another street; and respondent contends, therefore, that the store itself was an "inhabited" building within the meaning of said Code section. There is no merit in the point. The store and the hotel were wholly disconnected so far as communi-

cation was concerned, and there is no claim made that they were operated under the same management.

[3] For the reasons stated, and under the authority of subdivision 6 of section 1181 of the Penal Code, the judgment of conviction is modified by reducing the crime to burglary of the second degree; and, as thus modified, the judgment and order appealed from are affirmed.

135 Cal.App. 493

WARING v. PITCHER.

Civ. 9159.

District Court of Appeal, First District, Division 2, California.

Nov. 29, 1933.

Rehearing Denied Dec. 29, 1933.

Hearing Denied by Supreme Court Jan. 26, 1934.

1. Corporations ⇐243(2).

As regards stockholder's liability, one subscribing and paying for stock before permit to sell was obtained, but accepting delivery thereof after permit was issued, was "stockholder" (St. 1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Stockholder," see Words & Phrases.]

2. Corporations ⇐215.

As regards stockholder's liability, obligation of stockholder to corporation's creditors is contractual obligation.

3. Corporations ⇐217.

Repeal of constitutional provisions respecting stockholder's liability did not defeat such liability, where indebtedness was incurred and action commenced before such repeal (Const. art. 12, § 3).

4. Corporations ⇐413.

President and general manager of corporation *held* authorized to borrow money for it, where, by resolution of board of directors, he was appointed agent and attorney in fact for purpose of managing and operating vessel belonging to corporation.

5. Statutes ⇐225.

Statute providing that ship manager cannot borrow money without special authority should be read in light of statute defining "manager" and "managing owner" (Civ. Code, §§ 2070, 2389).

6. Corporations ⇐413.

Statute providing that ship manager cannot borrow money without special authority is not applicable to authority of president, general manager, and attorney in fact of corporation owning vessel (Civ. Code, § 2389).

7. Corporations ⇐413.

Resolution of board of directors appointing president and general manager of corporation agent and attorney in fact was sufficient "special authority" to authorize him to borrow money (Civ. Code, § 2389).

[Ed. Note.—For other definitions of "Special Authority," see Words & Phrases.]

8. Corporations ⇐316(1).

Action of director and general manager of corporation, whose compensation is dependent on corporation's income, in advancing money to corporation, *held* not void, though subject to rigid scrutiny.

9. Corporations ⇐308(1).

Statute providing trustee cannot use trust property for his own profit does not prevent president and general manager of corporation from recovering compensation for services (Civ. Code, § 2389).

10. Evidence ⇐354(10).

In action on stockholder's liability, admission of corporation's books of account *held* proper, though books were not kept in more elaborate form sometimes employed.

11. Appeal and error ⇐992.

Whether proof of loss of vouchers was satisfactory, so as to justify admission of secondary evidence, was question primarily for determination of trial court.

12. Appeal and error ⇐992.

Where there was some evidence of loss of original vouchers, reviewing court cannot say admission of secondary evidence was error (Code Civ. Proc. § 1855, subd. 1).

13. Appeal and error ⇐1050(1).

In action on stockholder's liability, admission of report which was summary of testimony before trial court, if error, *held* not prejudicial, where all material items of report found support in other evidence in record, and there was no contradiction of evidence relating to such items (Code Civ. Proc. § 1855, subd. 5).

14. Corporations ⇐270.

Refusal to dismiss action on stockholder's liability for want of diligence in prosecuting it *held* not abuse of discretion, where cause was tried within five years after answer was filed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action upon stockholder's liability brought by L. A. Waring against Isabel V. S. Pitcher. Judgment for plaintiff, and defendant appeals.

Affirmed.

Bion S. Gregory, of San Francisco, for appellant.

Hadsell, Sweet & Ingalls, Carroll Single, and Stanley J. Cook, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, as assignee of J. E. Davenport, brought this action against numerous defendants to recover upon defendants' alleged liability as stockholders in a corporation known as Monterey Motor Ship Company. The cause was otherwise disposed of as to all defendants save defendant Pitcher and proceeded to trial solely against said defendant before the court sitting without a jury. From a judgment in favor of plaintiff and against said defendant in the sum of $1,094.66 and interest, defendant appeals.

The corporation was organized in October, 1923, for the purpose of purchasing and operating a vessel to be known as the Monterey. It had an authorized capital stock of 100 shares of the par value of $500 per share. Defendant Pitcher subscribed for 4 of said shares. The vessel was purchased and was operated for about two years, during which time the voyages made by the vessel resulted in financial loss to the corporation. J. E. Davenport, plaintiff's assignor, had been made president and general manager of the corporation and had advanced approximately $26,000 for and on behalf of the corporation in the operation of the vessel. Davenport assigned his creditor's claim to plaintiff prior to the time this action was brought.

[1] Appellant contends that she never became a stockholder "because of the violation of the Corporate Securities Act and therefore she has no stockholder's liability." In support of this contention appellant cites numerous authorities dealing with violations of the Corporate Securities Act (St. 1917, p. 673, as amended), but we find none of them in point. In the instant case appellant subscribed and paid $2,000 for her 4 shares of stock in the proposed corporation on October 16, 1923. The corporation was not organized until October 24, 1923. On October 31, 1923, a permit to sell stock at par for cash was obtained from the corporation commission. The stock was actually delivered to appellant in December, 1923, at which time she accepted the same. She retained the certificate and acted as a stockholder until her stock was sold for delinquency on an assessment levied some time thereafter. Respondent concedes that the subscription and payment "prior to the issuance of a permit were void and could not be validated by ratification or estoppel." Under the authorities it appears entirely clear that prior to the time of receiving and accepting the certificate appellant could have demanded the return of her money. Respondent contends, however, that as the corporation was in existence when the certificate was delivered to plaintiff and held a valid permit to issue stock at that time, appellant's act of accepting and retaining the certificate had the same legal effect as a new and independent contract for the sale of the stock as of the time of such delivery. Respondent's contention finds ample support in Moore v. Moffatt, 188 Cal. 1, 204 P. 220, and must be sustained. Appellant was therefore a stockholder and subject to the provisions of the law then in force relating to stockholders' liability.

[2, 3] Appellant further contends that "there is no stockholders' liability since the repeal of the constitutional provisions therefor." Reference is made to the repeal in 1930 of section 3 of article 12 of the Constitution. This action was commenced on December 9, 1927, and of course the indebtedness was incurred prior to that time. It is well settled by the authorities relating to stockholders' liability, that the obligation of the stockholder to the creditor was a contractual obligation. Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1385; Whittier v. Visscher, 189 Cal. 450, 209 P. 23. We believe that appellant's contention is fully answered in Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, and the authorities cited therein.

[4-8] The further contention is made that Davenport had no authority to borrow money for the corporation, but we are of the opinion that this contention is likewise without merit. Davenport was the president and general manager of the corporation and by resolution of the board of directors he was appointed "the agent and attorney-in-fact of this corporation for the purpose of managing and operating said vessel which this corporation might or could do * * *." The wording of this resolution is somewhat out of the ordinary, but under a reasonable construction of the general authority therein granted, we believe that Davenport had the authority to borrow money for the corporation when necessary. Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 123 P. 212. In the resolution Davenport was also appointed "managing owner." Appellant cites section 2389 of the Civil Code, which provides that "without special authority a ship's manager cannot borrow money. * * *" This section should be read in the light of section 2070 of the Civil Code, which defines "manager" and "managing owner." We do not believe that said section 2389 has any application to the authority of one who is the president, general manager, and attorney in fact of a corporation owning a vessel, but even if it does apply the resolution of the board of directors was sufficient "special authority" for the purpose. The further claim is made that Davenport could not legally loan money to the corporation. Appellant calls attention to

the fact that Davenport was a director and that his compensation as manager depended upon the income of the corporation. She cites and relies upon the text found in 6 California Jurisprudence, p. 1074, and also upon Pacific Vinegar & Pickle Works v. Smith, 145 Cal. 352, 78 P. 550, 104 Am. St. Rep. 42, and Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095. There is nothing in these authorities indicating that a director and general manager of a corporation, whose compensation as general manager is dependent upon the income of a corporation, may not advance money to said corporation provided he acts in good faith and without fraud. His actions may be subject to rigid scrutiny, but they are not ipso facto void. Merrill v. Normandie Corporation, 110 Cal. App. 621, 294 P. 774; Shively v. Eureka Tellurium Gold Mining Company, 5 Cal. App. 236, 89 P. 1073; Schnittger v. Old Home, etc., Consolidated Mining Co., 144 Cal. 603, 78 P. 9; 6 Cal. Jur. 1074. Here the corporation received the benefit of the advances made by Davenport and the trial court's findings against appellant on the issues of fraud and bad faith were amply sustained by the evidence.

[9] Appellant also makes the contention that the corporation's losses were due to mismanagement on the part of Davenport and that as trustee for the stockholders, Davenport did not act in the highest good faith. In arguing these points appellant states that it was "the negligence and improper conduct of Davenport that caused the loss for which he is now trying to charge this defendant." Although no direct attack is made upon the findings of the trial court to the contrary, we assume that appellant is challenging the sufficiency of the evidence to sustain these findings. We have reviewed the evidence offered by the parties, but it would serve no useful purpose to set it forth in detail here. Suffice it to say that the findings that Davenport was not in any way "negligent in the management of the corporation" and that in all of his dealings he acted "reasonably and judicially" are amply sustained. Appellant also claims that "Davenport being a trustee could not use the operation of the boat for his own profit." She cites section 2229 of the Civil Code in support of this contention. Said section, however, cannot be construed to prevent a president and general manager from recovering compensation for his services when such compensation is duly authorized by resolution of the board of directors.

[10-13] It is also contended that the trial court erred in the admission of certain evidence. The first assignment of error relates to the admission of the books of account of the corporation and in support of said assignment appellant cites Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657. It is claimed that said books of account were kept in an "irregular manner." While the books of the corporation were not kept in the more elaborate form sometimes employed, we believe that they were kept in such manner as to render them admissible under the rules set forth under the case cited. The next assignment is that the trial court erred in admitting secondary evidence of certain vouchers. The record shows that during the pendency of this action these vouchers had been in the hands of the former attorneys for appellant and also in the hands of an auditor. At the time of the trial Davenport testified that they were not in his possession and the evidence showed that he was unable to find them after making search. Appellant claims that there was no "satisfactory proof" of the loss of the original vouchers, but this question of whether the proof of loss was satisfactory was a question primarily for the determination of the trial court. 10 Cal. Jur. 851. There being some evidence in the record of the loss of the original vouchers, we cannot say that the trial court erred in admitting secondary evidence. Code Civ. Proc. § 1855, subd. 1. The third assignment of error relates to the admission of what is termed the Sturrock report. Respondent argues that this report was admissible as a convenient summary of the books of account. Shields v. Rancho Buena Ventura, 187 Cal. 569, 203 P. 114; Code Civ. Proc., § 1855, subd. 5. Appellant points out, however, that this report was based in part, at least, upon the "books of account of J. E. Davenport and statements submitted by him in relation to the account." Neither the books of account of Davenport nor the statements Davenport submitted to the person drawing the report appear in the record. We may assume that the admission of said report was error, but appellant has not shown that the error was prejudicial. All the material items of said report appear to find support in the other evidence in the record and we find no contradiction of the evidence relating to said items. Under these circumstances, the report merely served as a convenient summary of the testimony before the trial court and it does not appear that the admission thereof was prejudicial to appellant.

[14] The last contention of appellant is that the action should have been dismissed for want of diligence in prosecuting the same. The cause was tried in 1932 and within five years after the answer was filed. Appellant has not called our attention to any motion to dismiss made in the trial court, but assuming that such motion was made and denied, appellant has failed to show any abuse of discretion on the part of the trial court in denying said motion.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

135 Cal.App. 482

BURBANK et ux. v. McINTYRE.

Civ. 4915.

District Court of Appeal, Third District, California.

Nov. 28, 1933.

1. Damages ⇐208(2).

Whether injuries to neck and shoulder of occupant of automobile struck by passing automobile were result of accident *held* for jury.

2. Automobiles ⇐243(3).

In automobile accident case, permitting plaintiff to show arrest of defendant on charge of reckless driving and subsequent court proceedings taken with intimation of conviction *held* error.

3. Trial ⇐133(6).

In automobile accident case, court's general admonition to jury to disregard counsel's statements and striking out testimony showing arrest of defendant for reckless driving and subsequent court proceedings did not cure prejudicial effect.

Facts disclosed that court instructed jury to disregard opening statements of plaintiff's counsel referring to record of conviction of defendant for reckless driving, and that, after justice of peace had been examined regarding defendant's arrest and subsequent steps taken, counsel asked that "that" be stricken out, which was granted, but it was not certain as to what court and counsel meant by "that." Facts also disclosed that member of state patrol was interrogated over objection of defendant regarding arrest of defendant, place of trial, and issuance of warrant, and that defendant was required to answer charge filed against him.

4. Evidence ⇐317(5).

In automobile accident case, evidence that motor vehicle department had informed officer over telephone that automobile bearing certain license number belonged to defendant *held* improperly admitted; evidence being hearsay.

5. Jury ⇐26.

Plaintiff depositing jury fees five days before trial under court rule or custom did not waive jury trial, since statute providing jury may be waived by failure to deposit jury fees ten days before trial does not provide absolute waiver (Code Civ. Proc. § 631).

6. Appeal and error ⇐1035.

Requiring defendant to submit to jury trial where he had learned on inquiry five days before trial that no jury fees had been deposited *held* harmless, where court granted continuance at conclusion of testimony for preparation of instructions (Code Civ. Proc. § 631).

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Willie Burbank and wife against J. M. McIntyre. From a judgment for plaintiffs, defendant appeals.

Reversed.

Ray W. Hays, Laurence B. Myers, and Arthur Drew, all of Fresno, for appellant.

Barcroft & Barcroft, of Madera, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, Willie Burbank, accompanied by his wife, Julia J. Burbank, also a plaintiff herein, was driving an automobile in a northerly direction upon the Golden State highway and, when near the town of Berenda, another automobile, also proceeding northerly, passed, and, in avoiding an on-coming truck, the passing car alleged to have been operated by defendant swerved toward the right and came in such close proximity with the car of plaintiffs that some portion thereof struck the left front hub cap of plaintiffs' car, causing that car to swing sharply to the left. The passing car did not stop, but sped on. Plaintiffs pursued, and were able to get the license number of the fleeing car, whereupon plaintiffs returned and gave the number to a state traffic officer.

It was contended by plaintiffs that the sudden swerving of the car caused plaintiff Julia J. Burbank to be thrown against the side and door of their automobile, as a result of which "the ligaments or tendons leading along the back and the right side of her neck were broken loose from their fastenings on her shoulder," for which injuries plaintiffs were awarded $8,000 by a jury.

[1] Defendant, appellant herein, maintains that the evidence is insufficient to show any ailment suffered by plaintiff Julia J. Burbank was a direct or proximate result of any injuries received in the accident narrated.

Various medical men testified for both plaintiffs and defendant, differing considerably in their opinions. It is not necessary to discuss their testimony, but it is quite clear that, after the accident, plaintiff Julia J. Burbank suffered severe pain in her neck and shoulder, and that she was unable to control her head movements naturally, and was compelled to support her head by artificial or mechanical means in order to ease the pain from which she was suffering. In view of this conflict in the testimony, as well as the direct testimony of Dr. Dearborn as to

the nature and extent of the injury to the muscles of the neck, we cannot say that the jury were not justified in finding that the injuries received by plaintiff were the result of the accident, and were permanent in character.

[2, 3] The second point urged by defendant for reversal is that the trial court erred in permitting plaintiffs to show the arrest of the defendant on a charge of reckless driving and the various subsequent court proceedings taken. In his opening statement counsel for plaintiffs stated to the jury that Mr. Burbank obtained the license number of the car that struck them, "and Mr. Burbank went to the Justice of the Peace in the Second Township in the County of Madera, State of California, which is the township in which the accident occurred, and procured a John Doe warrant, * * *" to which counsel for defendant objected and asked for a mistrial.

The court replied: "Well, the jury will be instructed to disregard the statement of counsel and remember it is not evidence in the case."

Whereupon counsel for plaintiffs said: "Is the court going to hold at this time that we are not allowed to introduce the record of the conviction of Mr.—

"Mr. Hays (interrupting): We ask again, your Honor, that a mistrial be declared.

"The Court: Well, the court will deny the motion with the instruction to the jury that they are to disregard the statement of counsel and they will be further instructed that any statement of counsel on either side is not evidence in the case and is not to be so considered by them."

During the course of the trial L. A. Shirley, a justice of the peace, was called by plaintiffs, and in answer to a question on direct examination, said, "* * * And I arraigned him as is always done and advised him of his constitutional rights and inquired into the matter and told him that he had the privilege of pleading either guilty or not guilty and he hesitated as to whether he should do—

"Mr. Hays: We object to that your honor, as being incompetent, irrelevant and immaterial and ask it be stricken out and the witness be instructed to relate the conversation.

"Court: Very well, just relate the conversation."

The witness then testified as to what the defendant said to him at that time, whereupon the court said: "Well, you cannot anyway go into all of this. I see what counsel is after You cannot go back of that judgment." Thereupon counsel for plaintiffs asked "that" be stricken out, which was granted, and then asked that the court admonish the jury to disregard any testimony that had been stricken out. As to that request no action was taken. Just what was meant by court and counsel in "that" is not definite nor certain. We cannot tell whether counsel referred to the preceding answer only or to the entire line of the examination dealing with the subject of the arrest and subsequent steps taken.

Officer Olivas of the state patrol was also called by plaintiffs, and over objection was interrogated as to the arrest of defendant, the place of trial, and that a warrant was issued returnable before the justice's court, and that the defendant was required to answer a charge filed against him.

We have set forth the foregoing from the record upon this point to show the general line of testimony attempted to be adduced by plaintiffs. Considerably more along similar lines was received, but without objection.

It is a general rule that a judgment in a criminal prosecution may not be received in a civil action to establish the truth of the facts in which it was rendered, but an exception thereto is recognized where the defendant has entered a plea of guilty, such record then being admitted, not as a judgment establishing the fact, but as an admission against interest. Langensand v. Obert, 129 Cal. App. 214, 18 P.(2d) 725, and cases there cited; People v. Luzovich, 127 Cal. App. 465, 16 P.(2d) 144; Rowe v. Such, 134 Cal. 573, 66 P. 862, 67 P. 760; Olsen v. Meachem, 129 Cal. App. 670, 19 P.(2d) 527.

In the instant case the record before us is silent as to what plea was entered by defendant. It does not appear whether defendant entered a plea of guilty or whether he pleaded not guilty. There could be no objection to the statements made by the defendant to a justice of the peace as statements against interest, but here the emphasis seemed to be laid upon the charge and arrest for reckless driving rather than upon the statements of defendant. We are convinced that counsel exceeded his legal limits, and, in the face of objection and contrary to the warning of the court, brought before the jury the proceedings of the justice's court, narrating the issuance of the warrant, the arrest and arraignment, and intimation of conviction of the defendant, which undoubtedly had the effect of influencing the feelings of the jury against one who appeared to be a self-admitted "hit and run" driver.

We believe the general admonition of the court to the jury to disregard the statements of counsel and the testimony stricken out cannot offset the damaging effect of its erroneous admission or its prejudicial effect upon the jury.

[4] A third specification of error is that the court erred in admitting hearsay evidence to show ownership by defendant of the passing automobile alleged to have collided with plaintiffs' car.

It will be remembered that plaintiff testified that he was able to obtain the license

number of the offending car. This number he gave to officer Olivas, who was called by plaintiffs at the trial, and over objection was permitted to testify that he had telephoned the motor vehicle department at Sacramento, and learned that the car bearing the license number given belonged to J. M. McIntyre of Coalinga. This was the only evidence attempted to be offered to show ownership of the offending car. No attempt was made to produce the records from the office of the motor vehicle department. This testimony was clearly hearsay, and the objection thereto should have been sustained.

[5, 6] Defendant's last point is that the court erred in compelling him to submit to a trial by jury. Five or six days prior to the day set for trial, counsel for defendant inquired of the clerk of the court as to whether jury fees had been deposited, and he was by the clerk informed that no deposit had as yet been made. Relying upon that, counsel claims he made no preparation to present his case to a jury, and, when required by the court to proceed before a jury, that he was at a great disadvantage by reason thereof. Section 631, Code of Civil Procedure, provides that a "trial by jury may be waived by the several parties to an issue of fact in manner following: * * * 5. By failing to deposit with the clerk, within ten days prior to the date set for trial, a sum equal to the amount of one (1) day's jury fees payable under the law." This provision is by its terms not an absolute waiver and is clearly enacted for the benefit of the court to aid in the orderly conduct of the trial.

In the case of Harmon v. Hopkins, 116 Cal. App. 184, 2 P.(2d) 540, 542, the court said: "One important purpose of the provision is to make certain that there will be time to call the jury after the deposit of the jury fee had been made and that the jury fee will be available when required. Such a provision is necessary to enable the court to conduct its business without delay and in an orderly manner."

Plaintiffs did comply with a court rule or custom permitting the deposit of such fees five days prior to trial, and, the court being satisfied with such an arrangement, we cannot see how defendant may complain.

The record discloses also that at the setting of the cause a jury was demanded by plaintiffs, which was of itself some notice to defendant that the issue might be submitted to a jury; also a continuance was requested by defendant and granted by the court at the conclusion of the taking of the testimony in order that defendant might prepare such instructions as he wished to submit upon the law of the case. We find no abuse of discretion nor injury sustained by defendant by the ruling.

Upon consideration of the entire case, however, we believe the objections heretofore discussed might have the effect of and did influence the jury in their determination of the issues involved.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

135 Cal.App. 435

BRADBURY et al. v. THOMAS.
THOMAS v. ADSIT et al.
Civ. 1071.

District Court of Appeal, Fourth District, California.

Nov. 24, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

1. Quieting title ⇐39.

In action to quiet title, cross-complaint to foreclose mortgage covering 84 lots, 15 of which were lots title to which was sought to be quieted in complaint, *held* not demurrable as alleging mortgage on different property (Code Civ. Proc. § 442).

2. Pleading ⇐147.

Facts surrounding cause of action and not form of complaint are determinative of what constitutes transaction as regards propriety of cross-complaint (Code Civ. Proc. § 442).

3. Appeal and error ⇐1010(1).

Where record discloses any evidence tending to support finding on fact question, it may not be disturbed.

4. Mortgages ⇐280(5).

In action to quiet title, evidence supporting cross-complaint to foreclose mortgage *held* to support finding that plaintiffs assumed mortgage and agreed to pay indebtedness secured thereby, so as to be liable for deficiency judgment after foreclosure sale.

5. Mortgages ⇐97.

Parties insisting on strict interpretation of one part of release clause in mortgage cannot complain if whole of it is literally construed.

6. Mortgages ⇐310.

Parties *held* "in default" when making payment on mortgage debt, and therefore not entitled to benefit of provision authorizing separate release of mortgaged lots when mortgagor made payment while not in default.

Ordinary meaning of the word "default," when used with respect to an obligation created by contract, is failure of

performance, and, when used with reference to indebtedness, it means simply nonpayment.

[Ed. Note.—For other definitions of "Default," see Words & Phrases.]

7. Mortgages ⇐306.

Where full amount of principal of mortgage debt was overdue, mortgagee's agreement to extend time of payment in consideration of payment of part of debt was invalid.

8. Quieting title ⇐49.

Where parties occupying position of mortgagor sought to quiet title against mortgagee without paying or offering to pay mortgage debt, decree that plaintiffs "take nothing" was not error.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by T. D. Bradbury and others against Harriet F. Thomas, in which defendant filed a cross-complaint against Henry B. Adsit and others. From an adverse judgment, Bradbury and others appeal.

Affirmed.

Leslie S. Bowden and Horace W. Danforth, both of Los Angeles, for appellants.

Harvey H. Atherton, of San Diego, for respondent.

JENNINGS, Justice.

Plaintiffs instituted this action for the purpose of quieting their title to fifteen specific lots described in the complaint. The defendant Harriet F. Thomas answered the complaint, admitting that she claimed an interest in the property described in the complaint which was adverse to any claim of plaintiffs. She likewise filed a cross-complaint wherein it was alleged that she was the owner and holder of two promissory notes executed by H. J. Adsit and wife and of the mortgage executed to secure payment of said notes; that subsequent to the execution of the notes and mortgage Adsit conveyed the mortgaged premises to plaintiffs who assumed the said mortgage and agreed to pay the indebtedness which it was given to secure; that a portion of the principal of said notes was paid, but that the balance of the indebtedness represented by the notes, together with interest thereon, was long past due. The cross-complaint concluded with a prayer that the said defendant have judgment against plaintiffs for the amount claimed, and that the mortgaged premises be sold for the purpose of satisfying the judgment and that, if the proceeds realized from the sale of the property should not be sufficient for the purpose, a judgment for the deficiency should be entered against plaintiffs. The plaintiffs interposed a demurrer to the cross-complaint, which was overruled, whereupon they filed an answer to the cross-complaint. The action proceeded to trial on the issues presented by the pleadings, and upon the termination of the trial the court rendered its judgment in favor of the defendant, adjudging that her mortgage be foreclosed in accordance with the prayer of the cross-complaint. From the judgment thus rendered the plaintiffs have appealed.

The record discloses that the following facts were developed during the trial of the action: On January 5, 1926, appellants entered into a contract with H. B. Adsit whereby they agreed to purchase from Adsit 46 acres of land comprising some 84 lots in a platted tract known as "Olivewood Acres" in San Diego county. The purchase price for the land was stated to be $18,400, and was to be paid in specified installments. The sum of $200 was paid by the purchasers at the time the contract was executed. At this time Adsit did not own the property, but merely had an option to purchase it from the owner, who was the respondent, Harriet F. Thomas. He did, however, at some time subsequent to January 5, 1926, secure a deed to the property, and on February 1, 1926, he executed two promissory notes in favor of Harriet F. Thomas. Each note was in the amount of $3,833. One note was payable on February 10, 1927, and the second note matured on February 10, 1928. To secure the payment of these notes Adsit, on February 1, 1926, executed a mortgage on the above-mentioned property. On the same date Adsit and his wife executed a grant deed conveying the property to appellants. The evidence shows that the purchase of the land by Adsit was a part of the same transaction whereby he sold the property to appellants. It also appears that, prior to the delivery of the deed from Adsit to appellants, they paid a further sum of $7,800 in addition to the $200 paid on January 5, 1926. Appellants made the payments of interest due on the two notes until February, 1931. The last payment was made on February 17, 1931, and constituted payment of interest on the notes until February 10, 1931. One of the two notes was due, according to its terms, on February 10, 1927, and appellants requested an extension of it for one year, which was granted by respondent. The record fails to show whether a similar extension was granted in 1928. However, during the month of February, 1929, respondent requested that appellants pay the full amount of both notes. Certain negotiations then took place between the parties, and on February 27, 1929, the respondent expressed a willingness to grant a further extension of one year, provided one-fifth of the principal amount of the two notes then overdue should be paid. Respondent's offer was accepted by appellants, who, during

the year 1929, made three payments on the principal of said notes, which aggregated $1,533.20. These payments were made on March 21, 1929, August 16, 1929, and on October 2, 1929. The first payment amounted to $533.20, and the second and third amounted to $500 each. On February 17, 1931, appellants made a payment of the interest due on the notes on February 10, 1931, and in a letter which was inclosed with the check representing the interest payment, an acknowledgment of a realization that the principal of the notes was then due was made. No request was made for a further extension, although there was an expression of a hope that the interest payment would be satisfactory "for the time being," and an assurance that payment of the full amount due would be "forthcoming at the earliest possible date." The respondent acknowledged receipt of the payment of interest by a letter which was dated February 28, 1931. This letter contained no suggestion that payment of the principal of the notes would be further extended. During the month of September, 1931, certain negotiations were had between the parties which resulted in the acceptance by respondent of 254 shares of capital stock in a certain Arizona corporation and an agreement by certain individuals to purchase said stock for the sum of $25 per share. Respondent thereupon surrendered to appellant Hazelton the two promissory notes, and executed a release of the mortgage. On September 28, 1931, respondent instituted an action against appellants whereby she sought to have her release of the mortgage canceled on the ground that the surrender of the notes and the release of the mortgage had been accomplished through the fraud and misrepresentation of appellant Hazelton. The prayer of the complaint in the action demanded that appellants be restrained from conveying title to the mortgaged premises; that they be required to return the notes; that the mortgage be restored; and that it be adjudged that it constituted a first lien upon all of the land described in it. The appellants were served with process in the action, and failed to make an appearance, whereupon their default was duly entered. A decree was thereupon entered in the action ordering that the release of mortgage executed by respondent be canceled and the mortgage declared to be in full force and effect and adjudged to be a first lien upon the real property described in it, and that the promissory notes be returned to respondent. On December 22, 1931, appellants Thomas A. Hazelton and Sophie Marie Hazelton made written demand upon respondent that she release to them, free and clear of the mortgage lien, 15 specified lots. This demand was made in reliance upon a certain release provision contained in the mortgage. Upon the failure of respondent to comply with the demand, the present quiet title action was instituted by appellants.

[1, 2] The first contention advanced by appellants is that the trial court erred in overruling the demurrer to respondent's cross-complaint. In support of this contention, it is urged that the cross-complaint shows on its face that the mortgage, whose foreclosure is sought by the cross-complaint, is a mortgage on real property other than the land mentioned in appellants' complaint. It is said, therefore, that the relief sought by the cross-complaint neither relates to the contract or transaction upon which the action was brought nor does it affect the property to which the action relates as required by section 442 of the Code of Civil Procedure. The contention of appellants in this regard may not be sustained. The mortgage whose foreclosure is sought is one which covers 84 lots, 15 of which are the lots the title to which is sought to be quieted in appellants by their complaint. It is apparent that, if the mortgage had not been in existence, there would have been no occasion for the institution of the present action. The lien of the mortgage is the very claim or cloud on appellants' title whose removal is sought by the complaint. While it is true that the complaint is in the usual brief form alleging simply appellants' title and right to possession and alleging that respondent claims an estate or interest in the property adverse to appellants, this is by no means conclusive. "The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction." Hanes v. Coffee, 212 Cal. 777, 300 P. 963, 965, California Trust Co. v. Cohn, 214 Cal. 619, 7 P.(2d) 297, Martin v. Hall (Cal. Sup.) 26 P.(2d) 288. In accordance with this view, it is evident that this action to quiet title arises out of the fact that respondent claims an interest in the land by virtue of the mortgage, and in the final analysis both the claim of appellants to have their title quieted and respondent's demand that the mortgage be foreclosed relate to the same transaction, i. e., the mortgaging of the property, and both claims must be adjudicated upon a consideration of the same issues. Hanes v. Coffee, supra. We entertain the opinion, therefore, that the trial court did not err in overruling appellants' demurrer to respondent's cross-complaint.

[3, 4] The second contention of appellants is that the trial court erred in finding that appellants assumed the mortgage and agreed to pay the indebtedness secured thereby, and that they are therefore liable for any deficiency that may remain upon a sale of the mortgaged premises. The question of whether or not appellants assumed the mortgage and agreed to pay the notes whose payment it was given to secure is a pure question of fact. The familiar rule binding upon a reviewing court that, if the record discloses the presentation of any evidence which tends to support the court's finding, it may not be dis-

turbed, is therefore applicable. The record herein does disclose the presence of evidence supporting the finding that appellants assumed the mortgage. The witness Adsit testified that appellants T. D. Bradbury and Thomas A. Hazelton, who were concededly acting for the two other appellants as well as for themselves, stated to him that "they would pay a half of the mortgage in one year and a half of it in two years." This evidence, although directly contradicted by the testimony of appellants T. D. Bradbury and Thomas A. Hazelton, furnishes sufficient basis for the court's finding that appellants assumed the mortgage and answers appellants' objection that the finding is lacking in evidentiary support.

[5-7] The most important contention presented by appellants upon this appeal is that the trial court erred in holding that they were not entitled to a release of the 15 lots described in their complaint. Appellants' claim that they were entitled to the release is based upon a provision which is contained in the mortgage executed by Adsit and wife on February 1, 1926. This provision reads as follows: "And also that mortgagor while not in default shall be entitled to a separate release of each or any of said lots or parcels at a flat release price of One Hundred Dollars ($100.00) each up to the total amount which has at any time been paid upon the principal of said notes, the lots to be released to be selected at the time of payment or at any time thereafter by the mortgagor; all payments for releases made by mortgagor to be applied upon the principal of the note or notes falling due next thereafter." As hereinabove noted, the evidence produced during the trial of the action showed that during the year 1929 appellants made three payments aggregating $1,533.20 on the principal amount of the notes which was secured by the mortgage. These payments were made as a result of negotiations between respondent and appellants. The evidence shows that respondent and members of her family who were interested in the property desired that payment of the full amount of the principal of the notes should be made and the "whole thing settled up." This is disclosed by a letter addressed by respondent to appellant Thomas A. Hazelton on February 27, 1929. This letter also contains an expression of willingness to extend the time of payment for another year, provided one-fifth of the total amount then due were paid. Appellant Thomas A. Hazelton evidently replied to this letter, offering to pay one-fifth of the principal in three installments, for there was introduced in evidence a second letter sent by respondent to Thomas A. Hazelton on March 11, 1929. This letter contains the following language: "My dear Mr. Hazelton—Your letter received. The arrangement you propose will be very satisfactory to my sister—that is $533.20 at present—$500.00 at intervals of three months until the $1,533.20 is paid." The evidence further shows that on March 21, 1929, a payment of $533.20 was made by appellants on the principal of the notes, a second payment of $500 was made on August 16, 1929, and a third payment of $500 on October 2, 1929. The court found that, at the time of making the aforesaid payments upon the principal of the notes, appellants were in default in the payment of the mortgage indebtedness. This finding is attacked by appellants. It is argued that the granting by respondent of an extension of one year in the time of payment of the principal, as shown by her letter of March 11, 1929, and her acceptance of the three payments during the year 1929, necessarily related back to the due date of the notes, viz., February 10, 1929, and cured the default which then existed and estopped respondent from asserting that there had been any failure to perform precisely at maturity. This contention merits analytical consideration.

It is obvious that appellants rely solely upon the release clause of the mortgage. This must be so, for it is the only provision which furnishes any force to their claim that they are entitled to have their title to 15 lots quieted against respondent's mortgage lien. Certainly, if the mortgage had contained no release provision, there could have been no pretense on their part that they were entitled to have any of the mortgaged premises declared freed from the mortgage lien. Furthermore, appellants are driven to seek a literal interpretation of the release clause, for the evidence conclusively shows that they made no demand for a release of any lots until the month of December, 1931, when they were clearly 10 months in default in the payment of the principal of the notes which was due on February 10, 1931. Since the release clause provides that the lots to be released may be selected at the time of payment "or at any time thereafter by mortgagor," it is urged that a literal interpretation of the above-quoted language means that, at the time of payment, appellants acquired a vested right to require a release either at that time or at any time thereafter. However, if appellants insist upon a strict interpretation of one part of the release clause, they will not be heard to complain if the whole of it is literally construed. The language of the provision is that "mortgagor *while not in default* (italics ours) shall be entitled to a separate release of each or any of said lots or parcels." The ordinary meaning of the word "default," when used with respect to an obligation created by contract, is failure of performance. When used with reference to an indebtedness, it means simply nonpayment. It can hardly be maintained that, at the time the payment of $533.20 was made on March 21, 1929, appellants were not in default. When the date on which payment of the principal of the notes should

have been made according to the express terms of the notes had passed, appellants were in default, and they continued in default at the time the payment was made. As a matter of fact, the payment by appellants of the sum of $1,533.20 during the year 1929 was the only consideration for respondent's promise to extend for one year the time of payment of the principal of the notes. Inasmuch as the full amount of the principal was overdue on March 11, 1929, respondent's agreement to extend the time of payment in consideration of the payment of a part of the debt was nudum pactum, since the payment of a part of the debt did not constitute valid consideration for the extension. Braun v. Crew, 183 Cal. 728, 734, 192 P. 531. Therefore appellants were in default at all times subsequent to February 10, 1929, and this default was not cured by the payment by appellants of a part of the amount then overdue.

In support of their contention that they were entitled to a release of 15 lots upon payment of the sum of $1,533.20 during the year 1929, appellants place much reliance upon the decision in Sacramento S. F. L. Co. v. Whaley, 50 Cal. App. 125, 194 P. 1054. The cited case is not apropos to the problem presented in the present action, as the release clause there considered contained no limitation that any payment for a release of land from the mortgage lien had to be made when the mortgagors were not in default. This fact impelled the following statement appearing at page 137 of 50 Cal. App., 194 P. 1054, 1059: "It will be observed that the release clause with which we are directly concerned contains no provision specifying a particular time at which payments may be made."

The view which we take of appellants' contention that they were entitled to a release of the 15 lots described in the complaint renders it unnecessary to give prolonged consideration to a further contention that the trial court committed reversible error in admitting in evidence the judgment roll in the prior action instituted by respondent against appellants for the purpose of having restored the lien of her mortgage which had been released through the alleged fraud of appellant Thomas A. Hazelton. Appellants' argument in this regard appears to be that the effect of the decree in the former action was simply to restore the mortgage lien as of September 14, 1931, the date on which respondent surrendered the two promissory notes and executed a release of the mortgage in return for the delivery to her of certificates of stock in a certain corporation, and that appellants' right to a release of the 15 lots had fully vested, although it had not been exercised, and that the mortgage lien on September 14, 1931, was subject to appellants' rights to a release, and therefore the restoration of the mortgage lien as of September 14, 1931, had no effect on appellants' right to demand a release of the property described in the complaint. The essential basis of this involved argument is necessarily that appellants, by virtue of the payment of the sum of $1,533.20 during the year 1929, had acquired a vested right to demand, either then or at any time thereafter, that respondent release to them the 15 lots which they selected in December, 1931. As we have heretofore indicated, our opinion being that appellants were in default when they made the payments in the year 1929, it follows that appellants were not entitled to demand the release of any part of the mortgaged premises in accordance with the release clause and appellants' argument may not be sustained.

[8] The final contention advanced by appellants is that the court erred in decreeing that appellants "take nothing." It is said that this amounted to a denial of any title whatever in appellants. It must again be observed that appellants by their complaint sought the rendition of a decree that respondent has no estate or interest whatever in the 15 specific lots described in the complaint. The complaint contains no allegation of willingness to pay the mortgage debt, and the record fails to show any offer by appellants to pay it. The basis of their demand for a decree quieting their title to the 15 lots is the claim that they are entitled to have the property released from the mortgage lien without any further payment by reason of the release clause of the mortgage. This claim was properly denied by the trial court, and under the circumstances disclosed by the record the court was justified in rendering a decree that they take nothing. Appellants occupy the position of mortgagors who are seeking to quiet their title against a mortgagee without paying or offering to pay the debt for which the mortgage was given. This they may not do. The only method for them to quiet the mortgage is to pay the debt which it secures. Brandt v. Thompson, 91 Cal. 458, 462, 27 P. 763, Burns v. Hiatt, 149 Cal. 617, 621, 87 P. 196, 117 Am. St. Rep. 157.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

Ex parte SARGEN.

Cr. 1764.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1933.

Hearing Denied by Supreme Court Dec. 21, 1933.

1. Criminal law ⇐998.

Trial court may entertain, and, under exceptional conditions, grant motion to vacate judgment of conviction for extrinsic fraud, though prisoner is confined in penitentiary under commitment.

2. Criminal law ⇐998.

Trial court is not divested of jurisdiction to vacate judgment of conviction for duress or extrinsic fraud merely because of defendant's previous commitment to and confinement in penitentiary.

3. Habeas corpus ⇐85(1).

All intendments being taken to support trial court's order granting motion to vacate judgment of conviction, it is presumed in habeas corpus proceeding for prisoner's release from penitentiary that sufficient supporting facts, not averred in insufficient supporting affidavits, were shown at hearing of motion, where record does not disclose such fact nor ground of order; burden being on state to show otherwise.

4. Criminal law ⇐998.

Trial court's order, vacating judgment of conviction, *held* not void, even if facts averred and proved were legally insufficient to warrant such relief; being merely error remediable by appeal only (Pen. Code, § 1238, subd. 5).

5. Judgment ⇐501.

Error in final decision of court, having jurisdiction of subject-matter, is not correctable through collateral attack, but solely by appeal.

6. Criminal law ⇐83.

Court's jurisdiction to decide case does not depend on sufficiency of pleadings, but attaches, if they state case within general class over which court's authority extends.

7. Judgment ⇐503.

Mere fact that complaint, showing subject-matter and demand for relief within court's jurisdiction, fails to state cause of action, does not render final judgment or subsequent order void and subject to collateral attack.

8. Judgment ⇐503.

Court having jurisdiction to hear and determine sufficiency of pleadings, his action with reference thereto is not void, though erroneous.

9. Criminal law ⇐999(1).

Commitment for felony, pursuant to which prisoner is delivered into state prison warden's custody, remains in full force as respects warden until notified officially by service of authentic document, that commitment has been vacated (Pen. Code, § 1168).

0. Criminal law ⇐999(1).

Court order for prisoner's temporary removal from state prison to testify at hearing of his motion to vacate judgment of conviction did not affect terms of his commitment, but merely authorized his delivery into sheriff's temporary custody for such purpose, and likewise limited trial court's jurisdiction over him (Pen. Code, §§ 1168, 1333).

11. Prisons ⇐14.

State prison warden, not being required to attend hearing of proceeding, in which prisoner, temporarily removed from his custody, appears as witness, nor charged with constructive notice of what happens therein, order, made therein, purporting to affect terms of prisoner's commitment, must be served on warden to entitle prisoner to release (Pen. Code, §§ 1168, 1333).

Proceeding by Betty Sargen for a writ of habeas corpus, directing the Warden of San Quentin State Prison to release Bernard Sargen from custody.

Prisoner's release ordered.

Harold Judson, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

This proceeding in habeas corpus was instituted on behalf of Bernard Sargen, a prisoner in the state prison at San Quentin, under commitment for felony from the superior court in and for Los Angeles county, it being contended as ground for discharge that said commitment was nullified by proceedings had in the trial court after the prisoner had been delivered into the custody of the warden of said state prison.

The following are the facts: Sargen was charged by information with having violated section 538 of the Penal Code. He was at all times represented by an attorney, and on August 8, 1932, entered a plea of guilty and applied for probation. On August 31, 1932, he was arraigned for judgment, at which time his attorney asked permission to withdraw from the case, and that a continuance be granted so as to enable Sargen to secure other counsel. In making such request the attorney stated that contrary to his advice Sargen insisted on making an application to withdraw

his plea of guilty, plead not guilty, and stand trial. The request for permission to withdraw from the case and for a continuance was denied, the court stating that Sargen had entered his plea of guilty after having already obtained one continuance from July 15, 1932, until August 8, 1932, for such purpose. The court then imposed a penitentiary sentence, and, learning that Sargen had been charged with crime in that county on two previous occasions, denied his application for probation. The commitment was issued and delivered to the sheriff; and on the night of September 7, 1932, Sargen was transported to the state prison at San Quentin and the following day delivered into the custody of the warden of said prison. In the meantime Sargen secured his present counsel and on September 7th, the day Sargen was taken to San Quentin, a notice of motion was filed to vacate and set aside the judgment of conviction upon the ground that at the time Sargen entered his plea of guilty he did not understand that even though probation were granted he would still stand convicted of a felony. Contrary to the allegations in the petition for this writ, however, no order was ever made staying the execution of the judgment of sentence; consequently the sheriff executed the commitment by delivering the prisoner into the custody of the warden. The motion to vacate the judgment was noticed for September 8th, and, after being partially heard, was continued until September 21, 1932. Between those dates counsel for Sargen obtained a court order under the authority of section 1333 of the Penal Code for the temporary removal of Sargen from the state prison to Los Angeles county for the purpose of having him testify as a witness at the hearing of said motion; and in obedience to said order the warden surrendered Sargen into the custody of said sheriff to be by him taken back to Los Angeles for such purpose, and thereupon as commanded in said Code section to be returned to said state prison. On September 21, 1932, the motion to set aside the judgment of conviction was heard and granted, following which Sargen was allowed to withdraw his plea of guilty and enter a plea of not guilty; and waiving a trial by jury he was tried by the court on the transcript of the testimony taken at the preliminary examination, found guilty, and again sentenced to imprisonment in the state prison. He applied for probation immediately; the application was heard on the report of the probation officer theretofore filed, and granted. The execution of the penitentiary sentence was suspended for a period of ten years, on condition that Sargen pay the party defrauded $240 and serve a year in the Los Angeles county jail; and complying with said condition Sargen was confined in the county jail until June 20, 1933, and then ordered released into the custody of the probation officer. The district attorney's office participated in all of the foregoing proceedings and took no appeal therefrom, although subdivision 5 of section 1238 of the Penal Code provides for an appeal by the people from any order made after judgment affecting the substantial rights of the people. The warden, however, was never advised of any of the trial court proceedings which took place after he turned over the custody of the prisoner to the sheriff in obedience to said order of temporary removal, and, after waiting several months for the prisoner to be returned as required by said Code section and said order, the warden learned through correspondence that the prisoner had been released on probation. Whereupon and on July 3, 1933, acting under the advice of the Attorney General, the warden apprehended the prisoner in Los Angeles under the authority of the original commitment and returned him to the state prison.

[1, 2] The position taken by the Attorney General is that the trial court's order purporting to vacate and set aside the judgment of conviction is void for the reason that when it issued the commitment and the prisoner was delivered at the penitentiary in execution thereof, it lost jurisdiction of the prisoner and the subject-matter of the case; and that therefore, the order being void, the commitment theretofore issued at all times remained in full force and effect. It has been held in several cases, however, that a trial court has jurisdiction to entertain and under exceptional conditions may grant a motion in the nature of an application for a writ of coram nobis to set aside a judgment of conviction on the ground of extrinsic fraud (People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435, People v. Perez, 9 Cal. App. 265, 98 P. 870, People v. Mooney, 178 Cal. 525, 174 P. 325, and People v. Schwarz, 201 Cal. 309, 257 P. 71, 73); and it appears from those cases that such relief is available and under the conditions there stated may be granted even though the prisoner has been committed to and is actually confined in the penitentiary, and whether the judgment of conviction be based on a plea of not guilty and a trial on the merits (People v. Reid, supra; People v. Mooney, supra), or, in cases such as we have here, on a plea of guilty without a trial on the merits (People v. Perez, supra; People v. Schwarz, supra). With respect to this latter class the Supreme Court in the Schwarz Case has declared: "It may be stated from the above authorities [citing People v. Perez, supra; People v. Mooney, supra; People v. Reid, supra] that it is now well settled in this state that where on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in which he was sentenced may after judgment and after the time for appeal has passed, if a properly supported motion is seasonably made, grant him the

privilege of withdrawing his plea of guilty and of reassuming the situation occupied by him before a plea of any kind was entered. It should be noted, however, that where statutory remedies are provided this method of relief may not be resorted to, and that this exceptional remedy applies only where no trial has been had on the merits and only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes." We are of the opinion, therefore, that there is no merit in the Attorney General's contention that a trial court is divested of jurisdiction to hear and determine a motion to set aside a judgment of conviction on the grounds mentioned merely because a commitment has theretofore issued and the prisoner is confined in the penitentiary in execution thereof.

The group of cases relied on by the Attorney General (In re Bost, 214 Cal. 150, 4 P.(2d) 534, 536, In re Sullivan, 3 Cal. App. 193, 84 P. 781, People v. Conley, 27 Cal. App. 362, 150 P. 412, 413, and In re Garrity, 97 Cal. App. 372, 275 P. 480) are not in point for the reason that they deal with a proposition entirely different from the one here presented, namely, the question of the inherent power of a trial court to alter, modify, or vacate a penitentiary sentence, after having issued a commitment in pursuance of such sentence and caused the defendant to be delivered at the penitentiary in execution of the commitment; and it is held that the trial court has no such power. In none of those cases was any attempt made, as here, to disturb the judgment of conviction; nor were any of those proceedings founded on claims of duress or extrinsic fraud.

[3-8] The Attorney General further contends, however, that the facts averred in the affidavits attached to the notice of motion were legally insufficient to constitute duress or extrinsic fraud, and that, therefore, in any event, the trial court was without jurisdiction to entertain the motion. The record before us does not disclose whether or not additional evidence was introduced at the hearing of the motion; nor does the order itself or the record show the particular ground upon which the order was granted; and in that state of the case, all intendments being taken in support of the trial court's action, and the burden being on the state to show otherwise, it must be presumed, in this proceeding at least, that additional evidence was introduced and that it is legally sufficient to support the order. But aside from the question of the application of such presumption, since, as we have seen, the trial court had jurisdiction to hear such a motion, the order it made in deciding the same is not void, even assuming, as the Attorney General contends and as we are inclined to believe, that the facts averred in the affidavits and those adduced at the hearing of the motion, were legally insufficient to warrant the court in granting the relief sought. Its action in the matter amounted to no more than an error committed in the exercise of jurisdiction, which was remediable by an appeal and not subject to collateral attack. In other words, as pointed out in California Jurisprudence (vol. 7, p. 590), it is held generally that the main test of jurisdiction in any particular matter is whether or not jurisdiction is given the court as to that matter; that jurisdiction necessarily involves power to decide incorrectly as well as correctly a controversy within that jurisdiction, and does not depend upon the rightfulness of the decision made; that the rule simply means that when a court has jurisdiction of the subject-matter and commits error in the final decision, such error is correctable not through collateral attack, but solely by appeal. And with respect to the legal sufficiency of the moving papers, as said in Ruling Case Law (vol. 7, p. 1030), it is incorrect to suppose that power to decide any case rests solely on the averments of the pleading, but, on the contrary, the jurisdiction of a court in no way depends on the sufficiency or insufficiency of pleadings. If, therefore, the pleadings state a case belonging to a general class over which the authority of the court extends, jurisdiction attaches and the lower court has power to hear and determine the issues involved. In this respect an order made after final judgment doubtless stands on the same footing as a judgment; and the law is well settled that if a complaint shows a subject-matter and a demand for relief within the jurisdiction of the court, the mere fact that it fails to state a cause of action does not render the judgment void and subject to indirect or collateral attack. The sufficiency of the pleadings is one of the matters which the court has jurisdiction to hear and determine and the action with reference thereto, though erroneous, is not void. 15 Cal. Jur. 86, Trans-Pacific T. Co. v. Patsy F. & R. Co., 189 Cal. 509, 209 P. 357, Kelsey v. Miller, 203 Cal. 61, 263 P. 200, and Brush v. Smith, 141 Cal. 466, 75 P. 55. It has been held in the nature of a qualification to the general rule that where a court, even of general jurisdiction, is exercising a limited statutory power, and a statute conferring such power declares that it may be exercised upon the presentation of a petition stating certain facts, the failure to allege such facts is fatal to the jurisdiction of the court and renders its judgments and orders in the proceeding void, even on collateral attack. Matter of Hughes, 159 Cal. 360, 113 P. 684. But the proceeding here is not one involving the exercise of a limited statutory power. It is our conclusion, therefore, that the trial court's order setting aside the judgment of conviction, however erroneous it may have been, was not void and therefore not subject to collateral attack; that if

erroneous, the remedy for its correction was by way of appeal, which, as stated, the people failed to take.

[9-11] We are of the opinion, also, however, that when, as here, a prisoner is delivered into the custody of the warden of the state prison in pursuance of a commitment for felony, such commitment, so far as the warden is concerned, remains in full force and effect until he is notified officially otherwise by service upon him of some authentic document issued by competent legal authority showing that such commitment has been either vacated or nullified. And in the present case it is not alleged or claimed that any document of any kind was ever served upon the warden showing the nature or result of the trial court proceedings had subsequent to the issuance of the order for the temporary removal of the prisoner. As already stated, Sargen was delivered into the custody of the warden by the sheriff under a commitment embodying a certified copy of a judgment which ordered and adjudged that Sargen "be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law"; and section 1168 of the Penal Code provides that it shall be the duty of the warden to receive a person so sentenced and to imprison him "until [such person is] duly released as provided for in this section." The section then goes on to provide for the release of the prisoner at the expiration of the term fixed by the prison board, or sooner on parole, commutation of sentence, or pardon; and there are other Code provisions prescribing procedure for the release of a prisoner after reversal on appeal. But manifestly, the order issued by the trial court under the authority of section 1333 did not purport to affect the terms of the commitment theretofore issued, nor can it be given any such effect. As indicated, that section provides merely for the granting of an order for the "temporary removal" of the prisoner from the state prison, and "for his production" as a witness in the trial court in a criminal proceeding; and it further provides that in executing such an order it shall be the duty of the sheriff "to bring the prisoner before the proper court, * * * to safely keep him, and when he is no longer required as a witness, to return him to the prison * * * whence he was taken." As said by the Supreme Court in Re Bost, supra: "The custody of the prisoner by the sheriff under this section must necessarily be temporary, qualified by and limited to the purposes of said section. The jurisdiction of the Superior Court over the prisoner would likewise be so limited." And where, as here, a prisoner is temporarily removed from the custody of the warden to appear as a witness in a criminal proceeding in the trial court there is no law requiring the warden to attend the hearing of such proceeding in order to ascertain the nature or result of it; nor is he charged with constructive notice of what is being there done, if he does not attend. If, therefore, any order be made in such or any other proceeding, purporting to affect the terms of the commitment theretofore issued, the order so made or a certified copy thereof must be served upon the warden; otherwise under the provisions of said section 1168 of the Penal Code it is his duty to enforce the mandate of imprisonment directed by the judgment of sentence embodied in said commitment.

It is ordered, therefore, that when such an order is served upon the warden, the prisoner is entitled to be released.

We concur: TYLER, P. J.; CASHIN, J.

135 Cal.App. 481

PEOPLE v. CLARK et al.

Cr. 1274.

District Court of Appeal, Third District, California.

Nov. 28, 1933.

Criminal law ⇐1182.

Where defendant made no appearance and filed no brief and reviewing court's examination of record and transcript disclosed no errors, judgment was affirmed.

Appeal from Superior Court, San Joaquin County; Thomas D. Johnston, Judge.

Fred M. O'Reilly was convicted of robbery in the first degree and with prior conviction of a felony, and he appeals.

Affirmed.

L. J. Schino, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant, together with another, was informed against for the crime of robbery, and also with having suffered two prior felony convictions. He admitted one conviction, but denied the second, and entered a plea of not guilty to the information charging robbery.

The issues were submitted to a jury, who returned a verdict of guilty of robbery in the first degree, and found it to be true that defendant had been previously convicted of the felony, namely, a violation of the National Motor Vehicle Theft Act (18 USCA § 408), a

felony, and that he had served a term of imprisonment therefor in the United States penitentiary at McNeil Island.

From the judgment and from the order denying a motion for a new trial, defendant appeals upon all the statutory grounds.

No appearance has been made by defendant to support his appeal, nor has any brief been filed in his behalf. We have, however, examined the record and transcript of the testimony, but can find no errors of any materiality therein. The defendant was fairly tried and legally convicted.

The order and judgment are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

135 Cal.App. 514

PEOPLE v. BOWLES.

Cr. 92.

District Court of Appeal, Fourth District, California.

Nov. 29, 1933.

As Amended Dec. 8, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

Criminal law ⇐1023(12).

Reviewing court would not entertain appeal from order refusing to vacate judgment of conviction where question presented upon such appeal could have been raised on appeal which had been taken from judgment, and where accused's rights could have therein received adequate protection (Pen. Code, § 1237, subd. 3).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

M. V. Bowles, alias F. E. Nesbit, was convicted of passing a fictitious check, and on appeal his conviction was affirmed, whereupon he moved to vacate judgment, and, from order denying his motion, he appeals.

Appeal dismissed.

M. V. Bowles, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant has appealed from an order of the superior court of Riverside county denying his motion to vacate a judgment rendered in a criminal action wherein he was accused of having issued a check drawn upon a bank in which he did not have sufficient funds on deposit to meet said check on presentation. The information filed in said action also charged that the defendant had theretofore suffered two prior convictions of felonies for each of which he had been sentenced to confinement in a state prison of the state of California, and in each instance the sentence imposed upon him was served. The defendant entered a plea of not guilty, and was tried before a jury which returned a verdict finding him guilty of the offense charged in the information and another verdict finding that the allegations that he had suffered two prior convictions were true. The defendant thereupon presented a motion for a new trial, which was denied, and on April 8, 1929, the trial court pronounced judgment adjudging that the defendant be confined in the state prison at Folsom, Cal., for the remainder of his natural life. From this judgment and from the order denying his motion for a new trial, the defendant appealed. The judgment and order were affirmed by Division 1 of the District Court of Appeal for the Second Appellate District on August 29, 1929. People v. Bowles, 100 Cal. App. 464, 280 P. 184. On August 22, 1933, the defendant moved the trial court to vacate the judgment rendered against him on April 8, 1929, on the ground that the court lacked jurisdiction to pronounce said judgment. This motion was denied on August 22, 1933, and the defendant thereupon perfected his appeal from said order.

It is the contention of appellant upon this appeal that the judgment rendered on April 8, 1929, is a void judgment and was not rendered valid by its affirmance, and that, since it is void upon its face, it is subject to attack, direct or collateral, at any time. Numerous authorities support this established principle. It is also pointed out that a motion to vacate a void judgment is a proper mode of attack and that an appeal lies from an order refusing to vacate such a judgment. These contentions based upon established principles are correct. However, it is equally well established that, although a defendant in a criminal action is specifically permitted to appeal from an order made after judgment, affecting his substantial rights (subdivision 3, § 1237, Pen. Code), "ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion" (8 Cal. Jur., p. 495, § 510). This latter rule is directly applicable to the situation here presented. The appellant could have properly presented, on his appeal from the judgment, precisely the same questions which he now seeks to present on his appeal from the court's order refusing to vacate the judgment, and obviously could have much sooner obtained whatever relief he was entitled to receive. The effect of sustaining appellant's contentions on this appeal "would be virtually allowing two appeals from the same ruling, and would, in some cases, have the ef-

fect of extending the time for appealing." De la Montanya v. De la Montanya, 112 Cal. 101, 118, 44 P. 345, 349, 32 L. R. A. 82, 53 Am. St. Rep. 165. It is our opinion that a reviewing court is not warranted in entertaining an appeal from an order made after judgment where the same questions presented upon such appeal could have been fairly and properly raised on an appeal which has been taken from the judgment and the rights of appellant could have therein received full and adequate protection. People v. Walker, 132 Cal. 137, 142, 64 P. 133; People v. Brattingham, 91 Cal. App. 527, 267 P. 120; People v. Van Buren (Cal. App.) 25 P.(2d) 32.

The appeal from the order refusing to vacate the judgment is therefore dismissed.

We concur: BARNARD, P. J.; MARKS, J.

135 Cal.App. 479

PEOPLE v. EGAN.

Cr. 1754.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1933.

1. Criminal law ⇐1069(6).

Court rule providing that, if grounds of appeal are not filed within five days after notice of appeal, appeal shall be dismissed, is mandatory (Rules for Supreme Court and District Court of Appeal, rule 2, § 7).

2. Criminal law ⇐1128(1).

Transcript on appeal of codefendant jointly tried with accused *held* unavailable to accused as his record on appeal so as to preclude granting motion to dismiss appeal for failure to file grounds thereof within five days, in absence of order or stipulation to that effect (Rules for Supreme Court and District Court of Appeal, rule 2, § 7).

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Frank J. Egan and another were convicted of first degree murder, and they separately appeal. On motion to dismiss appeal of named defendant.

Motion granted, and appeal dismissed.

Vincent W. Hallinan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant, Frank J. Egan, and Albert J. Tinnin were tried jointly and found guilty of first degree murder, the jury fixing the penalty at life imprisonment; and on September 14, 1932, they were sentenced accordingly. Throughout the trial they were represented by separate counsel, and each filed a separate notice of appeal. Egan's notice was filed the day sentence was pronounced, but he took no steps whatever to obtain a record on appeal; and on July 24, 1933, the Attorney General moved for a dismissal.

[1] Section 7 of rule II for the Supreme Court and District Court of Appeal, relating to appeals in criminal cases, provides: "* * * The appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed. * * *" As indicated, no such application was ever filed or presented by appellant; nor was any attempt made otherwise to obtain a record on appeal; and it has been repeatedly held that the provisions of the foregoing rule are mandatory, and that, upon failure to comply with the requirements thereof, the appeal must be dismissed. People v. Vincent, 116 Cal. App. 211, 2 P.(2d) 460; People v. Martin, 127 Cal. App. 93, 15 P.(2d) 202; People v. Sullivan, 123 Cal. App. 436, 11 P.(2d) 420; People v. Rutledge, 114 Cal. App. 728, 300 P. 828; People v. Schroeder, 112 Cal. App. 550, 297 P. 105; People v. Greve, 129 Cal. App. 558, 19 P.(2d) 23.

[2] In opposition to the granting of the motion, appellant contends that the transcripts prepared and filed in Tinnin's appeal are available to appellant as the record on his appeal; but, in the absence of any order of the trial court or stipulation of counsel to that effect, it cannot be so held, for the reason, among others, that Tinnin's application for the preparation of the transcripts was filed and presented in his own behalf, his codefendant, Egan, not being mentioned or referred to therein; and, without authentication by the trial court to that effect, we have no way of knowing that the transcripts in the Tinnin appeal contain all the matters upon which appellant's appeal may be fully and fairly determined.

The motion is granted, and accordingly the appeal is dismissed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

135 Cal.App. 466

Ex parte FONTINO.

Cr. 1295.

District Court of Appeal, Third District, California.

Nov. 27, 1933.

1. Criminal law ⇐1202(3).

Proof that defendant served terms under previous sentences *held* essential to give court jurisdiction to impose sentence upon him as habitual criminal (Pen. Code, § 644).

2. Criminal law ⇐996(2).

Trial court could not, after defendant served penitentiary sentence under plea of guilty, impose heavier sentence, though original sentence failed to take into account prior convictions charged in information (Pen. Code, § 644).

Application by George A. Fontino for a writ of habeas corpus to secure release from custody in the state prison at Folsom.

Petitioner ordered discharged.

George A. Fontino, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

On the 17th day of March, 1928, the above-named petitioner was arraigned upon an information in the superior court of the county of Riverside, charging that on or about the 5th day of February, 1928, he committed the crime of receiving stolen goods, a felony. The same information charged that the prisoner, on the 12th day of April, 1925, had been convicted of the crime of burglary, and sentenced to a term of three years in the state penitentiary in the state of Oklahoma; also that on or about the 12th day of October, 1922, the defendant had been convicted of the crime of larceny and sentenced to a term of not over two years in the state of Oregon. Thereupon the defendant was taken to and has been incarcerated in the state prison at Folsom.

On the 23d day of March, 1933, upon an affidavit of the district attorney alleging that the petitioner was not sentenced under the provisions of section 644 of the Penal Code as a habitual criminal, the superior court of the county of Riverside, on the 27th day of March, 1933, entered an order purporting to amend its judgment theretofore entered in this cause, and sentenced the defendant to be incarcerated in the state prison, under the provisions of section 644, supra, as a habitual criminal.

The record further shows that, upon being arraigned upon the information charging him with having received stolen goods, the petitioner entered a plea of guilty as charged in the information.

[1] Section 644 of the Penal Code, so far as pertinent herein, provides that every person convicted in this state, of any felony, who shall have been previously twice convicted upon charges separately brought and tried, and served a term in any state prison or federal penitentiary, either in this state or elsewhere, for a number of offenses specified, shall be sentenced as a habitual criminal.

The record shows that no proof was offered that the petitioner had ever served a term by reason of any of the previous sentences pronounced upon him, either at the time of the original sentence, or at the time of the purported amended sentence being pronounced by the superior court.

In the case of People v. Dawson, 210 Cal. 366, 292 P. 267, the Supreme Court specifically ruled that, in order to establish the statutory requirements as to a prior conviction, it is not only necessary to plead the prior conviction and subsequent serving of sentence, but that both elements must be pleaded and proved.

The same question was presented to this court in the case of People v. Chester Arnest and Alfred L. Worth, 23 P.(2d) 812, 816, and it was there held: "The information must charge that the person convicted has served a term therefor, and, if it fails to do so, it fails to charge the facts necessary to constitute a judgment carrying a heavier sentence."

It thus appears that the superior court had no jurisdiction to enter its purported amended judgment and resentence of the petitioner, as of March 23, 1933.

It further appears from the record that the petitioner has served more than the requisite five years, the penalty fixed for receiving stolen goods under the provisions of section 496 of the Penal Code.

[2] Another question enters into this cause which does not appear to have been considered in the case of In re Boatwright, 216 Cal. 677, 15 P.(2d) 755, or in the case of Ex parte Kepford (Cal. Sup.) 20 P.(2d) 333, to wit: The power of the trial court after having pronounced sentence five years later to recall the petitioner and pronounce a sentence carrying a much heavier penalty. Two cases directly in point are the following:

Hickman v. Fenton, 120 Neb. 66, 231 N. W. 510, 70 A. L. R. 819, where it was held that upon a plea of guilty under an information charging a felony and the proceedings were free from error up to the time of pronouncing judgment, a penitentiary sentence for less than the minimum term prescribed by statute is not void, and, after it has been partial-

ly served in absence of appellate review, the trial court is without power to vacate it and impose a greater penalty. A number of cases are cited supporting the rule just stated.

The second case to which we refer is that of In re Garrity, 97 Cal. App. 372, 275 P. 480, 482. In this case the petitioner was first sentenced to pay a fine. Afterwards, the defendant was recalled and an alternative sentence pronounced. After citing a number of decisions, the court said: "It is clear by the authorities hereinbefore cited that, after rendering the judgment in the first instance, the jurisdiction of the trial court to thereafter modify its judgment was exhausted, and that lack of jurisdiction in the matter could not be waived nor jurisdiction be stipulated by the defendant." The petitioner was accordingly discharged.

The Kepford Case, supra, we think is distinguishable from the case at bar, and also that the language not necessary to the decision appearing in the opinion in the case of Boatwright does not obviate the conclusion from what we have said herein, that the petitioner should be discharged, and it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

135 Cal.App. 488

NICHOLS v. NICHOLS et al.

Civ. 8940.

District Court of Appeal, First District, Division 1, California.

Nov. 29, 1933.

1. Appeal and error ⇐880(1).

Appellant cannot urge errors which affect only his coparties not appealing, but can urge only errors injuriously affecting his rights (Code Civ. Proc. § 938).

2. Appeal and error ⇐880(2).

Appellant cannot urge defects in complaint affecting only a codefendant who does not appeal and who was not served with copies of pleadings (Code Civ. Proc. § 938).

3. Divorce ⇐267.

Appointment of receiver in divorce case may be made ex parte, where facts justify such appointment (Civ. Code, § 140).

4. Appeal and error ⇐190(3).

Where no objection was made in lower court respecting sufficiency of receiver's bond, sufficiency could not be questioned in District Court of Appeal (Code Civ. Proc. § 566).

5. Divorce ⇐267.

In divorce case, court properly appointed receiver of community property on showing that wife did not know where husband was, that she had no funds or property, and that husband had conveyed real estate in trust (Civ. Code, § 140).

Evidence disclosed that wife suing for divorce did not know where husband was; that he had abandoned her in 1930 and had failed to furnish support since; that wife had no funds for support and no property from which to procure funds for support or to prosecute action; that certain parties had executed mortgage to husband which had not been paid; and that husband had conveyed real estate to bank pursuant to written declaration of trust whereby husband reserved life estate and directed that remainder should go to son, and expressly providing that husband reserved right to revoke trust.

6. Divorce ⇐276(3).

Complaint in divorce action alleging husband had conveyed community property in trust to defraud wife, and praying for appointment of receiver, and that trustee be restrained from transferring property and for other relief, *held* sufficient.

Complaint alleged that there was community property consisting of home, stores, and restaurant, and mortgage executed in favor of husband; that wife had no means or funds for support of herself or to pay attorney's fees and costs; that husband had, for purpose of defrauding wife, caused property to be conveyed to bank as trustee and had absented himself from state for purpose of liquidating community property and taking it beyond jurisdiction of state; that he was negotiating sale of property and collection of mortgage; and complaint prayed that mortgagors be restrained from paying mortgage and that bank be restrained from transferring trust property and for appointment of receiver.

7. Divorce ⇐276(1).

Where husband conveys community property with intent to defraud wife, grantee may be made a party, and such conveyance may be set aside.

8. Evidence ⇐83(1).

Presumption was that trustee, who appeared, did not controvert facts in complaint or show cause why he should not be restrained from transferring property, or why receiver should not be appointed, because facts were true.

Appeal from Superior Court, Los Angeles County; Raymond I. Turney, Judge.

Action by Ida Mae Nichols against Charles Wadsworth Nichols, the First Trust & Savings Bank of Pasadena, and others, in which a receiver was appointed. From the order appointing the receiver, defendant the First Trust & Savings Bank appeals.

Affirmed.

Frank McNulty, of Long Beach, for appellant.

Wilton W. Webster, of Pasadena, for respondent.

JAMISON, Justice pro tem.

This action was brought by plaintiff against defendant Charles Wadsworth Nichols for a divorce on the ground of extreme cruelty.

The complaint was filed on April 18, 1931. It alleges, among other things, that there is community property belonging to plaintiff and defendant Nichols of the value of $100,000, consisting of their home, a confectionery store and restaurant, and a candy store, located in Pasadena, Cal.; also a certain mortgage executed in favor of the said defendant Nichols by defendants Spalding for the sum of $12,000, and other property; that plaintiff has no means or funds for the support of herself or to pay attorney's fees and court costs; that said defendant has an income of $10,000 per annum from said community property, and is amply able to pay plaintiff a reasonable amount for her support and for her attorney's fee and court costs. It is further alleged that said defendant, for the purpose of defrauding plaintiff, and with the intent of concealing the ownership of their said home, caused it to be conveyed to the defendant First Trust & Savings Bank of Pasadena, as trustee of defendant, and that said trustee is now the owner and holder of the legal title to said real property. It is further alleged that defendant Nichols, ever since he deserted plaintiff in July, 1930, has constantly absented himself from the state of California and remained outside of its jurisdiction for the purpose of causing the liquidation of all of said community property, securing same for himself and taking same beyond the jurisdiction of this state, and defrauding plaintiff and depriving her of any portion thereof; that he is negotiating the sale of all of said property and the collection of said mortgage; and that, unless the said Spaldings be restrained from paying the said amount of said mortgage to said Nichols, and unless the defendant First Trust & Savings Bank of Pasadena be restrained from transferring said real property, the amounts realized from said mortgage and said real estate, and the entire value thereof, will be turned over to the said Nichols and be by him removed from the jurisdiction of this state. Plaintiff asked for the appointment of a receiver to take charge of said community property pending the outcome of this action, and that the said Spaldings be restrained from paying the said note or any part thereof to the said defendant Nichols, and that the First Trust & Savings Bank of Pasadena be restrained from conveying or transferring the said community real estate to the said defendant Nichols.

The only witnesses produced at the hearing of the order to show cause were produced by plaintiff. One of these was Volney Ayers Spalding, who testified that in October, 1928, he borrowed $12,000 from defendant Nichols and gave him his note therefor, signed by himself and wife, secured by a mortgage on real estate, and that said note had not been paid. The other witness was the plaintiff, who testified that she did not know where her husband was; that he abandoned her on July 26, 1930, and has failed to furnish her support since that time; that she has no funds for her support and no property from which she can procure funds for support, nor funds to prosecute this action.

The defendant First Trust & Savings Bank of Pasadena appeared by its attorney, who stated in open court that the bank held the said real estate in trust for the following purposes: That said property had been conveyed to it pursuant to a written declaration of trust; that said trust reserved to defendant Nichols a life estate in the property; that upon his death the remainder was to go to his son, but it expressly provided that said Nichols reserved the right to revoke the trust at any time he chose in whole or in part, without assigning any reason therefor.

The order to show cause came on for hearing before the trial court, and the said court made its order that during the pendency of this action the First Trust & Savings Bank be enjoined and restrained from conveying to said defendant Nichols the aforesaid real property. It also made an order appointing a receiver to take charge of said community property. From the order appointing a receiver, the First Trust & Savings Bank has appealed. Appellant contends that the trial court was without jurisdiction to make said order for the reason that notice of the said proceeding had not been given defendant Nichols, that the court erred in making the said order because the complaint does not state sufficient facts to constitute a cause of action, and that there was no evidence before the court justifying the appointment of a receiver.

[1, 2] It is elementary that an appellant is entitled to assign for error only such proceedings in the trial court as injuriously affect him, without regard to the errors of which others might complain. He cannot, on his appeal, urge errors which affect only

his coparties who do not appeal, and such errors can be reviewed only at the instance of the parties affected thereby. 2 Cal. Jur. 840–842; Dobbs v. Purington, 136 Cal. 70, 68 P. 323. He is also precluded from urging defects in the complaint affecting only a codefendant who does not appeal and who was not served with copies of the pleadings. 2 Cal. Jur. 843, 844; McGary v. De Pedrorena, 58 Cal. 91; Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Upon this appeal the appellant can rely only upon the alleged errors of the trial court by which it is aggrieved (section 938, Code Civ. Proc.), or by reason of which its rights have been injuriously affected (Goldtree v. Thompson, 83 Cal. 420, 23 P. 383).

[3-5] Appellant contends that the court was without authority to appoint a receiver. The order of the court recites that the matter was submitted to the court upon the evidence introduced and the verified complaint, and upon this showing the court appointed the receiver. Although this appointment was made ex parte, the bond required by section 566 of the Code of Civil Procedure in cases where a receiver is appointed ex parte was executed by respondent. Section 140 of the Civil Code provides for the appointment of a receiver in divorce cases, and this appointment may be made ex parte where the facts justify such appointment. Huellmantel v. Huellmantel, 124 Cal. 583, 57 P. 582, 584; Stoff v. Erken, 172 Cal. 481, 156 P. 1033; Real Estate Associates v. Superior Court of City and County of San Francisco, 60 Cal. 223. Appellant contends that the bond was for an insufficient amount. No objection having been made to it in the lower court, the question of its sufficiency cannot be raised here. In Huellmantel v. Huellmantel, supra, the court said: "A receiver ought not to be appointed except upon the clearest proofs of its propriety, nor without the application of some one of the parties, and generally not without notice. Such appointment is allowable under certain circumstances ex parte, upon proper showing. High, Rec. § 111 et seq. But the cases are exceptional." In the instant case we are of the opinion that on the showing made by respondent the trial court was justified in appointing a receiver.

[6, 7] As to the contention of appellant that the complaint does not state facts sufficient to constitute a cause of action, we find it is without merit. In Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97, the court held that the deserted wife, though not in strictness a creditor of her husband, is yet, as concerns her right to maintenance, so far within the protection of the law that transfers made with the design to defeat her rights are void. Where it is charged that the husband has conveyed the community property with intent to defraud the wife of her rights therein, the grantee in such fraudulent conveyance may be made a party, and such conveyance may be set aside. 9 Cal. Jur. § 66, p. 700; Kashaw v. Kashaw, 3 Cal. 312; Weyer v. Weyer, 40 Cal. App. 765, 182 P. 776.

[8] The appellant has appealed only from that part of said order appointing a receiver. At the hearing of the order to show cause, which order was served upon appellant and which required of it that it show cause why it should not be restrained and enjoined from transferring the said real estate held by it in trust, and why a receiver should not be appointed to take charge and control of the said community property, it appeared at said hearing by its attorney, but did not controvert any of the facts set forth in the complaint or show cause why it should not be restrained from transferring the said real estate held by it as trustee, or why a receiver should not be appointed to take charge of the community property of respondent and defendant Nichols. The presumption arises that it did not controvert or deny any of the allegations of said complaint, for the reason that the facts therein alleged were true, and that a necessity for the appointment of a receiver existed.

The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

135 Cal.App. 373

EARL et al. v. LOFQUIST et al.

Civ. 8992.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1933.

Hearing Denied by Supreme Court Jan. 18, 1934.

1. Limitation of actions ⇐174(1).

Where action is barred by limitation, neither corporation nor stockholder in its behalf, irrespective of when he became such, can maintain it; it being immaterial that stockholder is nominal plaintiff.

2. Corporations ⇐202.

Where cause of action exists in favor of corporation, stockholder thereof may maintain it, though he acquired his share after fraud complained of.

3. Fraud ⇐38.

Laches would not be presumed from delay in suing for fraud until seventeen months after discovery thereof, if action was not barred by limitation, in absence of affirmative showing of prejudice resulting therefrom.

4. Limitation of actions ⇐179(2).

In action for fraud committed more than three years prior to commencement of action, pleader must show that he did not discover fraud until within three years before action was begun, that fraud was committed under such circumstances that he would not be presumed to have had knowledge thereof, and must set forth times and circumstances under which facts constituting fraud came to his knowledge (Code Civ. Proc. § 338, subd. 4).

5. Limitation of actions ⇐179(2).

Stockholders' complaint against former director for monetary compensation, based on fraud allegedly perpetrated eleven years before commencement of action, *held* deficient in not alleging circumstances leading to discovery of fraud less than three years before commencement of action (Code Civ. Proc. § 338, subd. 4).

In justification of the delay in bringing the action more than eleven years after the alleged perpetration of fraud, stockholders pleaded merely that, since the transfer of the property and until September 4, 1928, defendant actively prevented plaintiffs and other stockholders of the corporation from ascertaining or discovering or in any wise learning of said representations, and by reason thereof the plaintiff did not discover the falsity of representations, but neither the circumstances under which the fraud was discovered nor the means whereby an earlier discovery was prevented were stated in the complaint.

6. Limitation of actions ⇐199(2).
Pleading ⇐8(21).

Whether there has been discovery of facts constituting fraud within meaning of statute of limitations is question of law to be determined by court from facts pleaded; it being insufficient to make mere averment thereof, but facts from which conclusion follows must be pleaded (Code Civ. Proc. § 338, subd. 4).

7. Limitation of actions ⇐100(7).

Stockholders could not maintain that their action for fraud was not barred by limitation on ground that fraud was committed by board of directors, where complaint alleged that only defendant and his wife were parties to fraud, and allegation that defendant dominated corporation was limited to date of alleged fraud and did not refer to period subsequent thereto (Code Civ. Proc. §§ 318, 338, subd. 4).

8. Limitation of actions ⇐19(1).

Where plaintiff alleges facts showing as matter of law that he is entitled to possession of land and part of relief asked is that he be let into possession or that his title be quieted, action is for recovery of realty, barred by five years' limitation, though main ground of action is fraud or mistake (Code Civ. Proc. § 318).

9. Limitation of actions ⇐179(2).

Complaint for recovery of realty, affirmatively showing that defendant was in possesssion of property for eleven years, and which did not plead circumstances leading to discovery of fraud less than five years before commencement of action, *held* demurrable (Code Civ. Proc. § 318).

10. Limitation of actions ⇐180(1).

That first cause of action in simple form of quiet title action was not specifically demurred to on ground of limitation *held* immaterial as regards effect of single demurrer, where first and second alleged causes of action stated one cause of action (Code Civ. Proc. § 318).

11. Action ⇐38(1).

Complaint to quiet title and as incidental thereto to have declared void instrument on which defendant asserts title states single cause of action.

12. Action ⇐38(1).

Where one cause of action is stated and portion of complaint designated as second cause of action is only detail of matters tending to show extent, form, and nature of relief to which plaintiff is entitled upon his single cause of action, words designating it as separate cause of action will be disregarded.

13. Corporations ⇐211(6).

Stockholders could not attack validity of conveyance by corporation on ground that directors' meeting at which action was taken was not held on regular meeting date and that no notice thereof was given, where allegation did not show absence of any director and did not negative waiver of notice authorized by statute (Civ. Code, § 320a).

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by E. M. Earl and others against Knute Lofquist, as executor of the last will and testament of R. W. Nuttall, deceased, substituted in the place and stead of R. W. Nuttall, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Leo E. Anderson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellants.

Earle K. Stanton, of Los Angeles, and M. R. Van Wormer, of San Luis Obispo, for respondent.

OGDEN, Justice pro tem.

This is an appeal from a judgment entered in favor of respondent after his demurrer to appellants' amended complaint was sustained and the latter declined to amend. Although the defendant R. W. Nuttall is now deceased and substitution made, he is referred to herein as respondent.

The action is representative in character, being brought by appellants as shareholders on behalf of the defendant Lopez Canyon Oil Company, a corporation; its directors refusing to bring suit. It is based upon fraud, and seeks the recovery to the corporation of certain real property in the possession of respondent alleged to have been fraudulently obtained by him from the corporation, the reasonable value of other real property allegedly obtained by the same means and under the same circumstances, but since disposed of, and the rents received from the properties by respondent.

In substance, it is alleged that respondent, a director and secretary of the corporation, which he dominated, falsely and with the fraudulent intent to defraud the corporation and to induce its directors to make the conveyances complained of, represented to the other directors that the corporation was heavily indebted and that it was necessary to dispose of its real property in order to pay its debts; that, relying thereon, the board of directors were thereby fraudulently induced by respondent to convey said property to the defendant S. F. Nuttall, the wife of respondent and a stockholder of the corporation, in consideration of the payment by her of the debts of the corporation. It is further alleged that the latter took and held the property in her name solely for the use and benefit of respondent, that no consideration whatsoever was given therefor; there being in truth no corporate indebtedness to be paid.

The amended complaint contains what are designated as five separate and distinct causes of action. The so-called first cause of action refers only to that portion of the real property still retained by respondent, and contains merely the usual averments found in ordinary quiet title actions, to wit, ownership and right of possession in the corporation and claims adverse thereto by respondent and his wife. The so-called second cause of action refers to the same property, incorporates by reference the preceding allegations, and sets forth in detail the fraudulent transaction complained of. The third and fourth so-called causes of action incorporate by reference the allegations of fraud and seek the recovery of the reasonable value of those portions of the property subsequently disposed of by respondent. By their so-called fifth cause of action the recovery of all rents received by respondent from the property is sought. The demurrer is to each so-called cause of action on the general ground that a cause of action is not stated and as to the second, third, fourth, and fifth causes of action pleads the provisions of section 318 and subdivision 4 of section 338 of the Code of Civil Procedure as a bar to recovery.

[1, 2] We cannot subscribe to either of the two contentions relied upon by respondent in support of the judgment. He first relies on the fact, which affirmatively appears from the complaint, that appellants were not stockholders of the corporation at the time of the acts complained of, and argues that, where the corporation has lost its right of action by reason of the statute of limitations, the action cannot be maintained by a stockholder who purchased his stock subsequent to the date of the transaction complained of. This merely begs the real question with which we are concerned in this appeal, namely, whether the cause of action is barred by the statute as to the corporation. If the right to maintain the action is barred as to the corporation by the statute of limitations, neither the corporation nor a stockholder in its behalf, irrespective of when he became such, can maintain it. The fact that a stockholder is the nominal plaintiff does not in any manner enlarge the rights and remedies of the action. Turner v. Markham, 155 Cal. 562, 102 P. 272. But, where the cause of action exists in favor of the corporation, a stockholder thereof may maintain it even though he acquired his shares after the fraud complained of. Harvey v. Meigs, 17 Cal. App. 353, 119 P. 941; Beal v. Smith, 46 Cal. App. 271, 189 P. 341. Federal New Equity Rule No. 27 and the decisions of the federal courts based thereon requiring the plaintiff to have been a shareholder at the time of the transaction complained of, or that his share must have devolved on him by operation of law, is not the law of this state. 6a Cal. Jur. 818, n. 13.

[3] Respondent next contends that appellants, having waited approximately one year and five months after the date they allege discovery of the fraud before commencing the action, are guilty of laches. Here again he avoids the real question, for, if the statute has not run, no presumption of laches arises from the mere fact of delay (Haynes v. Indio Levee District, 46 Cal. App. 436, 189 P. 475), in the absence of an affirmative showing of prejudice resulting therefrom.

We are, however, of the opinion that the action is barred by the statutes of limitation pleaded and that the demurrer was therefore properly sustained. The fraudulent representations and the conveyance complained of are alleged to have occurred on October 16, 1918, and the action was commenced on February 3, 1930, over eleven years later.

[4] The third, fourth, and fifth causes of action being for relief, by way of monetary compensation, on the ground of fraud, subdivision 4 of section 338 of the Code of Civil Procedure applies. The period of limitation therein provided is three years from the date of discovery by the aggrieved party of the facts constituting the fraud.

In Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268, containing an exhaustive review of the pertinent authorities, the rules of pleading governing the statement of a cause of action for fraud committed more than three years prior to the commencement of suit are clarified and definitely stated. These rules require that the pleader must not only show (1) that he did not discover the fraud until within three years next before the action was begun, and (2) that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but (3) he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge so that the court may determine from the allegations of the complaint whether the discovery was within that period.

[5, 6] Applying the foregoing to the pleading in the present case, it is apparent that appellants have not met the third requirement. In justification of the delay in bringing the action, it is pleaded merely that, since the transfer of the properties and until September 4, 1928, the defendants actively prevented the plaintiffs and other stockholders of the corporation from ascertaining or discovering or in any wise learning of said representations and the falsity thereof, and by reason thereof plaintiffs and the other stockholders did not discover the falsity of said representations or that said representations had been made until on or about the 4th day of September, 1928. Neither the circumstances under which the fraud was discovered nor the means whereby an earlier discovery was prevented are stated. As said in Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810: "Whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded."

[7] Appellants seek to bring this case within the rule announced in Reid v. Robinson, 64 Cal. App. 46, 220 P. 676, that, where the control of a corporation lies in a board of directors, all the members of which are personally concerned in the fraud, and where it would follow that no action could nor would be instituted by the corporation for redress of its wrongs, an action by a stockholder of the corporation will not be barred by reason of the lapse of time provided by the statute. The allegations of the amended complaint do not, however, warrant the application of this rule. It is not alleged that the members of the board of directors, other than the respondent and his wife, were parties to the fraud. The allegation, upon which appellants rely in this regard, that respondent dominated the corporation, is limited to the date of the alleged fraudulent acts and does not refer to the period subsequent thereto.

[8, 9] The first and second so-called causes of action are, however, for the recovery of real property, and subdivision 4 of section 338 of the Code of Civil Procedure does not apply. The rule stated in Murphy v. Crowley, 140 Cal. 141, 73 P. 820, 821, that "although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-years limitation contained in section 318 [Code of Civil Procedure]" has been repeatedly approved and followed in a long line of authorities, an enumeration of which may be found in 16 Cal. Jur. 438, n. 12. The provisions of section 318 are pleaded by way of demurrer to that portion of the amended complaint designated as the second cause of action. This section provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action." It affirmatively appearing from the amended complaint that respondent has been in possession of the property since the date of the transaction complained of, over eleven years before the action was commenced, the demurrer thereto was properly sustained on this ground. Whether a concealment of the fraud and delayed discovery thereof would, where properly pleaded, operate to extend the time of commencement of the period of limitation prescribed in section 318, is not necessary to here determine in view of our conclusions as to the inadequacy of the pleading in that regard.

[10-12] That the so-called first cause of action is in the simple form of quiet title action, containing only the usual averments as to ownership and claim adverse thereto, and was not specifically demurred to on the ground of the statute of limitations is of no

importance, for, although designated as separate causes, those portions of the amended complaint entitled first and second causes of action state but one cause of action. A complaint to quiet title and, as incidental thereto, to have declared void the instrument under which the defendant asserts title, states but a single cause of action. Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am. St. Rep. 118. Where, as here, but one cause of action is stated, and that portion of the complaint designated as a second cause of action is not a real attempt to state a second transaction intended as an independent ground for plaintiff's suit, but is only a detail of matters tending to show the extent, form, and nature of the relief to which plaintiff is entitled upon his single cause of action, the words designating it a separate cause of action will be disregarded. Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97.

[13] Appellants call attention to their allegations that the action of the board of directors in conveying the property was void by reason of the fact that the meeting at which such action was taken was not held on the regular meeting date as provided by the by-laws of the corporation and that no notice thereof was given as provided by law. They take the position that aside from the allegations as to fraud these allegations alone are sufficient to sustain the cause of action. The allegations do not, however, sufficiently show the invalidity of the action of the directors. From aught that appears in the pleading, all of the directors were present and participated in the meeting, and there is no averment negativing a waiver of notice authorized by section 320a of the Civil Code in effect at that time.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

135 Cal.App. 445

HEINFELT et al. v. ARTH.

Civ. 1430.

District Court of Appeal, Fourth District, California.

Nov. 24, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

1. Pleading ⇐129(1).

Allegations of complaint are admitted, where not denied in answer.

2. Partnership ⇐191.

Partnership, as such, cannot bring and maintain action.

3. Brokers ⇐42.

Individuals duly licensed as real estate brokers and constituting all of members of partnership may bring and maintain action for commission earned while acting as partners, notwithstanding partnership, as such, has not been separately licensed (Gen. Laws 1931, Act 112, §§ 1, 8, 9, 20).

4. Brokers ⇐42.

Individually licensed partners *held* not precluded from recovering real estate commission because principal's written authorization named partnership, which was not separately licensed, where partners had recorded and published notice of fictitious name under which they operated (Gen. Laws 1931, Act 112).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by P. A. Heinfelt and another, copartners doing business under the fictitious firm name and style of the National Realty Company, against Fred Arth. Judgment for defendant, and plaintiffs appeal.

Reversed.

Swing & Swing, of San Bernardino, for appellants.

Burton E. Hales, of Redlands, for respondent.

BARNARD, Presiding Justice.

[1] The plaintiffs brought this action to collect a real estate commission alleged to have been earned by them. The court denied recovery on the sole ground that the copartnership, as distinguished from the individuals constituting the same, was not separately licensed under the California Real Estate Act (Deering's General Laws 1931, vol. 1, p. 25, Act 112). The complaint alleged that the plaintiffs P. A. Heinfelt and M. G. Hoffman were copartners doing business under the fictitious firm name and style of National Realty Company, and that they had duly recorded and published the required certificate of such fictitious name. It was further alleged that each of the plaintiffs was duly licensed as a real estate broker. These allegations were not denied in the answer, and were therefore admitted. Vickery v. Valdez, 113 Cal. App. 135, 298 P. 151. The only findings were to the effect that the National Realty Company, as a copartnership, was not alleged and proved to have been licensed as a real estate broker. The plaintiffs have appealed upon the judgment roll alone, and the only question requiring our consideration is whether two individuals who have been duly licensed as real estate brokers and who constitute all of the members of a copartnership may bring and maintain an action for the collection of a commission earned by them while acting as such copartners, when the copartnership, as such, has not been separately licensed.

The respondent relies upon certain language used in the opinion in Wise v. Radis, 74 Cal. App. 765, 242 P. 90. The language referred to is clearly dicta, as the question now before us was not involved in that case, and the court expressly refrained from passing upon the same.

[2, 3] Section 1 of this act provides that it shall be unlawful for any person, copartnership, or corporation to act as a real estate broker without first obtaining a license. So far as a copartnership is concerned, this provision contains an element of uncertainty and indefiniteness, since a copartnership is not a separate entity, and cannot, in itself, act as a broker or in any other capacity except as it acts through one or more of its individual members. Section 20 provides that no person, copartnership, or corporation shall bring or maintain an action for the collection of a real estate commission without alleging and proving that such person, copartnership, or corporation was at the time a licensed broker or salesman. The uncertainty referred to is here further complicated by the fact that a copartnership, even if directly licensed, could not, as such, maintain such an action. While a partnership, as such, may be sued in this state, it may not bring and maintain an action, and in any action arising from a transaction in which the partnership has been engaged the individual members thereof are the real plaintiffs, irrespective of the name under which they operate, Ginsberg Tile Co. v. Faraone, 99 Cal. App. 381, 278 P. 866. If a partnership has no existence apart from its members, cannot act as a broker except through its members, cannot bring an action except in the name of its members, and, if all its acts and rights are the acts and rights of its members, it would seem reasonable that, where the validity of any such acts depends upon the existence of a license, the essential thing would be the existence of a license applying to and covering each partner. Properly construed, we think the Real Estate Act recognizes this and provides for it.

Assuming that a copartnership must in some way be licensed as a broker, the question remains as to how this may be done under the terms of the act. Section 9 relates to the manner of making application for a license. While it contains several references to a copartnership, it is at once apparent that its provisions, in so far as a copartnership is concerned, are most vague. It would be obviously impossible for a copartnership, as such, to furnish some of the things required of an applicant which, of necessity, would have to be furnished by, and would have to relate to, the individual members of the partnership. While the act seems to provide that a license may be issued to a partnership with the definite limitation that all members who are to act for the partnership shall in some way be licensed, the act contains neither a provision that this is the only way a partnership can be licensed nor any provision forbidding individuals who are fully licensed from acting in partnership with each other. In section 8 certain limitations on a broker's license are set forth. While these are designed to, and they do, limit any license that may be granted to a corporation or a partnership so that the same may not apply to an unlicensed person or permit such a person to act under the same or profit thereby, it is significant that they contain no limitation upon a license that is issued to an individual. In so far as the effect of a license is concerned, the act places no limitation upon an individual who may be licensed other than that he may not share his compensation with an unlicensed person. If the act is to be construed in such a manner as to prevent two individuals who are licensed without limitation, other than the one referred to, from working in partnership with each other, this result must arise from inference only. If the respondent's position is correct, although these two plaintiffs were licensed without limitation, they would in effect be unlicensed the moment they agreed to work in partnership even for one transaction only, unless they secured another license in the firm name, which in turn would be worthless unless each were again in some way licensed. We think we are not required to give to the act so unreasonable a construction. If the Legislature ever intended to prohibit two individuals who have been given an unlimited license from working together in partnership, it should have plainly said so, and such a result should not have been left to mere inference.

In Riley v. Chambers, 181 Cal. 589, 185 P. 855, 856, 8 A. L. R. 418, the court said: "Now, the single primary purpose of the act is to require of real estate brokers and salesmen that they be 'honest, truthful and of good reputation.' All of its provisions, including the requirements of a license, are but incidental to this single purpose and designed to accomplish it."

The entire act discloses an intent to accomplish its purpose of protecting the public in the matter of the truthfulness, honesty, and good reputation of real estate brokers and salesmen by requiring that every individual who acts as a real estate broker and benefits thereby shall be licensed. It discloses a definite intention to prevent unlicensed persons from acting as brokers and benefiting thereby under cover of a partnership, and to this end contains elaborate provisions to prevent any person from directly or indirectly engaging in the business without a license.

We think it is equally clear that it was not intended to limit the activities of any broker who is actually licensed as such and who has fully complied with the terms of the act,

or to prevent him from working in partnership with another broker who is also duly licensed. Where each of two partners are already licensed, it would be a mere matter of form to require a separate license in the name of the partnership. This would accomplish nothing useful in carrying out the purpose of the act, and would, in fact, call for merely a double license for persons whose qualifications have already been favorably passed upon. Such a result can be held necessary only by an inference based upon an unnecessarily technical construction of the act, would be in many respects inconsistent with both the purpose of the act and the language used, and is not what the Legislature can reasonably be supposed to have intended. The essential requirement of the act is that every person, natural or artificial, operating as a real estate broker, must obtain a license so to do. In the absence of a positive provision to the contrary, it is in accord with both the letter and the spirit of the act to hold that fully licensed individuals may work in partnership with each other without obtaining another license in the firm name, the only possible effect of which would be to license the same individuals who are already licensed. The fact of partnership is only incidental and cannot interfere with the rights of its members as licensed brokers. In our opinion, a partnership is licensed as a real estate broker within the meaning of this act when each member of the partnership is licensed, whether through a general license or in the other way apparently authorized by the act although vaguely provided for, that is, through one in the name of the partnership, applying to the persons named therein, and to be supplemented by other licenses for those members not named therein. This action is by all of the individuals composing the copartnership and, each being licensed, the action can be maintained without alleging or proving a separate license in the name of the partnership.

[4] The evidence is not before us, but, if the fact be that the written authorization named the National Realty Company instead of naming the plaintiffs individually, that fact would make no difference in this action. The appellants had recorded and published notice of the fictitious name under which they operated, and the respondent not only had constructive notice of their identity, but he admitted in his answer that he authorized these plaintiffs to sell or exchange the property described in the complaint. While the appellants are under the necessity of showing a written authorization of employment, not only has the respondent admitted such an authorization here, but it is well settled that a memorandum only is sufficient, that a complete contract is not required, and that the identity of the agent may be shown by parol. Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114.

The judgment appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 789

P. A. HEINFELT and M. G. Hoffman, Copartners, Doing Business Under the Fictitious Firm Name and Style of National Realty Company, Plaintiffs and Appellants, v. Fred ARTH, R. W. Plummer, and John J. Geib, Defendants and Respondents.

Civ. 1431.

District Court of Appeal, Fourth District, California.

Nov. 24, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Swing & Swing, of San Bernardino, for appellants.

Burton E. Hales, of Redlands, for respondents.

BARNARD, Presiding Justice.

In so far as they relate to the only question to be here decided, the facts in this case are similar in all respects to the facts in the case of P. A. Heinfelt and M. G. Hoffman, Copartners, Doing Business Under the Fictitious Firm Name and Style of National Realty Company, v. Fred Arth (Cal. App.) 27 P. (2d) 420, this day decided, and the question of law presented is identical with the question decided in that case. Upon authority of the case referred to and for the reasons there given, the judgment here appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.

ALLEN v. McCOY, Sheriff, et al.*

Civ. 4991.

District Court of Appeal, Third District, California.

Nov. 29, 1933.

As Modified on Denial of Rehearing Dec. 29, 1933.

1. False Imprisonment ⇐31.

In false imprisonment action by one who had been arrested because of mistaken identity, facts showed sheriff had "probable cause" to believe plaintiff was criminal sought for kidnapping of officer so that sheriff was not liable.

Facts showing "probable cause," which is suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true, was in effect that officer seeking to arrest occupants in automobile had been kidnapped by such occupants, and that in pursuit of their automobile automobile was overturned and wrecked within six miles of cabin where plaintiff was arrested, that occupants, including woman with one shoe, escaped, and that on following afternoon officers discovered nearby foot tracks of two men and woman having one shoe, and that they traced such tracks to gate entering premises where deserted cabin stood, and that when plaintiff appeared on porch and was commanded to surrender he immediately disappeared inside the cabin.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

2. False Imprisonment ⇐13.

Officer is not liable for false imprisonment for arrest without warrant of one whom officer has reasonable grounds to believe is guilty of crime.

3. Appeal and error ⇐842(2).

Question of probable cause for officer to believe that one arrested without warrant is guilty of crime being required to be determined as matter of law from facts and circumstances, reviewing court is not bound by trial court's conclusions on question.

4. False Imprisonment ⇐7(3).

Arresting officer's failure to inform plaintiff of charge against him or authority to make arrest did not render officer liable for false imprisonment, where officer and his posse were in continuous pursuit of criminal sought until arrest of plaintiff by mistake 16 hours after kidnapping occurred (Pen. Code, § 841).

Failure to inform plaintiff of charge and officer's authority under Pen. Code, § 841, requiring arresting officer to give such information except where person to be arrested is pursued immediately after commission of crime, did not render sheriff liable for damages for false imprisonment, since evidence disclosed that, although 16 hours elapsed after kidnapping before arrest of plaintiff, that sheriff and his posse continued to search for kidnappers all night and during entire forenoon of following day until they discovered tracks of fugitives on afternoon of following day, and that they then followed tracks to place where plaintiff was arrested, so that pursuit never ceased until arrest occurred.

5. False Imprisonment ⇐7(3).

Sheriff was not liable for false imprisonment because not notifying plaintiff of official capacity before making arrest, where official capacity was known from clothes and badges of men in party, or should have been known by exercise of ordinary reason (Pen. Code, § 841).

6. False Imprisonment ⇐7(3).

Mere departure from strict statutory method of making arrest does not necessarily impose upon officer liability for false imprisonment (Pen. Code, § 841).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by William O. Allen against Charles J. McCoy, as Sheriff of the County of Yuba, State of California, and another. From a judgment for plaintiff, defendants appeal.

Reversed.

Ray Manwell and Rich, Weis & Carlin, all of Marysville, for appellants.

W. E. Duncan, Jr., and George F. Jones, both of Oroville, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment rendered against them pursuant to a verdict which was returned in a suit for false imprisonment.

In response to a message by telephone from the sheriff of Sacramento county to arrest two men and a woman belonging to a well-known criminal organization known as the "Weston Gang," who were fleeing in an automobile, the sheriff of Yuba county sent Merrill Le Boeuf, a city police officer, out to intercept them. The officer stopped the car in Marysville about 10:30 p. m., Saturday, October 8, 1932. It contained the three fugitives. Upon a command to surrender, the men got out on opposite sides of the machine. Armed with a rifle, one of them walked around the rear end of the car and commanded the officer on penalty of death for re-

*Rehearing denied 28 P.(2d) 56.

fusal to do so to get into the rear seat of the automobile. He complied with the order. The bandits promptly re-entered the car, and fled with the police officer as their prisoner. One of the men sat by his side armed with a loaded rifle. During the brief flight which followed, his life was repeatedly threatened. There is little doubt he was in serious danger of being killed. The fugitives drove north toward Oroville. When they reached a point near Gianella's Corners, they passed the machine of Sheriff Toland of Butte county, which was parked by the roadside with the lights extinguished. He had also been informed of the flight of the criminals, and was lying in wait for them. The sheriff immediately gave chase. Observing the pursuit of the sheriff's machine, the speed of the fugitives' car was greatly increased. After traveling at a terrific rate of speed for about a mile, the foremost car was turned at an acute angle in an attempt to take an unfrequented side road. The car was overturned and wrecked. On account of the darkness, the three fugitives escaped in the adjacent timber and brush. In the casualty, the woman lost a shoe. In their haste to escape, the police officer was left in the wreck. This accident occurred about midnight. When Toland arrived the officer was just emerging uninjured from the wreckage. A hasty examination of the wrecked car disclosed the presence of a loaded and cocked rifle, some cartridges, several robbers' masks, a bottle of whisky, the lost shoe, and other paraphernalia. After a fruitless search for the fugitives, the officers hastened to Oroville and notified Sheriff McCoy of the kidnaping of Police Officer Le Boeuf and of the escape of the bandits. The defendant McCoy promptly summoned three of his deputies, and in company with two other highway patrolmen and a forest ranger, they continued to search for the fugitives all night and during the entire forenoon of the following day. No trace of them was found.

About 1 o'clock the following day the officers all visited the scene of the wreck once more for the purpose of making a more detailed examination of the premises. They were then told of the presence of foot tracks along a dirt road several miles away near the Simpson ranch. The entire posse, including the sheriff McCoy, his deputies, and a number of other men, immediately went, in four or five automobiles, towards the Simpson ranch. They soon discovered the tracks of the fugitives going southerly along a dusty dirt road. The tracks were positively identified as those of the bandits from the fact that they included those of one individual having small feet, with one shoe missing. These tracks were closely examined, identified, and followed for a distance of more than a mile to a gate leading into the Simpson ranch. While they were examining these tracks, before reaching the gate, a member of the party by the name of Hunt, who lived in that neighborhood, told Sheriff McCoy he would find his parties in an old abandoned cabin which stood a distance of about 500 feet from the road among the trees; that a couple of strangers had been seen in there during the past few days. Several witnesses testified these foot tracks led directly to the gate. Sheriff McCoy said he just assumed the fugitives were staying in the cabin and that he did not attempt to trace the tracks beyond the gate. Half a dozen witnesses testified regarding these facts. All agreed that the footprints included those of one individual without a shoe. Every one in the party assumed they had succeeded in locating the fugitives. It appears to have been mutually conceded by all that the fugitives were probably concealed in the old cabin. Some advised surrounding the field and approaching the cabin from various points. The sheriff decided that they would go through the gate and directly to the cabin. The party consisted of from ten to fifteen individuals, including the sheriff, several deputy sheriffs, one or more police officers, two traffic officers in uniform, a forest ranger in his khaki clothes, together with several other persons. The sheriffs and deputies wore their badges of office in plain view. The traffic officers also wore their badges together with the belts and revolvers which they were accustomed to wear. The posse filed through the gate in procession with at least four automobiles, parking their cars at different points within 75 to 100 feet of the cabin, which was a small board shack 12 by 16 feet in size with walls about 10 feet in height to the point of the eaves. The building had but one small window on the side, which was boarded over on the outside. A single door opened at the end fronting toward the gate. In front of this door there is a small outside porch about 7 feet in size, which is elevated 3 feet above the ground. It was 3 o'clock in the afternoon of the day following the kidnapping of the officer when the posse entered the gate and surrounded the cabin.

The plaintiff and his partner had been occupying this cabin for several days past. They were strangers in that community. They had lately driven through from Arizona. Their automobile was parked near the cabin under a tree. The plaintiff's companion was absent taking a bath in the stream near by. The plaintiff testified that he was an honorably discharged soldier of the World War; that he had suffered shell-shock and was extremely nervous on that account; that he sat in the cabin writing a letter when the posse arrived. He looked out through the door and saw at least three automobiles and a number of men coming through the gate; he continued writing his letter, expecting them to call at the door. After parking their cars, Sheriff McCoy, armed with a short shot-

gun loaded with buckshot, and his two deputies, Wilcoxon and Barrett, each armed with rifles, all three of whom had their official badges plainly displayed, were the first to reach a point 15 or 20 feet from the door of the cabin. At the same time, Traffic Officers Richardson and Couch, in full official uniforms, and armed with revolvers, approached a short distance behind the defendant McCoy. At that moment the plaintiff appeared on the front porch to ascertain the unusual occasion of the visit of this group of men. Half a dozen witnesses testified that McCoy promptly commanded him to "put up your hands," with the further declaration, "We are officers."

The plaintiff denies that he was informed they were officers. One other witness corroborates him in that regard. Instead of throwing up his hands, the plaintiff immediately disappeared through the doorway of the cabin. Several witnesses said "he ducked into the cabin." The plaintiff said he was surprised and frightened and fell backward into the open door. After demanding that the plaintiff and his associates come out and surrender, Sheriff McCoy fired three charges of buckshot toward the cabin. One charge of shot took effect in the boards which covered the window at a point 5 feet above the floor. Another charge took effect in the side of the building 4½ feet above the floor. The third charge was fired into the ground at the bottom of the building. Two rifle shots were fired into the gable or roof of the building. The officers said they were trying to fire their guns so as to avoid hitting the inmates of the cabin, but with the purpose of frightening them to induce their surrender. Several witnesses testified that the officers repeatedly demanded the surrender of the inmates of the cabin, with the statement that they were officers. During the bombardment the plaintiff lay upon the floor of the cabin. He claimed to have been hit by a stray shot. Several witnesses examined his body and his undershirt to determine whether he had been actually hit. A red spot was found on his side, which appeared to be a mere pimple. There was no blood present. An examination of his shirt disclosed no evidence that it had been penetrated by a shot. The shirt was not presented in court. The evidence is very persuasive that he was not hit by a shot. He admitted that he was not hurt "to amount to anything."

After the several shots had been fired, the plaintiff again appeared on the front porch, and while one of the officers kept him covered with a gun, the defendant McCoy placed handcuffs on his wrists. The officers repeatedly demanded that his companions should come out and surrender. He was asked, "Where is the woman?" The plaintiff told them there was no woman in the cabin. He said his partner had gone to the stream to swim. After his arrest, the cabin and his automobile which was parked under a tree behind the building were immediately searched. Within a few minutes the sheriff returned from his inspection of the plaintiff's car and declared they had made a mistake in arresting the plaintiff. After talking with him a few moments, the handcuffs were removed. The sheriff apologized for the mistake, and explained that they were pursuing three desperate criminals whom they had tracked to that vicinity. The plaintiff assured the sheriff that he was all right and that no harm had resulted. They laughed good naturedly, shook hands, and parted.

This suit for false imprisonment was subsequently commenced. The cause was tried with a jury. A verdict of $500 was returned against the defendants. A judgment for that amount was accordingly rendered. From that judgment the defendants have appealed.

[1] The only question which is involved in this appeal is whether the sheriff arrested the plaintiff in good faith, actually satisfied, or with probable cause and good reason to believe, that he was one of the criminals whom they sought for the kidnaping of the police officer. "Probable cause" is defined as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." Michel v. Smith, 188 Cal. 205, 205 P. 113, 116; Murphy v. Murray, 74 Cal. App. 731, 241 P. 938. Without any question of a doubt, the sheriff did firmly believe the plaintiff was one of the fugitives who had kidnaped the policeman, and whom they had tracked to the very entrance of the premises where the deserted cabin stood. Every act and utterance of the arresting officers indicates that not only did the sheriff honestly believe they had apprehended one of the criminals they were pursuing, but every other individual in the posse also believed that fact. They had been notified by the sheriff of Sacramento county to look out for an automobile with an Arizona plate, containing two men and a woman, and arrest them. The sheriff dispatched the policeman, Le Boeuf, who succeeded in locating them. In an effort to place them under arrest, he was kidnaped and taken away in their machine. In pursuit of their machine by the sheriff of Butte county it was overturned and wrecked within six miles of the cabin where the plaintiff was arrested. The fugitives managed to escape. The woman disappeared with the loss of one shoe, which was found in the car. It is true the defendant McCoy did not then know that they belonged to the notorious Weston gang of outlaws, but an examination of their wrecked car disclosed the fact that they were robbers and dangerous criminals. The officers found in their machine a cocked gun with which the kidnaped officer was held prisoner, and several masks which are used

by professional robbers. The pursuit of the fugitives continued without cessation throughout the night and the following forenoon. In the afternoon they discovered in the dust of a dirt roadway near by the foot tracks of two men and a woman having one shoe off. They traced these tracks directly to the gate entering the premises where the deserted cabin stood. No inmate of the cabin was in sight. When the plaintiff did appear on the front porch and was commanded to surrender, he immediately disappeared inside the cabin. Apparently every individual member of the posse thought they had discovered the kidnapers whom they were pursuing. Certainly the sheriff, McCoy, had reasonable cause to honestly believe the plaintiff was a member of the criminal gang which he sought to apprehend. Not a single circumstance disclosed by the record indicates that any one in company with the sheriff doubted they had captured one of the kidnapers of the police officer. It was a clear case of mistaken identity. The plaintiff was innocent of any wrong.

[2, 3] An officer is not liable for false imprisonment for the arrest without a warrant of a person whom he has reasonable grounds to believe is guilty of a crime. The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case. On appeal, this court is therefore not bound by the conclusions of the trial court in that regard. Michel v. Smith, 188 Cal. 199, 206, 205 P. 113; Murphy v. Murray, 74 Cal. App. 726, 730, 241 P. 938; Mackie v. Ambassador Hotel, etc., Corp., 123 Cal. App. 215, 220, 11 P.(2d) 3; 25 C. J. 471, § 36; p. 550, § 159.

[4] It is contended the arresting officer failed to inform the plaintiff of the charge against him, or of the authority to make his arrest, as required by the provisions of section 841 of the Penal Code. That section provides that: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

It is asserted the circumstances of this case do not fall within the exception mentioned in the foregoing section, exempting an officer from the necessity of declaring his authority to make the arrest, when one "is pursued immediately after the commission," of an offense, since sixteen hours had elapsed from the time of the kidnaping until the plaintiff was handcuffed. We are of the opinion there is no merit in this contention. The sheriff and his posse were in actual continuous pursuit of the kidnapers from the time they were notified of the crime until the plaintiff's arrest. Several hours of darkness intervened. They did not discover the tracks of the fugitives until the afternoon of the following day. Under the circumstances of this case we have no hesitancy in saying the pursuit never ceased until the arrest of the plaintiff occurred.

[5] Moreover, the authority of the officer and his intention to make the arrest were sufficiently indicated. Several witnesses testified that the defendant McCoy said to the plaintiff, "Throw up your hands, we are officers." The plaintiff denied that he was told they were officers. Assuming there is a substantial conflict of evidence in that regard, there was no necessity of telling him they were officers when he could plainly observe that fact for himself. People v. Pool, 27 Cal. 572; State v. Evans, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; 5 C. J. 419, §§ 49, 50. An officer is not obliged to notify the accused of his official capacity before making an arrest, when it is known to the accused or when by the exercise of ordinary reason he should have known it. In commenting on the effect of a statute requiring an arresting officer to disclose his identity and purpose at the time of taking an accused person into custody, it is said in 5 C. J. at page 420: "Some decisions and statutes in terms require the officer in making an arrest to give notice of his authority, intention, and the cause of the arrest; but this probably means no more than that such notice must be given at the time or upon the occasion of the arrest, and not necessarily before taking the person into actual or potential custody. It is sufficient if such notice is given upon the occasion of the arrest, at the earliest reasonable opportunity."

[6] The plaintiff must have known he was being arrested by officers. One sheriff and two deputies faced him at a distance of 15 or 20 feet with their official badges plainly displayed. Two highway traffic officers, in full uniform, were present with their badges displayed, and their belts and pistols in plain view, only a few feet behind the sheriff. The plaintiff had seen several automobiles and the entire group of men enter the gate. It is unreasonable to concede he was warranted in believing he was the victim of a band of robbers. Bandits do not travel in such imposing processions and garb to hold up remote dilapidated cabins in the hope of securing loot. There was no violation of the provisions of section 841 of the Penal Code in making the arrest in this case. Moreover, the mere departure from the strict statutory method of making an arrest as prescribed by that section does not necessarily impose liability upon an officer for false imprisonment. While all innocent persons should be adequately protected, with the alarming prevalence of kidnaping and crime

in many modern forms, our peace officers should not be discouraged in the performance of their duties by too technical a construction of legal procedure. The chief question in the present case is whether the sheriff in good faith exercised reasonable care and honestly believed he was performing his official duty in arresting one of the kidnapers he was engaged in pursuing. We are perfectly satisfied he did, and that, under the undisputed facts of this case, as a matter of law he is not liable for false imprisonment.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

PEOPLE v. GAINES.*

Cr. 2329.

District Court of Appeal, Second District, Division 1, California.

Nov. 24, 1933.

Hearing Granted by Supreme Court Dec. 21, 1933.

1. Criminal law ⇐649(2).

Refusing to grant recess until next morning, so that accused might have benefit of examination by handwriting expert of exhibits introduced by prosecution *held* not error, where evidence which accused sought to rebut was introduced October 13, 1932, and request for recess was made October 20, 1932, and court granted recess until 2 p. m.

2. Criminal law ⇐586, 1151.

Application for continuance is addressed to discretion of trial court, whose ruling will not be reviewed except for abuse of discretion.

3. Criminal law ⇐491(1).

In forgery prosecution, handwriting expert's testimony as to characteristics of handwriting of accused and alleged victim *held* properly disallowed, where expert testified that he had not reached conclusion whether documents had been written by accused or by victim, though he also testified that he had reached conclusion as to characteristics of handwriting.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Jack Gaines was convicted of forgery and grand theft, and, from an order denying motions for new trial, he appeals.

Affirmed.

Paul E. Gehres and R. C. Pardoe, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, Justice.

The appellant was tried upon an indictment containing ten counts charging him with the offense of forgery, and upon two informations containing ten counts charging him with the offense of grand theft. From judgments of convictions on all counts charged in said indictment and informations, and from the orders of the trial court denying his motions for a new trial, appellant prosecutes this appeal.

Defendant was charged with the theft of $9,500 in money, the personal property of Lola Carr Harman, real property of the value of $10,000 belonging to said Lola Carr Harman, and stock of the J. C. Penny Company of the value of $92,716.25, also the property of said Lola Carr Harman. In addition, he was charged with the theft of $350 in money, the property of C. M. and Ruth Bowler. The indictment charged the forging of the name of Lola Carr Harman to ten stock transfers and assurances and letters of attorneys, and the revocable power to receive and transfer certain stock certificates of the J. C. Penney Company.

As a defense, appellant claimed that he had formed a partnership with Mrs. Harman for the purpose of conducting and maintaining a general brokerage and real estate business, and that, in pursuance of that association and relationship, appellant was to continue his already established business as a real estate broker, but on a more expanded and extensive scale, due, in the main, to the fact that the said Lola Carr Harman had and did agree to furnish large sums of money to be used in the conduct of the business of making property loans, and that all profits—the result of said loans—were to be shared equally by appellant and said Lola Carr Harman. In her testimony, the said Mrs. Harman denied the existence of such relationship, and charged that appellant at various times had forged her name and signature to certain documents, instruments, and securities, and, by reason of such forgeries, appellant secured divers sums of money and converted the same to his own personal use.

It is contended by appellant that, since he "admitted the receipt of the money and property in question, as alleged in the counts for grand theft and upon which he was being tried, and advanced no theory or defense other than his contention that he did so, not with a felonious intent, but by virtue of an agreement between himself and the said Lola Harman that the property should be used in their common business enterprise, then the para-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 34 P.2d 146.

mount and vital issues of fact of the cause were: 1. Did such an agreement exist as between appellant and the said Lola Harman, and 2. Did the appellant forge the signatures to the several documents in question or did the said Lola Harman actually sign them as contended by appellant."

Predicated upon this theory, appellant contends that the trial court erred in refusing to grant defendant's handwriting witness sufficient time to complete his investigation of the handwriting in issue before offering his testimony—such testimony to be offered for the purpose of rebutting expert evidence which had been given by witnesses on behalf of the people in an effort to prove that forgery had been committed by appellant. Appellant also alleges error on the part of the trial court in sustaining the people's objection limiting scope of expert testimony; in refusing to give certain instructions requested by defendant; and in refusing to direct the jury to return a verdict in favor of defendant.

[1] The trial of this case was begun in the superior court on October 11, 1932; on October 13, three handwriting experts testified for the prosecution, at which time certain exhibits involving both the handwriting of the defendant and the handwriting of the complaining witness were introduced in evidence. On October 20, 1932, counsel for defendant asked the court for a recess until the following morning "so that we can have the benefit of the examination by a handwriting expert." The court refused this request, but did grant a recess until 2 o'clock of the same day, at which time the attorney for defendant called as his witness, Milton Carlson, handwriting expert, and by his testimony sought to rebut evidence given by handwriting experts, who had previously testified in favor of the prosecution. Since the testimony which appellant sought to rebut was given on October 13, 1932, we are of the opinion that sufficient time intervened between that date and October 20th, the date upon which Mr. Carlson was called, within which he could have made an examination of the exhibits referred to, and that no error was committed by the trial judge in refusing to grant a recess until the next day.

[2] "'It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is therefore better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable and not an arbitrary discretion, its action will not be disturbed.' 5 Cal. Jur. 968." People v. Collins, 195 Cal. 325, 332, 333, 233 P. 97, 100. There is nothing in the record that suggests the exercise of an arbitrary discretion of the trial court in refusing to grant the recess here referred to.

[3] Appellant's contention that the trial court erred in limiting the scope of expert testimony is without merit. The handwriting expert, when asked if he had come to any conclusion regarding the questioned documents, particularly as to whether or not they had been written by defendant or by Mrs. Harman, answered, "As a definite conclusion, I have not." A further question as to whether or not he had come to any conclusion with regard to the characteristics of the handwriting of either party was answered in the affirmative. Thereupon he was asked by counsel for the defendant to point out to the jury the various characteristics in the respective handwritings which would indicate, or would not indicate, that Mrs. Harman may have been the author thereof. This was objected to by the prosecution on the ground that the witness had already stated he had not come to any conclusion about any questioned document in the case, which objection was sustained by the court. In sustaining further objections to the same line of questioning, the court said (Tr. p. 729): "A witness is entitled, under the exception of the rule to express his opinion. It is not a proper function of an expert to come here and point out a lot of similarities, and dissimilarities, without expressing an opinion. Anyone can do that. Objection sustained."

We find no merit in appellant's contentions that the court erred in refusing to give to the jury certain instructions requested by defendant, nor in refusing to direct the jury to return a verdict in favor of defendant. So far as appears, the instructions given by the court to the jury covered the same subjects, and covered them correctly. Appellant should have pointed out the omissions, if any. Rule VIII, subd. 3.

The judgments of conviction are affirmed. The orders denying motions for new trial are affirmed.

I concur: CONREY, P. J.

HOUSER, Justice.

I dissent. My disagreement with the conclusion reached by my associates arises from the persistent refusal by the trial court, in response to a question propounded by counsel for defendant, to permit a witness who theretofore had qualified as an expert on the subject of handwriting, but who stated that, because of lack of sufficient time within which to make a proper examination of the several examples of handwriting in evidence in the action, he could not express "a definite conclusion" or opinion with reference to the identity of the person who had executed such exemplars—to "point out to the jury the vari-

ous characteristics in the respective handwritings which indicate, or do not indicate, that Mrs. Harman (the prosecuting witness) may have been the author thereof." And in that connection attention is directed to the following questions as examples of the many attempts that were unsuccessfully made by counsel for defendant to indicate some of the "various characteristics" in the handwriting of the prosecuting witness, and thereby to introduce evidence which at least was calculated to establish a reasonable doubt regarding the guilt of defendant, to wit:

"Q. By Mr. Bird: Mr. Carlson, I will call your attention to People's Exhibit 9, consisting of the photographic picture of fifteen signatures, the top ten being the name 'Lolo Carr Harman,' on People's Exhibit 5, a questioned document or a series of questioned documents, and the bottom five being the same name as it appears in People's Exhibit 6. I call your attention now to the capital letter 'L' as it appears on the lower part of Exhibit 9, and as it appears upon the five documents in Exhibit 6. I will ask you if in your examination of any of the exemplars of Mrs. Harman's handwriting you found any capital 'L's' unlike the particular five that were here shown to you. * * *

"Q. By Mr. Bird: I will call your attention to the capital letter 'L' in the various questioned documents and more particularly to the little upstroke at the end of the 'L', which I will illustrate on the blackboard, right there at the end (indicating), a kind of an upstroke at the end of the capital letter 'L', and ask you if in examining any of the exhibits offered here as exemplars of Mrs. Lola Harman's handwriting you found that she ever formed capital 'L's' in that form or with that characteristic? * * *

"Q. By Mr. Bird: Now, I want to call your attention to the power of attorney attached to certificate number NC-11879, comprising part of People's Exhibit 5, and more particularly to the finishing of the capital 'H', which appears to be in this form—kind of a snail-shell nature. I want to ask you if you found any of the 'H's' written—capital 'H's'—written by either the defendant C. Jack Gaines as you have witnessed them or by Mrs. Harman that were so written other than that one?"

In ruling upon objections interposed by the people to such line of questions, the attitude of the trial judge with reference thereto is aptly shown by the following statements made by him:

"* * * Objection sustained. He says he has not reached a conclusion, so what difference does it make if he goes on and talks about a thousand similarities or dissimilarities, of what good are they to anybody if they are of no value to him? * * * It is not a proper function of an expert to come here and point out a lot of similarities, and dissimilarities, without expressing an opinion. Anyone can do that. Objection sustained."

It thus appears that the ruling made by the trial judge was founded upon the theory that, unless an expert witness first express an opinion with reference to the existence of the ultimate fact at issue, he may not testify to any fact or facts within his knowledge as an expert upon which a decision or a conclusion upon such ultimate fact might possibly be based.

At the outset, it may be observed that the identification of handwriting is so generally regarded as a subject for the introduction of expert or opinion evidence that the citation of authority in that connection is deemed unnecessary. In fact, the propriety or the admissibility of such evidence is recognized by the provisions of two separate statutes in this state. In effect, subdivision 9 of section 1870 of the Code of Civil Procedure provides that "the opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;" may be given in evidence. And by section 1944 of the same Code it is provided that: "Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge."

By the provisions of no statute, nor by ruling of any court to which attention has been directed, may there be found any indication that in law the opinion of an expert witness regarding a fact at issue, together with the several facts upon which the opinion of the expert may be predicated, must be testified to by the same witness. Indeed, in many matters, and especially in those wherein specialists either in medicine or in surgery are frequently called as expert witnesses, the common experience of courts is that the foundational facts regarding symptoms of specific disease, or pathological conditions, are introduced in evidence by the testimony of either lay or expert witnesses; and that, based upon such assumed facts, and through the medium of a "hypothetical question," the final opinion of the specialist or the expert is given in evidence. In such circumstances, it is apparent that the foundational facts not only are separable, but actually are separated from the ultimate fact at issue, and that such foundational facts are wholly distinct from the conclusion reached with reference thereto.

To some extent treating the question here involved, in 11 Ruling Case Law, at page 573, among other things, it is said: "* * * It may be stated as a general proposition that

there are two classes of cases in which expert testimony as to the facts is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend on the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. * * * In the other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend on professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts. * * *"

And in 10 California Jurisprudence, p. 960, the following statement of the law may be noted: "In the other class are found those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts, but the conclusions to which they lead, may be testified to by qualified experts. The distinction between these two kinds of testimony is apparent. In one kind the facts are to be stated by the experts and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury. If the knowledge of the experts consists in descriptive facts which can be intelligently communicated to others not familiar with the subject, the case belongs to the first class." See, also, same volume, at page 964.

As hereinbefore has appeared, by the terms of section 1944 of the Code of Civil Procedure, "evidence respecting the handwriting may also be given by a comparison" of several writings "admitted or treated as genuine," etc. By no express language contained in the statute is it provided, nor may it properly be inferred therefrom, that before a "comparison" may be made it is necessary that the witness express an opinion regarding the result of such comparison. It is true that in the following subdivision of the same statute (subdivision 10 of section 1870), in a case in which the issue of the "mental sanity" of some person is involved, provision is made for enabling an "intimate acquaintance" to give his opinion "respecting the mental sanity of a person, the reason for the opinion being given. * * *" But no such situation is here under consideration; nor have the provisions of that statute any application to the facts here involved. It is plain that in making a "comparison" the witness should not be restricted or limited to generalities, but that, in the interest of the administration of justice, he should be privileged to attract attention to such specific details as may appear to be helpful in determining the issue. In other words, he should be permitted "to point out to the jury the various characteristics of the respective handwritings which indicate, or do not indicate" that a certain conclusion is, or may be, well founded. As is stated in 10 Ruling Case Law, at page 994: "* * * It is now generally recognized that a comparison of writings is a rational method of investigation, and that similarities and dissimilarities thus disclosed are probative, and as satisfactory in the instinctive search for truth as opinion formed by the unquestioned method of comparing the signature in issue with an exemplar of a person's handwriting existing in the mind and derived from direct acquaintance, however little, with that handwriting. If the discovery of truth is the object of evidence, it must be admitted that in doubtful cases the jury, after hearing other testimony, may be much assisted by a comparison of hands. And the court or jury in making the comparison and reaching a conclusion therefrom is held to be entitled to the aid of expert witnesses."

And again, in 11 Ruling Case Law, at page 590, it is said: "Any subject wherein a person may become specially learned or skilled is within the broad field of opinion evidence. Thus, experts may be examined to explain terms of art, and the state of art, at any given time. They may explain to the court and jury the machines, models, or drawings exhibited. They may point out the differences or identity of the mechanical devices involved in their construction. * * *" In that connection, as tending to the same effect in regard to the principle here involved, the cases of People v. Weber, 149 Cal. 325, 86 P. 671, and People v. Wilson, 14 Cal. App. 515, 112 P. 579, are in point.

In Rogers on Expert Testimony, at page 303, it is said: "Expert testimony is admissible as to the characteristics of different signatures * * *"—citing Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107, 108. In the cited case it appears that the Iowa statute is a practical duplicate of section 1944 of the Code of Civil Procedure of this state. It was there held that it was proper to permit "witnesses, examined with reference to the genuineness of the signature to the note in suit * * * to testify as to the characteristics of different signatures in evidence, including that attached to the note, the comparative size and length of these signatures, whether written on or above or below the lines designed for them, the differences in certain letters, and other facts of like character." It was further stated therein that "it is insisted by appellant that the court erred in permitting this testimony to be introduced, for the reason that the facts to which it was directed did not require

the testimony of an expert, but could have been determined by the jury. There are at least two answers to this claim of appellant: * * * (2) It was confined to the signature in controversy, and to others admitted to be genuine, and was therefore authorized by section 3655 of the Code" (which, as hereinbefore indicated, is practically identical with section 1944 of the Code of Civil Procedure of this state).

To my mind, that which herein is assumed to have been error committed by the trial court was so prejudicial to the substantial rights of defendant that because thereof the judgment rendered against him should be reversed and a new trial granted.

DUNCAN v. STANDARD ACC. INS. CO.*

Civ. 8842.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1933.

Rehearing Denied Dec. 21, 1933.

Hearing Granted by Supreme Court Jan. 18, 1934.

1. Appeal and error ⇐1026.

Reviewing court cannot reverse judgment for error unless error resulted in miscarriage of justice.

2. Appeal and error ⇐1073(1).

If result of order directing clerk to enter satisfaction of judgment where judgment debtor paid amount of judgment to sheriff in garnishment proceeding was that money would go into hands of party legally entitled thereto, judgment creditor could not complain on appeal.

3. Appeal and error ⇐1073(1).

That judgment at time of judgment debtor's payment to sheriff in garnishment proceeding was not final judgment was immaterial on judgment creditor's appeal from order directing satisfaction of judgment.

4. Evidence ⇐83(7).

Where sheriff's receipt to judgment debtor recited it was payment of judgment, interest, and costs, it would not be presumed that officer's receipt was false.

5. Appeal and error ⇐882(3).

Where all interested parties actively participated in presenting all issues in proceeding to require court to enter satisfaction of judgment, party appealing could not claim he was not attempting to have determined a cause of action as in interpleader, regardless of form of pleadings.

6. Garnishment ⇐233.

Under statute allowing any debtor of judgment debtor to pay latter's creditors, judgment debtor could not pay sheriff amount of judgment in favor of four judgment creditors in garnishment proceeding against one of them, since payment could not be made before court apportioned rights of parties (Code Civ. Proc. § 716).

7. Garnishment ⇐233.

Where judgment debtor, in garnishment proceeding against one judgment creditor, paid sheriff amount of judgment in favor of four judgment creditors, parties could not compel sheriff to apportion fund and sheriff could not do so (Code Civ. Proc. § 688).

8. Garnishment ⇐233.

Where judgment debtor, in garnishment proceeding against one judgment creditor, paid sheriff amount of judgment in favor of four judgment creditors, no party could impose on sheriff duty of having courts apportion fund, since statute leaves such burden on parties interested (Code Civ. Proc. § 710 et seq.).

9. Garnishment ⇐106.

Service of writ of garnishment does not create lien on any specific property, but creates personal liability only to respond to any judgment recovered against defendant to extent of debt due from garnishee to defendant (Code Civ. Proc. § 542, subd. 6, and § 688).

10. Garnishment ⇐200.

Statute respecting third person's claim to property levied on *held* inapplicable in garnishment proceedings, since no specific property is levied on by garnishing debt (Code Civ. Proc. §§ 689, 714 et seq.).

11. Garnishment ⇐200.

Where plaintiff had no right under common law to file third party claim, it was incumbent on him, if he had such right, to quote statute giving him right.

12. Judgment ⇐850.

Assignee of judgment in favor of four plaintiffs could not file third party claim where garnishment proceeding was commenced against one of such plaintiffs and judgment debtor, without notice of assignment, paid amount of judgment to sheriff (Code Civ. Proc. §§ 689, 714 et seq.).

13. Garnishment ⇐233.

Where judgment debtor, in garnishment proceeding, paid amount of judgment to sheriff, sheriff held fund as trustee for persons adjudged entitled thereto (Code Civ. Proc. §§ 542, 688).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 35 P.2d 523.

14. Judgment ⇐848.

Judgment debtor *held* not bound by assignment of judgment of which it had no notice.

15. Execution ⇐115.

Assignment of judgment made after levy of execution does not affect levy.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

An action was commenced by W. F. Dunn and others against the Standard Accident Insurance Company in which they recovered a judgment. Thereafter they assigned the judgment to A. Don Duncan. An execution issued under a judgment entered in another case was levied on the judgment debt owing by defendant, and Duncan filed a purported third party claim, and from an order granting a motion for an order directing the clerk to enter a satisfaction of judgment, Duncan appeals.

Affirmed.

A. Don Duncan and Percy A. Smith, both of San Francisco, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondent.

STURTEVANT, Justice.

Heretofore, Dunn-Williams Company, a copartnership, W. F. Dunn, J. A. Williams, and John A. Clecak commenced an action to recover damages on two bonds executed by the defendant. The defendant interposed a demurrer which was overruled. After notice of the order overruling the demurrer the defendant failed to answer and a judgment by default was entered against it on December 28, 1929, for $820.36 and $114 costs. Thereafter the trial court made an order vacating the default judgment. From the latter order the plaintiffs appealed. Thereafter on May 19, 1931, this court rendered its opinion reversing the said order. Dunn v. Standard Acc. Ins. Co., 114 Cal. App. 208, 299 P. 575. The judgment was not final until July 20, 1931. On May 20, 1931, John A. Clecak, one of the plaintiffs, made a purported assignment of his interest in the judgment to his coplaintiffs. It does not appear that the sheriff or the garnishing creditor had any notice of said assignment. Out of another action, Clecak v. Clecak, in which a judgment had been entered against the said John A. Clecak, an execution was issued on the 10th day of June, 1931. The writ of execution was against the property of John A. Clecak. It was in due form and under the seal of the clerk of the superior court. On the day it was issued it was delivered to the sheriff. Written directions were also delivered to him to levy on the judgment debt owing by this defendant. On June 11, 1931, the deputy sheriff appeared at the office of the defendant with the writ in his possession. Thereupon, the defendant paid to the deputy sheriff $1,045 and the deputy delivered to this defendant a receipt as payment of the amount of the judgment in the bond action. On the 12th day of June, 1931, a purported third party claim was made in the name of this plaintiff, A. Don Duncan, as assignee of the plaintiffs in the bond action. As the sheriff neglected and refused to satisfy the judgment in the bond action, on August 6, 1931, the defendant gave notice that it would apply to the court for an order directing the clerk of the superior court to enter a satisfaction of judgment. Thereafter the motion was duly made and was granted. From that order the plaintiff has appealed.

In the meantime Nancy B. Fitzgerald, formerly Nancy Clecak, had commenced a proceeding in mandamus against William J. Fitzgerald, as sheriff, asking for a writ directing him, after deducting his legal fees, to pay over to her the moneys collected by him from Standard Accident Insurance Company. The sheriff answered and the hearing in the mandamus action and the hearing of the motion to satisfy came on at the same time and in the same court. On motion of counsel for Mrs. Fitzgerald, the attorney for the defendant was associated with her attorney. Before defendant filed its brief this court granted its motion suggesting a diminution of the record. When thereafter the defendant brought up a part of the mandamus record this plaintiff was dissatisfied and he made a motion suggesting a diminution of the record. That motion was submitted at the same time that the cause was submitted. It is also granted and the entire record in both matters is before us.

[1] Before proceeding the court desires to state that in no respect does it approve the practice followed by any one of the parties. The proper rules are set forth at length in 28 C. J. 366–393. No one of the parties even attempted to follow such rules. However, it is not sufficient that this court should hold an error has been committed but it is necessary it should be of the opinion that the error complained of has resulted in a miscarriage of justice, otherwise it should not enter a judgment of reversal.

[2] If this defendant has paid no more than it was bound to pay, then it has not been wronged. If the result of the orders made is such that the money has gone, or will go, into the hands of the party legally entitled thereto, then the plaintiff may not complain.

[3, 4] It is contended that the judgment in the bond action was not, at the time of the payment, a final judgment. That is immaterial. Nordstrom v. Corona City Water Co., 155 Cal. 206, 212, 100 P. 242, 132 Am. St. Rep. 81. It is not contended by any one that the defendant was compelled to make an excessive pay-

ment. But it is contended that $1,045 was not enough. The sheriff's receipt recited that it was payment of the judgment, interest, and costs. It will not be presumed that the officer's receipt was false. There is nothing in the record contradicting the receipt. We think it is clear therefore that it may not be said the defendant has not paid a sufficient sum to satisfy the judgment against it.

[5] The plaintiff states that the judgment in the bond action was in favor of four different parties and only one of them, John A. Clecak, was a debtor of the plaintiff in the divorce action. Continuing, he claims that John A. Clecak in fact was not interested in the judgment in the bond action. We think his assertion is not sustained by the record before us. In the petition for a writ of mandate the petitioner alleged: "That heretofore and in said court in an action entitled W. F. Dunn and J. A. Williams and John A. Clecak, etc. v. Standard Accident Insurance Company, and numbered 209333, in the records of said court, a judgment was rendered in favor of said named plaintiffs against said defendant, whereon and whereby there was owing from the said Standard Accident Insurance Company to the said John A. Clecak on the said 10th day of June, 1931, the sum of $1,045; * * *" The trial court found said allegation to be true. This plaintiff has not called to our attention any portion of the record showing or tending to show that said finding is unsupported by the record. However, he does claim that on this hearing the court should not consider the record in the mandamus action nor any part thereof. The defendant takes a contrary view. It contends it is a rule that where a person, who, though not technically a party to a judgment but who is so connected with it by his interest in the result of the litigation and by active participation therein, is bound by such judgment and that the courts will look beyond the nominal parties and will treat all those whose interests are involved in the litigation and who conduct or control the action or defense as real parties, and hold them concluded by any judgment that may be rendered. Hoskins v. Hotel Randolph Co., 203 Iowa, 1152, 211 N. W. 423, 65 A. L. R. 1125; Parsons v. Urie, 104 Md. 238, 64 A. 927, 8 L. R. A. (N. S.) 559, 10 Ann. Cas. 278. However, we do not feel called upon in the instant case to apply that rule. All parties concerned were before the court actively engaged in presenting their respective claims. That an action in interpleader would have been an appropriate remedy to settle all questions will hardly be disputed. 28 C. J. 366. In form such an action was not brought; but we think the parties each assumed that they were, in effect, presenting such issues. Each one of the parties appeared before the court and actively participated in presenting all of the issues and we think that he may not now claim he was not attempting, at least in legal effect, to present and have determined a cause of action as in interpleader, whatever the form of the pleadings may have been.

[6-8] The defendant asserts that it acted, and is entitled to claim protection under Code of Civil Procedure, § 716. But a mere reading of that statute shows that the defendant was not entitled to pay to the sheriff the amount of a judgment which, as the facts then appeared, was in favor of John A. Clecak and three others who were in no manner before the court issuing the garnishment. That could not be done before the rights of the several parties had been apportioned by the courts. No one of the parties had the right to compel the sheriff to apportion the fund and he had no authority to do so. Veach v. Adams, 51 Cal. 609. Nor did either party have the right to impose on him the duty of having the courts apportion the fund. The statute leaves that burden on the parties interested in the fund. Code Civ. Proc. § 710 et seq. Of course, we are not holding that the levy itself was irregular, because it was not. Code Civ. Proc. §§ 542, 688. The error rested in the premature payment of the fund by the defendant before that court had apportioned the rights of the respective parties. 1 Freeman on Executions, 853; Fairchild v. Lampson, 37 Vt. 407; Kennedy v. McLellan, 76 Mich. 598, 604, 43 N. W. 641.

[9-13] The plaintiff relies on his third party claim. If the execution had been issued against specific personal property he might do so, as the statute expressly deals with such writs. Code Civ. Proc. § 689. But the execution was both in form and effect a garnishment. By the terms of section 688 an execution in the nature of a garnishment may issue "* * * in like manner as like property may be attached or released from attachment. * * *" Then in subdivision 6 of section 542, Code of Civil Procedure, the manner of attaching a debt is provided as follows: "Debts * * * must be attached by leaving with the person owing such debts * * * a copy of the writ, and a notice that the debts owing by him to the defendant * * * are attached in pursuance of such writ. * * *" No manual taking of possession is provided for. When the writ is served the garnishee is not bound to make any answer or to take any action until thereafter ordered by the court. Code Civ. Proc. § 714 et seq. Or, under certain limited conditions, the garnishee may pay the debt to the garnisher. Code Civ. Proc. § 716; Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655. The service of the writ does not create a lien on any specific property, but creates a personal liability only to respond to any judgment that may be recovered against the defendant to the extent of the debt due from the garnishee to the defendant. 28 C. J. 254. In Hulley

v. Chedic, 22 Nev. 127, 36 P. 783, 58 Am. St. Rep. 729, the question was before the Supreme Court of Nevada. On page 785 of 36 P. the court said: "Such a debt can be paid by any legal-tender money. No particular pieces belong to the creditor; and it would be, under such circumstances, an anomalous thing to hold that a lien can be obtained upon that which may be paid to him or his assignee. To so hold would be equivalent to determining that a garnishment creates a lien on all the garnishee's property which might subsequently be delivered in settlement of the debt; but, clearly, that is not the law. Drake, Attachm. § 226, and cases cited." The right to file a third party claim is set forth in the Code of Civil Procedure, § 689. It will not be claimed that it contains any express language showing that it applies to a debt that has been garnished. In the first sentence we find, "If the property levied on is claimed by a third person," a third party may file his claim. As we have just shown no specific property is levied on by garnishing a debt. Hence that provision is not applicable. Continuing the statute provides that the claim shall set out "his right to the possession thereof." But as stated by the Supreme Court of Nevada, no particular pieces of money belong to the creditor. Particularly is that true in the instant case where until the remittitur went down the plaintiff could not assert the right to the possession of anything in the possession of this defendant. Under the common law the plaintiff had no right to file a third party claim. If he has such right it is incumbent on him to quote a statute which gives him the right. 28 C. J. 393. That he has not done. It follows that the plaintiff had no right to file a third party claim. No point is based on Code of Civil Procedure, §§ 554–561. Section 689 is the only statute under which it is claimed the sheriff had the right to release. We have shown that said section is not applicable. As the proceeding is wholly statutory, it follows that the sheriff holds the fund as trustee for the person or persons adjudged entitled thereto.

[14, 15] The purported assignment dated May 20, 1931, by John A. Clecak was not served on the defendant. The evidence introduced was to the effect that it had no notice thereof. It follows it was not bound thereby. Buckeye Refining Co. v. Kelly, 163 Cal. 8, 13, 124 P. 536, Ann. Cas. 1913E, 840. The assignment made after the levy of the execution did not affect the levy. Nordstrom v. Corona City Water Co., supra.

Looking back over what has been said above, we concede it may not be said that certain errors have not been committed. However, we think it is equally clear that none of the errors have resulted in a miscarriage of justice. The sheriff still holds the fund and the rights of the parties therein can be fully protected in the pending proceedings.

It follows that the order appealed from should be affirmed. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

without cars being uncoupled *held* question for jury (Safety Appliance Act § 2 [45 USCA § 2]).

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by William M. Devaney against the Atchison, Topeka & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals.

Modified on condition of remittitur.

Prior opinion, 18 P.(2d) 84.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant.

Paul Blackwood, of Los Angeles, for respondent.

219 Cal. 487

DEVANEY v. ATCHISON, T. & S. F. RY. CO.

L. A. 14147.

Supreme Court of California.

Dec. 1, 1933.

1. Master and servant ⇐293(12).

Instruction that proof of failure of automatic coupler to work at any time sustained charge of railroad's violation of Safety Appliance Act *held* erroneous (Safety Appliance Act § 2 [45 USCA § 2]).

2. Trial ⇐296(3).

Error in instruction that proof of failure of automatic coupler to work sustained charge of railroad's violation of statute *held* not cured by subsequent instruction which stated it was immaterial whether coupler operated prior to or after accident (Safety Appliance Act § 2 [45 USCA § 2]).

3. Appeal and error ⇐1140(1).

Error in instruction relative to Safety Appliance Act *held* not to require reversal but only reduction of $35,000 verdict, where verdict was amply supported under count based on Employers' Liability Act (Federal Employers' Liability Act § 1 [45 USCA § 51]; Safety Appliance Act § 2 [45 USCA § 2]).

4. Master and servant ⇐204(1).

Railroad brakeman riding on top of car to brake string of cars about to be disconnected, as matter of law, did not assume risk of being thrown off car by negligent or unusual and violent stop (Federal Employers' Liability Act § 1 [45 USCA § 51]).

5. Master and servant ⇐285(7).

Whether defective coupler between cars was proximate cause of injury to brakeman thrown off freight car when train stopped

PER CURIAM.

The plaintiff brought the present action to recover damages on account of personal injuries sustained by him while acting as a brakeman in the employ of the defendant. It is conceded that at the time the defendant was operating in interstate commerce. The plaintiff recovered a verdict of $35,000. From a judgment entered thereon, the defendant appeals.

On the morning of October 30, 1928, the plaintiff and other members of a crew were engaged in switching operations in the defendant's yards at Barstow, Cal. At the time of the injury the crew was engaged in attempting to cut off the 12th car from the middle of a string of about 22 freight cars. The plaintiff was riding the top of the last or 22d car about six feet back from the end thereof for the purpose of setting the handbrake when the cut should be made between the 12th and 13th cars. There was some distance for the train to go to reach the switch where this cut was to be made and it proceeded at a pace of about five or six miles an hour. The yard was not entirely level but was built on what in the testimony is called a "hump." When the string was backed to the switching point, the engine foreman took a position at the cut lever between the cars to be separated and gave a stop signal to the engineer. By the force of the ensuing stop the plaintiff was thrown over the end of the last car and was found a distance of about fifteen feet from the end of that car when the stop was completed. The testimony on the question whether the engine foreman made any attempt to operate the cut lever to disconnect the coupling appliance was conflicting. There was testimony by observers that he gave two or three pulls or jerks on the cut

lever. The testimony of the engine foreman is that when he gave the stop signal, from a consideration of the incline at that point, he intentionally as yet made no attempt to disconnect until the slack had been gathered or "bunched" toward the engine. Evidence was introduced by the defendant that the appliance worked properly both before and after the accident and that an inspection thereof showed no defect. The plaintiff was an experienced brakeman and had worked for the defendant for about a year.

The plaintiff predicated a recovery on two causes of action. In the first, based on the terms of the Federal Employers' Liability Act (April 22, 1908, c. 149, § 1, 35 Stat. 65, 45 USCA § 51), he charged the negligent operation of the train by the employees by which the train was caused to come to a violent and unexpected stop which precipitated the plaintiff to the ground, etc. By the second cause of action the plaintiff charged a violation of section 2 of the Safety Appliance Act (March 2, 1893, 27 Stat. 531, 45 USCA § 2).

On this appeal the defendant assigns as prejudicial error the giving of certain instructions. The court by its instruction numbered twenty stated to the jury: "There has been some evidence introduced by the defendant that the automatic couplers * * * were inspected shortly after the accident * * * and that there was no defect found in said automatic couplers"; that under the Safety Appliance Act "it was the absolute duty of the defendant to equip its cars with automatic couplers which could be uncoupled at all times without the necessity of men going between the ends of the cars, and proof of a faliure of a coupler to work at any time sustains the charge" that the act has been violated. Further, that, if the jury believe from the evidence that proper attempt was made to uncouple the cars and the automatic coupler failed to work, "then I instruct you that it is immaterial whether said coupler was operated prior to or after the occurrence of said accident, and the plaintiff would be entitled to your verdict irrespective of what the proof may show regarding the operation or condition of said coupler prior to or after said accident had occurred." The defendant contends that the instruction erroneously places absolute liability on the defendant upon a showing merely that the appliance failed to uncouple. The provisions of section 2 of the act place an absolute duty upon the defendant to equip its cars "with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Chicago, B. & Q. Ry. v. United States, 220 U. S. 559, 31 S. Ct. 612, 613, 55 L. Ed. 582. The cases hereinafter cited establish the liability of the defendant for any injuries to its employees proximately resulting from a violation of that duty.

The plaintiff maintains that the decisions establish that proof of the failure of the coupling device to work at any time supports the charge of the violation of the act.

In Burho v. Minneapolis & St. L. Ry. Co., 121 Minn. 326, 141 N. W. 300, 302, an uncoupling case, we find the following pronouncement: "In so far as the Supreme Court of the United States has spoken on the subject, we draw the conclusion that this statute imposes an absolute duty on a railroad engaged in interstate commerce to have couplers that will at all times, when operated in an ordinary and reasonable manner, work without necessitating employees going in between the cars. Johnson v. Southern Pacific Railway Co., 196 U. S. 1, 25 S. Ct. 158, 49 L. Ed. 363; Chicago, Burlington & Quincy Ry. Co. v. United States, 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582; Delk v. St. Louis & San Francisco Ry. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590; Johnson v. Great Northern Ry. Co., 178 F. 643, 102 C. C. A. 89; Nichols v. Chesapeake & O. Ry. Co., 195 F. 913, 115 C. C. A. 601. To say that the law has been complied with when the coupler can be made to work only after extraordinary efforts, or sporadically, or by opening the knuckle thereof with the hand, would give very little protection and relief to employees. If a coupler fails to work when an honest and reasonable effort is made to operate it, under circumstances and in the manner it is designed to be operated, we conclude the law is not complied with." In Holz v. Chicago, M., St. P. & P. R. Co., 176 Minn. 575, 224 N. W. 241, 243, also an uncoupling case, the same court stated: "As to negligence, the rule is that a coupler which fails to work, when an honest and reasonable effort is made to operate it, does not comply with the act in question, and such failure to operate is sufficient evidence to justify the jury in finding it defective and in finding the carrier negligent. Burho v. M. & St. L. R. Co., supra; M. & St. L. R. Co. v. Gotschall, supra [244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995]; Chicago, R. I. & Pac. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; McDonald v. Great Northern R. Co., 166 Minn. 87, 207 N. W. 194."

In Philadelphia & R. Ry. Co. v. McKibbin (C. C. A.) 259 F. 476, 478, 479, and Pennsylvania R. Co. v. Jones (C. C. A.) 300 F. 525, 527, cases relied upon by the plaintiff are discussed. In the former, an uncoupling case, this statement appears: "The case then presents the question whether the repeated and unsuccessful efforts, by an experienced person, to operate the lever of an automatic coupler, when there are no circumstances consistent with its being in repair and workable condition to explain the inability to suc-

cessfully operate it at a given time when, under the statute, it should be in working order, without other evidence of its defective condition, is sufficient to permit the inference that the coupler was not in the condition required by the statute when the efforts to operate it were made. This question has received an affirmative answer by the Circuit Court of Appeals of the Sixth Circuit in Nichols v. Chesapeake & Ohio Ry. Co., 195 F. 913, 917, 115 C. C. A. 601. With the conclusion thus reached we are in accord. We do not wish to be understood, however, as holding what seems to have been conceded in Chicago, R. I. & Pac. Ry. Co. v. Brown, 229 U. S. 317, 320, 33 S. Ct. 840, 57 L. Ed. 1204; and what the Court in San Antonio Ry. v. Wagner, 241 U. S. 476, 484, 36 S. Ct. 626, 629, 60 L. Ed. 1110, expressly found it unnecessary to determine, 'that the failure of a coupler to work at any time sustains a charge that the (Safety Appliance) act has been violated'; nor do we wish to be understood as intimating any opinion upon that question. We merely decide that the failure of the coupler to work under the circumstances above detailed is some evidence, the weight of which is for the jury under all the circumstances of a given case, that the coupler was not in the condition required by the act, when the plaintiff was injured." In the case of Pennsylvania R. Co. v. Jones, at page 527 of 300 F., also an uncoupling case, we find the following discussion: "The question chiefly argued has been whether the mere fact that the device did not operate upon the first or perhaps the second trial was any substantial evidence that there was a statutory defect, or was inconsistent with the thought of the phrase 'can be operated.' It is pointed out that the statement in Chicago Co. v. Brown (an uncoupling case) 229 U. S. 317, 321, 322, 33 S. Ct. 840, 841, 57 L. Ed. 1204, 'the failure of a coupler to work at any time, sustains a charge of negligence in this respect,' was merely a recital of counsel's concession, and in a later coupling case, San Antonio Co. v. Wagner, 241 U. S. 476, 484, 36 S. Ct. 626, 60 L. Ed. 1110, the very point was carefully reserved. In Atlantic Co. v. Parker, 242 U. S. 56, 37 S. Ct. 69, 61 L. Ed. 150, the only holding is that the jury may infer a statutory defect if there is evidence that the required automatic coupling did not occur because there was too much lateral play in the drawheads, and the fact that some lateral play is necessary in order to permit coupling on a curve did not necessarily show that there was not an unnecessary amount in these drawheads. These cases are closest in point, but they fall short of any definite holding; and, in addition, it must be noted that the problem and the inference from nonaction are not the same in a matter of uncoupling as in a matter of coupling. Apparently coupling by impact will always occur automatically, unless there is some defect or some abnormal attendant condition. Hence a failure to couple usually tends to show a coupler defect. As to the uncoupling devices, it seems to be conceded by counsel, and we understand it to be true, that, however perfect they may be, they will not work at all while there is a binding friction upon the lifting pin, such as undoubtedly exists while there is a pulling strain. Hence a failure of the pin to lift may indicate that the device is defective, or may indicate that the effort was made at the wrong time. We are convinced that evidence that the lifting pin did not work upon the first effort may be sufficient evidence of an existing defect, if it also appears that the effort was of a character and made at a time when it would have naturally been effective save for a defect. * * *"

In St. Louis Southwestern Ry. Co. of Texas v. Bounds, 244 S. W. 1099, 1102, a coupling case, wherein a judgment for the plaintiff was reversed, we note the Court of Civil Appeals of Texas making the following observation: "It would be manifestly unfair to hold that the carrier had violated the statute until the inefficiency of the device had been disclosed by some reasonable test that would justify the conclusion that it was defective. Chesapeake & Ohio R. Co. v. Charlton, 247 F. 34, 159 C. C. A. 252; Id. (C. C. A.) 256 F. 988; Morris v. St. L. S. W. R. Co. of Texas (Tex. Civ. App.) 158 S. W. 1055. The first case above cited is very similar in its facts to the case here under consideration. That case was twice passed on by the Circuit Court of Appeals, and the evidence was held to be insufficient. Later the federal Supreme Court refused to grant a certiorari. See 249 U. S. 614, 39 S. Ct. 388, 63 L. Ed. 802."

On the other hand, the cases which in Chicago, R. I. & Pac. Ry. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204, were stated by concession of counsel to have settled the rule that the failure of a coupler to work at any time sustains a charge of negligence, were apparently followed to that effect in Minn. & St. Louis R. R. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995 (where the train "broke"); Philadelphia & R. Ry. Co. v. Auchenbach (C. C. A.) 16 F.(2d) 550, 552 (coupling), certiorari denied 273 U. S. 761, 47 S. Ct. 476, 71 L. Ed. 878; Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88, 164 S. W. 310, 312 (uncoupling); Northcutt v. Davis, 113 Kan. 444, 214 P. 1113 (uncoupling); Sacre v. St. Louis M. B. T. Ry. Co. (Mo. Sup.) 260 S. W. 85 (uncoupling); Saxton v. Delaware & Hudson Co., 256 N. Y. 363, 176 N. E. 425 (train "broke").

[1, 2] An examination into the facts of all of the foregoing cases makes it apparent, however, that the cases present no real con-

flict. The question in each case where the verdict or judgment was for the plaintiff is whether, under the particular facts, the trier of the facts was entitled to find that the device was defective. In none of them was it intimated that it was not a question for the jury to determine whether under all of the facts and circumstances a violation had been committed. In many of them the only testimony material to the issue of whether a defect existed was that relating to the effort made to couple or uncouple by virtue of which the workman making the attempt to couple or uncouple was injured. No question appeared therein that the effort was not made under ordinary conditions and at a time when save for a defect the appliance would have operated. Where the evidence was that the train "broke," it is obvious that that fact alone is sufficient to uphold a finding that a defect existed. The giving of an instruction which has the effect of stating to the jury that the mere failure of the device to operate is conclusive evidence of a violation of the act does not find authority in any of the cases. We think that that portion of instruction 20 which embodied the phrase "proof of a failure of a coupler to work at any time sustains the charge," standing alone, so stated. It is contended that the balance of the instruction being conditioned upon the finding of the jury "that proper attempt was made to uncouple the cars" had the effect to cure any such error. That instruction, however, also told the jury that it could, upon such a finding being made, entirely disregard anything that the proof might show regarding the operation or condition of the coupler prior to or after the accident. In this connection, the plaintiff relies upon the statement appearing in some of the foregoing cases that proof that the appliance was examined and showed no defect or that it operated perfectly on other occasions is not sufficient to overcome the reasonable inference that a defect existed from proof of what was done at the time of the accident to operate the appliance and its failure to work. This, however, was not made as a statement of a proposition of law or a legal principle, nor that such evidence was not to be considered by the jury at all, but was a statement of the reviewing court's conclusion that under the facts of the particular case the failure of the appliance to operate supports the finding that a defect existed. In other words, that under the particular facts the weight of such evidence is not sufficient as a matter of law to overcome the inferences which may reasonably be drawn from the evidence of the failure of the device to operate at the time of the accident. None of the cases relied upon is authority for the proposition either that such evidence is not material on the issue of whether a defect existed, or that the trial court may take from the jury the right to consider all of the evidence in determining whether under all of the facts and circumstances a defect may be said to exist. The erroneous impression created by the first portion of instruction No. 20 herein cannot be said to be overcome by another portion thereof which itself is subject to criticism for invading the province of the jury.

[3] From a review of the record we are not prepared to say that omission of instruction 20 from the instructions given to the jury would have resulted in a verdict for the defendant. The jury was otherwise properly instructed on all the issues, including the question of proximate cause. No other error prejudicial to the defendant appears in the giving or refusal to give any instruction nor in any other ruling made by the trial court. The testimony on the issue of negligence under the first cause of action, although conflicting to some degree, did not present a close question in view of the physical facts presented substantially without dispute, and which were sufficient to support a charge of negligence. Ft. Worth & D. C. Ry. Co. v. Stalcup (Tex. Civ. App.) 167 S. W. 279. It is manifest from this state of the record that the verdict is amply supported under the first count in the complaint. Therefore the only prejudice, if any, suffered by the defendant was on the issue of the amount of damages, which it is claimed is excessive.

[4] The defendant contends that nevertheless reversal is compulsory by virtue of the presence of the issue of assumption of risk under the first count, which, by the provisions of the Safety Appliance Act, is not an issue under the second count. March 2, 1893, c. 196, § 8, 27 Stat. 532, 45 USCA § 7; April 22, 1908, c. 149, § 4; 35 Stat. 66, 45 USCA § 54; Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; Chesapeake & O. Ry. v. De Atley, 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016. But it is settled without question and as a matter of law that the employee does not assume the risk of being thrown off the top of a car by a negligent stop or an unusual stop of the violence indicated by the undisputed physical facts in the present case. Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905; Chicago, R. I. & P. Ry. Co. v. Ward, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430, affirming judgment of the Supreme Court of Oklahoma 68 Okl. 201, 173 P. 212; Erie R. Co. v. Linnekogel (C. C. A.) 248 F. 389; Texas & N. O. R. Co. v. Cammack (Tex. Civ. App.) 280 S. W. 864 (writ of error refused April 20, 1926); Devine v. Chicago, R. I. & P. Ry. Co., 266 Ill. 248, 107 N. E. 595, Ann. Cas. 1916B, 481.

The defendant argues that there was open to the plaintiff a choice between two methods of doing the work and that the plaintiff chose the more hazardous. This argument is properly addressed to an issue of contributory negligence which does not appear to have been raised. Moreover, no showing was made that in the ordinary course of his duties the position taken by the plaintiff was one which he was not entitled to choose. He was obliged to take an appropriate position to perform his duties in braking the string about to be disconnected and the testimony of the defendant's witnesses shows that his position was known to them. The contention is therefore answered by the foregoing decisions in connection with the question of assumption of risk. Under these cases, in the absence of any warning or notice that the position taken was unusually hazardous, any unusual risk attendant thereon was not assumed by the plaintiff.

[5] The defendant makes the further contention that, as a matter of law, assuming a defective coupler, the defect merely created a condition of the injury and was not the proximate cause thereof, relying on St. Louis & S. F. Ry. Co. v. Conarty, 238 U. S. 243, 35 S. Ct. 785, 59 L. Ed. 1290; Louisville & N. R. Co. v. Layton, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; Lang v. N. Y. Central Ry. Co., 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729; and especially the case of McCalmont v. Penn. Co. (D. C.) 273 F. 231, wherein the preceding three cases are discussed. In view of our disposition of claimed prejudicial errors affecting the cause of action to which this argument is addressed, it will not be of any special benefit to do more than to call attention to the following cases which have settled the question adversely to the defendant's contention, and which show that, as applied to the particular facts assumed and present in this case, the cases relied upon by the defendant do not support the claim made therefor: Louisville & Nashville R. R. Co. v. Layton, supra; Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 68 L. Ed. 284; Philadelphia & R. Ry. Co. v. Eisenhart (C. C. A.) 280 F. 271; Atchison, T. & S. F. Ry. Co. v. Keddy (C. C. A.) 28 F.(2d) 952.

A review of the entire record leads us to the conclusion that the effect of the giving of instruction number 20 was to create such an impression on the minds of the jury as to result in an excessive verdict. Evidence of some malingering or at least exaggeration on the part of the plaintiff as to the permanency of the effect of the injuries was shown on his cross-examination. This evidence would doubtless have been weighed more closely by the jury were it not for the apparent opportunity offered by the erroneous instruction to impose punitive damages. We also conclude that the prejudice suffered by the defendant by the giving of said instruction does not necessarily require a reversal, but that a final disposition of the case may properly be made by the following order:

It is ordered that, if the plaintiff within thirty days from the filing hereof file with the clerk of this court his written consent to a modification of the judgment by a deduction therefrom of the sum of $15,000, leaving the judgment to stand for the sum of $20,000 and costs of suit, said judgment be modified accordingly; such modified judgment to bear interest at the legal rate from the date of the entry of the original judgment in the superior court; but if such consent be not so filed within said time, the judgment shall be reversed.

PRESTON, Justice.

I dissent. I think the judgment should be reversed.

LANGDON and IRA F. THOMPSON, JJ., being disqualified, do not participate herein.

219 Cal. 474

CARDOZA et al. v. WHITE, Sheriff, et al.

Sac. 4716.

Supreme Court of California.

Dec. 1, 1933.

1. Mortgages ⇐32(3).

Deed made solely as security will, when attacked by grantor, be construed as mortgage in accordance with real intent of parties.

2. Trusts ⇐35(1).

Where grantor executed deed as security and directed grantee to convey property to named person on payment of loan, grantor's intention *held* effective as trust, and trust was executed on conveyance as directed.

3. Trusts ⇐55.

Creditor of grantor in trust *held* not entitled to challenge voluntary completed performance by trustee on ground agreement creating trust was oral and in violation of statute of frauds (Civ. Code, § 852).

In Bank.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Lucy Cardoza and another against W. T. White, as Sheriff of the County

of Merced, and others. From a judgment in favor of the plaintiffs, the defendants appeal.

Affirmed.

Prior opinion, 23 P.(2d) 810.

Ernest S. Leslie and E. H. Christian, both of Oakland, for appellants.

Whitehurst & Logan, of Patterson, for respondents.

LANGDON, Justice.

This is an action to quiet title. In 1924 Antonio B. Nunes owned real property in Merced county. He borrowed the sum of $2,600 from the First National Bank of Livermore, to secure which loan he executed a deed of the land to J. H. Callaghan on September 27, 1924. He delivered this deed to Callaghan, stating that, if anything should happen to him, the property was to go to his daughter, plaintiff Lucy Cardoza. On May 12, 1926, Nunes paid the indebtedness, Mrs. Cardoza contributing the sum of $900 to said payment, and Nunes requested Callaghan to convey the property to her. Callaghan thereupon executed a deed to her.

Meanwhile, on July 10, 1925, Frank Rodrigues obtained judgment in Alameda county in the sum of $1,222.86 against Nunes, in an action on a promissory note. Execution being unsatisfied as to a balance of $992.23, Rodrigues assigned the judgment to defendant E. H. Christian on February 18, 1927. Christian proceeded to execute in Merced county, with the same negative result. Then, on December 3, 1928, he brought an action in Merced county against Nunes and Mrs. Cardoza to set aside the deed from Callaghan. A demurrer to his complaint was sustained, and, upon his failure to amend, judgment was rendered against him. He took no appeal, but proceeded to execute directly on the property standing in the name of Mrs. Cardoza. The sheriff gave notice of sale, and this suit was then commenced by Mrs. Cardoza to quiet her title and enjoin her sale. The trial court gave its judgment in favor of plaintiff, and defendants appeal.

[1] Appellants make no claim of fraudulent transfer, and the facts dispose of any possible claim of priority in time, for plaintiff received the deed on May 12, 1926, and no abstract of the Alameda judgment was recorded in Merced county until long afterwards. The theory upon which they rest is that the deed from Nunes to Callaghan was intended merely as security; that Callaghan thereby became only a mortgagee; and that consequently he had no legal title which he could convey to Mrs. Cardoza. But the authorities cited do not sustain this theory, for they go no further than to state the familiar proposition that a deed made solely for security will, when attacked by the grantor, be construed as a mortgage in accordance with the real intent of the parties. See McGuigan v. Millar, 117 Cal. App. 739, 4 P.(2d) 607; Chapman v. Hicks, 41 Cal. App. 158, 182 P. 336.

[2] In the instant case we have something more than a mortgage intended by the parties. Nunes, at the time of making the deed to Callaghan, desired that the latter should have power to convey to Mrs. Cardoza. The testimony establishes without conflict that he originally instructed Callaghan to convey to her if something should happen to him; and later he modified his instructions by directing Callaghan to convey to her upon payment of the loan. We have, then, a case where the owner of property transfers title thereto, with the intention that the grantee shall subsequently convey that title to another. In the absence of fraud or other inequitable purpose, we see no reason why this intention, either in its original form or as subsequently modified (see Civ. Code, § 2258), might not be given effect as a trust. This conclusion finds full support in the case of Renton v. Gibson, 148 Cal. 650, 655, 84 P. 186, 187, where the court said: "We say, therefore, that the complaint itself, taken with the plaintiff's evidence in support of it, establishes that the instrument was something more than a mere mortgage, and that it did convey, and must of necessity have conveyed, the legal title to the property to defendant Gibson, for the purposes contemplated—the commencement and prosecution by Gibson of a suit to quiet title to the land in question, and the procuring a decree of the court to that effect. So far as these purposes were concerned the transfer could not have been a mortgage. It is only those transfers made as security for the performance of an act (other than transfers in trust) which are mortgages (Civ. Code, § 2924), and as it was contemplated between parties that an act should be done by defendant in relation to the real property, which act could not lawfully have been performed by him if he were not the holder and owner of the legal title, it must follow * * * that the conveyance was what it purported to be on its face, a deed either absolute or in trust for the indicated purposes."

[3] Defendants argue that the transaction cannot be upheld as a trust because, while the deed was in writing, the agreement constituting the trust was oral, and, hence, violative of the statute of frauds. (Civ. Code, § 852.) But an oral trust in real property cannot be held wholly void; it is merely unenforceable when, in an action brought to compel performance of its terms, the party to be charged asserts its invalidity. Callaghan, the party obligated, did not refuse to recognize the trust. On the contrary, he carried out its terms. A creditor of the trustor has no right to challenge the voluntary completed performance by a trustee in such a situation. In-

deed, if Callaghan had repudiated his obligation, plaintiff, as the intended beneficiary, could have held him as constructive trustee for her benefit. See Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

219 Cal. 446

In re BYERS.

S. F. 15047.

Supreme Court of California.

Nov. 28, 1933.

Rehearing Denied Dec. 28, 1933.

1. Newspapers ⇐3(3).

Statute requiring mechanical work of newspapers of general circulation to be performed at place of its issue *held* not applicable to newspaper already established as paper of general circulation, so that such newspaper's standing could not be revoked because mechanical work was not performed where published (Pol. Code, §§ 4458–4462, and §§ 4463–4465, as added by St. 1923, p. 512).

2. Constitutional law ⇐208(6).

Statute requiring mechanical work of newspapers of general circulation to be performed at place of its issue, not applicable to newspapers of general circulation already established as such, *held* not unconstitutional because attempting to classify such newspapers into two classes (Pol. Code, §§ 4458–4462 and §§ 4463–4465, as added by St. 1923, p. 512).

3. Statutes ⇐114(7).

Statute entitled an act to add two new sections to Political Code relating to newspapers of general circulation, *held* not unconstitutional because title did not refer to third section added, where title referred to newspapers of general circulation as subject-matter of legislation (Pol. Code, §§ 4463–4465, as added by St. 1923, p. 512).

In Bank.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Application by Glenn Byers for the establishment of the Peninsula News as a newspaper of general circulation, wherein E. E. Bramble filed a petition to have an order adjudicating the newspaper to be a newspaper of general circulation vacated and set aside. From an adverse judgment, petitioner appeals.

Affirmed.

Prior opinion, 25 P.(2d) 236.

Rehearing denied; PRESTON, J., dissenting.

J. W. Coleberd, of South San Francisco, for appellant.

Kirkbride, Wilson & Brooks, of San Mateo (John D. Willard, of San Francisco, of counsel), for respondents.

CURTIS, Justice.

By a decree of the superior court of the county of San Mateo, of date December 30, 1915, the Peninsula News was adjudicated to be a newspaper of general circulation, printed and published in the city of San Bruno, in said county of San Mateo. Subsequent thereto, but prior to the institution of the present proceeding, said newspaper was consolidated with the San Bruno Herald, and after said consolidation said newspaper continued to be published under the name of the San Bruno Herald and Peninsula News, at said city of San Bruno, up to the 14th day of December, 1931, and thereafter. On December 14, 1931, the petitioner herein, E. E. Bramble, filed in said superior court his petition to have the order of December 30, 1915, adjudicating said newspaper to be a newspaper of general circulation, vacated and set aside, on the ground that for more than one year immediately prior to the filing of said petition the mechanical work of producing said newspaper, that is to say, the work of typesetting and impressing types on paper in the production of said newspaper, had not been done in the city of San Bruno. The proprietors of said newspaper appeared in said proceeding, and answered said petition, but made no denial that the mechanical work of producing said newspaper had not been done in said city of San Bruno. The denials contained in said answer related to immaterial matters, and it is not necessary to further refer to them.

The trial court made findings in accordance with the admitted allegations of the petition that for more than one year prior to the institution of said proceedings the mechanical work of producing said newspaper had not been done in the city of San Bruno. Upon these findings, judgment was rendered that petitioner was not entitled to a decree vacating or setting aside said decree of December 30, 1915, establishing said Peninsula News as a newspaper of general circulation, and that the defendants recover their costs from petitioner. From this judgment the petitioner has appealed.

The statutory law of this state defining a newspaper of general circulation and providing the procedure necessary to be followed in order to have it judicially determined that a newspaper has such a standing is now contained in sections 4458 to 4465, inclusive, of

the Political Code. The last three of said sections were added as new sections of the Code in 1923 (St. 1923, p. 512).

At the date of the decree establishing the Peninsula News as a newspaper of general circulation, it was provided by the Code sections then in force that, in addition to publishing the local and telegraphic news and having a bona fide subscription list of paying members, said newspaper shall have been established, printed, and published at regular intervals in the state, county, or other municipality where it is issued and circulated for a period of one year prior to the time of the filing of a petition to have such newspaper adjudged to be a newspaper of general circulation.

In the case of In re McDonald, 187 Cal. 158, 201 P. 110, the requirements that a newspaper shall be established, printed, and published in a certain definite locality for the period of one year came before this court for construction, and it was held there that a newspaper was printed and published in a city or locality if it was issued and circulated there, although the mechanical work of producing the paper was done entirely in some other city or locality.

After this decision, and in 1923, three new sections, 4463, 4464, and 4465 of the Political Code, were enacted. Section 4463 provided that the word "printed," as used in section 4460 defining a newspaper of general circulation, shall mean, and be construed to mean, that the mechanical work of producing a newspaper of general circulation shall be performed at the place of its issue and circulation. Undoubtedly, this new section, 4463, was enacted to overcome the construction given to section 4460 by the court in the McDonald Case.

Appellant now contends that, while the Peninsula News complied with the law in every respect at the date of the decree of December 30, 1915, establishing it as a newspaper of general circulation, its successor, the San Bruno Herald and Peninsula News, does not now, nor did it at the inception of these proceedings, meet the requirements of the law as amended by the enactment of section 4463 in 1923, and therefore it has lost its standing as a newspaper of general circulation, and the trial court should have vacated and set aside the judgment of December 30, 1915, whereby it was established as such a newspaper.

[1] There might be considerable force in appellant's argument had not the Legislature in the same act in which it enacted section 4463 also enacted section 4465, which provides that: "Nothing in this title shall be construed to alter the standing of any newspaper which, prior to the passage of this act, was an established newspaper of general circulation, irrespective of whether it has been printed in the place where it is published for a period of one year as required by section four thousand four hundred sixty." The intent and purpose of the Legislature in the enactment of said section 4465 is, in our opinion, perfectly clear. By express pronouncement it is provided that nothing therein should be construed to alter the standing of any newspaper which at that date was an established newspaper of general circulation, even though it had not been printed in the place where it was published for a period of one year, as required by section 4460. As we have seen, by section 4463 the term "printed," as used in section 4460, shall be construed to mean the mechanical work of producing a newspaper, such as typesetting and impressing types on paper. Accordingly, by the terms of section 4465, newspapers of general circulation established as such at the date of the enactment of section 4463 were not in any manner affected by the provisions of said section, even though they failed to meet the requirements of such legislation. In other words, it was the clear intent and purpose of the Legislature not to make the statute retroactive, but to confine its application to such newspapers as were not, at that date, newspapers of general circulation.

[2] The further contention is made that such a construction of these sections of the Political Code renders the same unconstitutional and void, for the reason that it is an attempt to classify the newspapers in the state into two classes, those established before the legislation of 1923, which are free from the requirements of such legislation, and those established at a later date, which are forced to comply with such requirements. This same contention in principle has been before this court on frequent occasions, one of the most recent of which was in the case of Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14. We there held that an ordinance excluding hospitals and sanitariums for the treatment of mental and nervous diseases from certain districts in said city was valid in so far as it purported to prohibit the establishment of such institutions within said district in the future, but that it was void when applied to an existing business of the same character in said district. Such a classification, if we may properly use that term, may not be said to be an unreasonable application of the police power. Upon the same principle, it cannot be said in the present action that it is unreasonable to exact certain requirements of a newspaper to be established in the future which are not required of those long established and which have proved their right to exist by a full compliance with all the laws in force at the time of their establishment.

[3] Equally without merit is the contention of appellant that section 4465 of the Political Code is unconstitutional for the reason that the title of the act makes no reference to this

section of the Code. The title of the act is as follows: "An act to add two new sections to the Political Code to be numbered four thousand four hundred sixty-three and four thousand four hundred sixty-four, relating to newspapers of general circulation." It is true that only sections 4463 and 4464 are expressly mentioned in the title of the act, and no mention is made therein of section 4465. But the subject of the legislation relates to newspapers of general circulation, and this subject is expressed in the title of the statute. The title would have been sufficient had it simply recited that it was an act to add new sections to the Political Code relating to newspapers of general circulation. We fail to see how anybody could have been misled by the recital in the statute, that only two new sections, instead of three, were to be added, so long as the title made reference to the subject-matter of the legislation. Upon this subject this court has held that: "All that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation is to be addressed." O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 323, 245 P. 164, 171; Estate of Phillips, 203 Cal. 106, 115, 263 P. 1017.

We are satisfied that the trial court correctly applied the law applicable to the facts in this case, and that its judgment should be affirmed. It is so ordered.

We concur: WASTE, C. J.; PRESTON, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

219 Cal. 498

JACKSON v. DEAUVILLE HOLDING CO. et al.

L. A. 12728.

Supreme Court of California.

Dec. 4, 1933.

Rehearing Denied Dec. 30, 1933.

1. Fraud ⇐9.

Purchasers of club memberships sold by false representations affecting value thereof could recover damages for fraud.

2. Fraud ⇐59(2).

Measure of damages of purchasers of club memberships sold by fraudulent representations is difference between actual value of memberships and value if representations had been true.

3. Assignments ⇐24(3).

Causes of action of purchasers of valueless club memberships sold by false representations *held* assignable, since purchasers' property was acquired and their estates diminished by fraud (Civ. Code, §§ 953, 954, 1044).

In Bank.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by W. R. Jackson against the Deauville Holding Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

For prior opinion, see 19 P.(2d) 1025.

Clement L. Shinn and Julius V. Patrosso, both of Los Angeles, for appellants.

Marion P. Betty, Thorwald Siegfried and Guy T. Graves, all of Los Angeles, for respondent.

WASTE, Chief Justice.

Defendants appeal from a money judgment entered in favor of the plaintiff.

Plaintiff is the assignee of fifty-one individuals who purchased memberships in the Deauville Beach Company through the instrumentality of the Deauville Holding Company. The beach company is a nonprofit corporation organized under the laws of this state. The holding company is a corporation organized in Nevada and authorized to do business in this state. The incorporators planned to construct a beach clubhouse in Santa Monica upon land to be purchased by the Nevada corporation and club memberships were sold by agents of the holding company through means of a prospectus giving elaborate details regarding the type of building and the facilities to be offered club members.

The plaintiff pleaded three causes of action and had judgment upon the second cause only. This cause is a simple action for damages for fraudulent representations which the trial court found were the inducements which led plaintiff's assignors to part with certain sums of money and which the court found caused damages in the precise amounts so paid. It would serve no useful purpose to detail the representations of fact upon which the plaintiff relied and which the trial court found were made without intent to perform—it is sufficient to refer to one relating to the type of structure to be erected. It is alleged and found that defendants' agents represented to the purchasers that two buildings would be erected for the use of club members, one to be twelve stories in height and to contain five hundred sleeping rooms; that a gymnasium, outdoor plunge, nursery, and special auto-parking facilities would be provided. The court found that but one building was constructed and that no sleeping rooms and none of the other promised facilities was included.

It is alleged in the complaint that the failure to fulfill these promises depreciated the value of the memberships.

[1, 2] The sale having been made upon representations affecting the value of the thing sold, the vendees are entitled to recover damages for the fraud practiced upon them. The measure of such damages is the difference between the actual value of the property purchased and the value it would have had if the representations had been true. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Hines v. Brode, 168 Cal. 507, 143 P. 729. In its judgment herein the trial court awarded damages in the exact sums paid in by the purchasers after finding that the property purchased is without value.

In his first cause of action plaintiff sued for "money had and received" under the theory that the contracts were all void "ab initio," because they were executed before the corporation had legal authority to contract. In his second cause the plaintiff elected to affirm the contracts and to sue for damages for the fraud. The third cause was in equity to impress a trust. The court below denied recovery upon the first and third causes of action and limited its judgment to the second.

[3] We are thus faced with the pertinent question whether an action in tort of this character is capable of assignment. The authorities on the subject are collected and the principles of law announced in our recent decision in Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959, 960. It therein appears:

"As regards particular results, it is pretty generally held in America that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander, assault and battery, negligent personal injuries, criminal conversation, seduction, breach of marriage promise, malicious prosecution, and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable. In conformity with the principle just stated the following demands, claims, and rights of action have been held to be assignable: Causes of action arising from the breach of a contract of any kind (except the breach of a promise to marry); causes of action arising from torts *which affect the estate* rather than the person of the individual who is injured. Under the latter head are claims arising from the carrying away or conversion, of personal property, from the fraudulent misapplication of funds by the officer of a bank, from negligent or intentional injury done to personal property or upon real estate. In view of the general tendency to recognize the transferability of rights of action growing out of injuries done in respect of one's property or estate, it is somewhat curious to note that it is commonly held that the right of action for fraud and deceit is not assignable. But where *property* is obtained by a deceit or fraudulent device of any sort, the cause of action is assignable, for here the injury is done in respect of the particular property which is wrongfully acquired.' * * *

"But, supplementing said general doctrine, it must be said that sections 953 and 954 of the Civil Code have lifted many of the restrictions imposed by the rule of the common law upon this subject. There can be little doubt that the cause of action set forth in the complaint here is a 'thing in action,' under said section 953, and arises 'out of the violation of a right of property,' under said section 954, and is expressly made assignable and declared to survive the death of the owner by the latter statute. That these statutes were intended to liberalize the common-law rule was expressly held in Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605. * * *"

The Wikstrom Case, supra, refers with approval to McCord v. Martin, 34 Cal. App. 129, 132, 166 P. 1014, 1015, wherein it is declared: "We are unable to give our concurrence to the views of the trial court in sustaining the defendants' demurrers without leave to the plaintiffs to amend upon the ground that the causes of action set forth in the complaint were not assignable. It is true, as the respondents contend, that naked actions for fraud and deceit are not the subject of assignment under long and well settled rules of equity. But the state of facts set forth in the plaintiffs' amended complaint and above recited does not present a case where the plaintiffs are seeking to recover upon assigned claims for damages for naked fraud and deceit, involving no substantial right of property in plaintiffs' assignors. On the contrary the facts, in our opinion, clearly show that the defendants, by means of their alleged fraudulent and deceitful acts and conduct, were enabled to come into possession of an amount of money representing the difference between $8 a share, which the respective stockholdings of plaintiffs' assignors in the Lost Hills Mining Company were really worth, and for which they were actually sold, and the sum of $5 per share, which was all that the plaintiffs' assignors received for their said stock by reason of the defendants' fraudulent and deceitful representations. This sum of money, amounting to the exact damages claimed in this action, was a sum of money which these defendants must be equitably held to have received and retained for the use and benefit of the plaintiffs' assignors, the right to recover which was a substantial part of their cause of action against said defendants. It is not disputed that the form of assignment to plaintiffs was sufficient to cover the entire equitable and property rights and claims of the plaintiffs'

assignors in the premises, and was thus a transfer of much more than a mere naked right of action for fraud and deceit, since it included also the right to recover the respective sums of money which the defendants had received for the use and benefit of plaintiffs' assignors, and to which in equity they were justly entitled. This being so we are entirely satisfied that these several causes of action were assignable under sections 953, 954, and 1044 of the Civil Code. * * *"

In our opinion the quotations from the cited cases are determinative of the present appeal. There is ample evidence in the record now before us to support the trial court's findings that the plaintiff's assignors by reason of fraudulent representations were induced to part with $5,929.60, the exact amount of damages here sought and recovered, in exchange for which they received club memberships found to be valueless. In other words, *property* of the plaintiff's assignors was acquired and their estate diminished by fraud and deceit. This being so, the causes of action transferred to the plaintiff, and here sued on, are not, within the meaning of the cited cases, naked, unassignable causes of action for fraud unconnected with any property or thing which had itself a legal existence and value independent of the right to sue for fraud. The form of assignment to plaintiff was sufficient to cover the property rights and claims of his assignors in and to the moneys so obtained by fraud and deceit and, therefore, represents and constitutes a transfer of more than a mere naked right of action for fraud and deceit, since it includes also the right to recover the respective sums of money so obtained.

Our conclusion makes it unnecessary to consider other points discussed by the parties.

The judgment is affirmed.

We concur: PRESTON, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.

219 Cal. 439

CRAWFORD v. FRANCE.

L. A. 14381.

Supreme Court of California.

Nov. 28, 1933.

1. Evidence ⇐417(9), 433(6), 434(8), 448.

Parol evidence is admissible to show fraud, accident, or mistake in inducing written contract, omitted portion of contract, and to clear up ambiguity or uncertainty.

2. Evidence ⇐442(1).

Where all terms of contract are not incorporated in writing, or writing was not intended to express entire agreement, parol evidence is admissible to establish separate oral agreement not inconsistent with terms of writing, or to show other conditions or explain latent ambiguities.

3. Evidence ⇐442(4).

In action by architect for services rendered under written contract, parol evidence showing oral agreement to limit cost of construction on which writing was silent *held* admissible.

Written contract was entered into employing architect to design hotel building suitable for the needs of the owner, and to furnish all the necessary preliminary sketches and estimates of cost. However, no provision was included in the written contract limiting the cost of construction. The architect prepared the plans and specifications, and the lowest bid received was in an amount which the owner considered excessive, whereupon the owner abandoned the proposed project.

In Bank.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by Louis N. Crawford against J. E. France. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

For prior opinion, see 22 P.(2d) 753.

Shaeffer & Weldon and Fred A. Shaeffer, both of Santa Maria, and David F. Hart, for appellant.

Preisker, Goble & Twitchell, of Santa Maria, for respondent.

IRA F. THOMPSON, Justice.

This action was brought by an architect for a fee claimed to be due him under the terms of a written contract for professional services in connection with the construction of a hotel building. Judgment was rendered for the defendant, and the plaintiff has appealed.

More specifically, the contract for the plaintiff's services provided:

"(1) That the Architect is to design a hotel building suitable for the needs of the Owner; is to furnish all necessary preliminary sketches and estimates of cost; is to furnish complete working drawings, specifications and details necessary for the construction of such a hotel building.

"(2) The Architect is to supervise all of the work committed to his control. The Ar-

chitect is to carry all of the necessary administrative work required in the proper keeping of accounts, the issuance of certificates of payment and such superintendence of the work as is hereinafter mentioned.

"(3) The Architect is to keep an inspector acceptable to the Owner on the work during the pouring of concrete or the erection of masonry construction. The cost of such an inspector is to be paid by the Architect.

"(4) The Owner agrees that the Architect is to be paid for his services, the sum equal to six per cent. of the cost of the work exclusive of the cost of the land, in installments as follows: 1/5 of the total fee based upon the estimated cost, on acceptance of preliminary drawings and estimates of cost; on completion of working drawings exclusive of details, a sum sufficient to bring the total payments to 3/5 of the total fee based on the estimated cost or upon the lowest reputable bids for construction; the balance, 2/5, to be in installments as the work progresses."

There was a fifth paragraph which required the owner to pay for surveys and borings and to make prompt statements of his requirements and decisions relating to the conduct of the work.

The plaintiff prepared plans and specifications for a thirty-room hotel which the defendant admits were satisfactory to him. Thereafter bids for its construction were sought and the lowest bid received was something over $61,000. The defendant thereupon abandoned the project because of the excessive cost of construction and refused to pay the plaintiff on the theory that he had failed to perform his part of the contract in the preparation of plans suitable to the needs of the defendant. This action was commenced on the written contract for the sum of $1,963.50, three-fifths of the total fee based upon the lowest bid submitted, in accordance with the provisions of paragraph (4) of the contract.

The defendant's answer contained a general denial and, in addition thereto, affirmative allegations of the oral agreement of the plaintiff to prepare plans and specifications for a hotel building which would not cost over $45,000; that the plaintiff failed to design a hotel building "suitable to the needs of the owner," since one of the defendant's known needs was that the cost of construction should not exceed $45,000; and, predicating it upon these same facts, fraud in inducing the defendant to enter into the written contract.

At the trial defendant abandoned the defense of fraud "because proof constituting the elements of fraud was lacking," but the defendant was allowed by the trial court to introduce parol evidence of the prior conversation, conduct, and acts of the parties for the purpose of proving the parol agreement as to the cost of the building. It is the appellant's contention that this evidence was inadmissible except to substantiate the third affirmative defense of fraud, and that, after this defense had been abandoned, it could not properly be considered by either the court or the jury with respect to any of the remaining issues. It is urged as error that the trial court allowed the defendant to add by parol an "entirely new, distinct and independent clause" to the written contract. It is also urged that the defendant's failure to make an affirmative showing and ask for the reformation of the contract on the ground of mistake precluded the introduction of any evidence in support of the omitted clause of the contract.

The appellant further complains of numerous instructions, refusals to give instructions and changes made by the trial court in instructions offered by the plaintiff, which resulted in the jury's being told that they might find that plaintiff and defendant had orally agreed that the plans and specifications were to be prepared for a building, the cost of construction of which was not to exceed $45,000, and, if they further found that the plaintiff had failed to furnish such plans and specifications, the defendant would not be bound to accept the plans and that unless he did accept or make use of them he would not be liable for the plaintiff's services. One such instruction was as follows: "If you find that the plaintiff agreed to design a building so that the cost thereof should not exceed $45,000, there is the implied agreement that the architect cannot recover unless he performs his contract in this respect, and it is not necessary in order to produce this result that the parties should expressly agree that the architect should receive no pay in the event that he failed to perform this part of the agreement."

[1] The one question to be determined upon this appeal is whether it was proper to permit defendant to show the oral agreement limiting the cost of construction. Its solution depends upon whether the case can be said to come within one of the recognized exceptions to the parol evidence rule upon which the appellant relies. Although a contract has been reduced to writing by the parties, parol evidence is admissible to show fraud, accident, or mistake, to show the omitted portion of the contract where the writing is incomplete on its face, and to clear up an ambiguity or uncertainty. Ayers v. Southern Pac. R. R. Co., 173 Cal. 74, 81, 159 P. 144, L. R. A. 1917F, 949; and see note 70 A. L. R. 752, collecting cases.

[2] This evidence was offered to complete the written contract by adding a term which was obviously omitted and with which the appellant admittedly had not complied. The written contract was entirely silent as to

cost of construction, the only subject which it covered with any degree of thoroughness being the architect's fees and the manner of their payment, which fees, however, could not be determined until the estimated cost was ascertained. "It has long been the rule that, when parties have not incorporated into an instrument all of the terms of their contract, evidence is admissible to prove the existence of a separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms. * * *" Buckner v. Leon & Co., 204 Cal. 225, 227, 267 P. 693. Where it appears upon the face of the writing that it is incomplete, parol evidence may be received for the purpose of supplying the missing matter. "If the writing does not show upon its face that it was intended to express the whole agreement between the parties, parol evidence is admissible to show other conditions or explain latent ambiguities. Kreuzberger v. Wingfield, 96 Cal. 255, 31 P. 109; Sivers v. Sivers, 97 Cal. 521, 32 P. 571; Balfour v. Fresno Canal, etc., Co., 109 Cal. 221, 41 P. 876." Williams v. Ashurst Oil, etc., Co., 144 Cal. 619, 624, 78 P. 28, 30; Stephan v. Lagerqvest, 52 Cal. App. 519, 523, 199 P. 52; Hudson v. Barneson, 41 Cal. App. 633, 183 P. 274.

Despite the greater formality of the contract in that case, we consider that Hudson v. Barneson, supra, is determinative on the question of the completeness of this instrument for the purpose of excluding all oral agreements. The same question was there involved and it arose upon an almost identical set of facts, the contract being evidenced by correspondence between the parties. It was there said, page 636 of 41 Cal. App., 183 P. 274, 275: "Appellants contend that the confirmation of that letter by the defendant bound him to pay to the plaintiffs the agreed percentage upon whatever might be the entire estimated cost of any residence and garage which plaintiffs might plan. Respondent, on the other hand, insists that the amount to be paid plaintiffs could not be determined without a prior determination of the cost of the buildings, and as that cost was nowhere stated in the writings, it was an element of the contract omitted therefrom. In our opinion, the trial court did not err in construing the contract in accordance with respondent's contention. Disregarding the improvident nature of such a contract as appellants' construction would make of the one here involved, it is manifest that the plaintiffs' commissions could not be computed from the terms of the written contract alone. This shows its incompleteness. A necessary element of plaintiffs' cause of action was the cost of the buildings. Plaintiffs could not object to evidence on the part of defendant as to the amount of such cost upon the ground that the entire contract was included in the writings, while the necessities of their own case compelled them to adopt a like course to supply the same omitted portion of the contract. It cannot be held, therefore, that the letter imports on its face to be a complete expression of the whole agreement."

[3] In addition it is to be noted that there exists an uncertainty upon the face of the contract. In paragraph 1 it is provided that "the Architect is to design a hotel building suitable for the needs of the Owner." Those needs are in no way described in the written contract. Obviously there must have been some discussion and agreement as to the size, type, and style of the building to be planned and erected, and the cost of construction must almost necessarily have been inseparably connected with any discussion of such questions. This is such an uncertainty as may be cleared up by parol evidence as to the nature and character of the building which, within the contemplation and understanding of the parties at the time of the execution of the written contract, would be "suitable for the needs of the Owner." That its cost was a material factor seems to me to admit of no doubt. In Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 184 P. 661, 662, the contract, for the purchase and sale of a piece of realty, provided: "The seller agrees that it will have the roads in said division 'R' constructed during the fall of 1913 after the rains or when the ground is able to be worked. And construct the necessary bridges." The action was for rescission and recovery of the cash payment for failure of the vendor to construct the roads referred to in the contract. Some bridges and approaches having been constructed before the attempted rescission, the issue was the performance of the vendor. With regard to the exclusion by the trial court of conversations had between the parties before and at the time of the execution of the contract and offered for the purpose of showing the real agreement of the parties in that respect, the court said, page 382 of 181 Cal., 184 P. 661, 662: "This ruling was erroneous. The contract was altogether silent in regard to the character and kind of work that was to be done upon the roads. If there was any agreement on that subject, or any plan relating thereto adopted by defendant and acquiesced in by the plaintiffs, it was not set forth in the contract. So far as appears, it was in parol only. Such an agreement would be collateral and supplemental to the contract contained in the writing, and, as parol evidence thereof would not be inconsistent with the contract and would not alter it in any respect, evidence thereof would be admissible if material to the issues. Sivers v. Sivers, 97 Cal. 521, 32 P. 571; Daly v. Ruddell, 137 Cal. 676, 70 P. 784; 17 Cyc. 741." In Rohan v. Proctor, 61 Cal. App. 447, 214 P. 986, where the lease provided that alterations were to be made before the ten-

ant should enter but did not contain a definite description of what the improvements were to consist or a definite date for their completion, and so was uncertain as to the time when the term was to begin, it was held that this was such an uncertainty as could be cleared up by parol evidence as to the kind and character of alterations and improvements within the understanding and contemplation of the parties at the time of the execution of the contract. However, the complaint therein expressly alleged that the agreement with regard to the nature of the changes to be made in the premises was arrived at subsequent to the execution of the contract. See, also, Austin v. Bullion, 77 Cal. App. 257, 246 P. 151; Lewis Publishing Co. v. Henderson, 103 Cal. App. 425, 284 P. 713. We consequently conclude that there was no error in the admission by the trial court of the testimony complained of and that such evidence was relevant to the issue of the appellant's performance.

Appellant's contention that the respondent should have sought affirmative relief through reformation of the contract for mutual mistake is beside the point since it was never urged that the written contract was not in accordance with the real agreement of the parties, but rather that the whole of the agreement was not reduced to writing.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.

135 Cal.App. 558

McCALL v. McCALL BROS. CO. et al.

Civ. 9011.

District Court of Appeal, First District, Division 2, California.

Dec. 4, 1933.

Receivers ⇐35(1).

Ex parte order appointing receiver *held* improper where no showing was made that irreparable injury would otherwise result.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Cora M. McCall against McCall Bros. Company and others. From an ex parte order appointing a receiver, defendant Thaddeus D. McCall appeals.

Reversed.

M. W. Conkling, of San Diego, and Harry W. Horton, of El Centro, for appellant.

Holbrook, Taylor, Tarr & Horton, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action for a dissolution of copartnership, for an accounting and for the appointment of a receiver. Upon the filing of the verified complaint the trial court made an ex parte order appointing a receiver. Defendant Thaddeus D. McCall appeals from said order.

The sole contention made by appellant is that the trial court erred in making an ex parte order appointing a receiver, as no showing was made that irreparable injury would result unless a receiver was so appointed. In our opinion this contention must be sustained. A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Fischer v. Superior Court, 110 Cal. 129, 42 P. 561; Tyler v. Park Ridge County Club, 103 Cal. App. 117, 284 P. 247; Ryan v. Murphy, 39 Cal. App. 640, 179 P. 517; Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94, 89 P. 866. In Fischer v. Superior Court, supra, the Supreme Court said, at page 138 of the opinion in 110 Cal., 42 P. 561, 562: "The general rule, no doubt, is that so harsh a measure as the appointment of a receiver to take property out of one's possession without trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice. * * *" In Ryan v. Murphy, supra, at page 641 of 39 Cal. App., 179 P. 517, 518, the court said: "It is obvious that the receiver in this case was appointed without formal notice. Such an appointment, under the established law of this state, cannot be legally made except upon a showing of great emergency." The allegations of the complaint in the present case were insufficient to show any "great emergency" or that any "irreparable injury would be done during the few days necessary for a hearing on notice" of an application for the appointment of a receiver.

The ex parte order appointing the receiver is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

135 Cal.App. 560

PEOPLE v. MARMILLION.

Cr. 2435.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1933.

Homicide ⇐234(3).

Evidence *held* to corroborate testimony of accomplice and sustain conviction for second-degree murder based on pregnant woman's death following abortion operation.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Mathew J. Marmillion was convicted of second-degree murder, and he appeals.

Affirmed.

Crop & Crop, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

The crime of which defendant has been convicted is murder in the second degree. The death of the murdered woman occurred as the result of an abortion, or attempted abortion; the woman being pregnant at that time.

The sole ground of appeal asserted by appellant is that the evidence is insufficient to sustain the verdict, in this, "that there is no corroboration of the testimony of the accomplice Hairston connecting appellant with the crime charged or with any included lesser offense." The evidence shows that the woman died while lying upon an operating table in the office of the defendant. Not only does the evidence prove that the woman died as the result of an abortion operation, but there is an abundance of evidence of circumstances connecting defendant with the commission of the offense. We are unable to discover so much as an excuse for this appeal.

The judgment and order are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

135 Cal.App. 541

Ex parte SOMMERS.

Cr. 1300.

District Court of Appeal, Third District, California.

Dec. 1, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

1. Criminal law ⇐1216(6).

Paroled prisoner, willfully absenting himself from prison after parole was revoked, could not claim benefit of running of sentence, while he remained outside prison as fugitive from justice.

2. Criminal law ⇐1216(6).

Paroled prisoner willfully absenting himself from prison after revocation of parole was not entitled to credit on original sentence for period he was confined in county jail for subsequent offense.

Original application by Robert Sommers for writ of habeas corpus prayed to be directed to Warden of Folsom State Prison.

Writ denied.

Robert Sommers, in pro. per.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The petitioner was convicted of the crime of forgery and sentenced to imprisonment at Folsom state prison, where he was received October 21, 1924. His term was subsequently fixed by the prison board at five years' imprisonment. June 11, 1927, he was granted parole. For violation of the terms of his parole, the credits and parole were forfeited and canceled October 29, 1927. The petitioner failed to return to the state prison to complete his sentence, but continued to violate his parole by absconding and concealing his whereabouts from the prison authorities. He thereby became a fugitive from justice. The prison authorities had no knowledge of his whereabouts until he was arrested at Los Angeles on June 12, 1931, convicted and sentenced to one year imprisonment in the county jail for the commission of a subsequent offense. After the expiration of his term of imprisonment in the county jail at Los Angeles, he was returned to Folsom to complete the service of his term in that institution. It is contended the petitioner is entitled to his discharge from custody for the reason that the five-year term of imprisonment fixed by the prison board has expired.

[1] The petitioner's term of imprisonment at Folsom state prison has not expired, and he is therefore not entitled to be discharged.

After the petitioner's parole was revoked October 29, 1927, it became his duty to present himself to the prison authorities at Folsom to complete his sentence of imprisonment in that institution. He had then served but three years of his term. He thereafter willfully absented himself from that prison, and thereby became a fugitive from justice. One may not claim the benefit of the running of a sentence of imprisonment while he willfully remains outside the prison without the sanction of the prison authorities and while

he is a fugitive from justice. In re Forbes, 108 Cal. App. 683, 292 P. 142.

[2] Nor is the petitioner entitled to credit for the running of his term of imprisonment in the state prison for the period of time during which he was serving sentence in the Los Angeles county jail for the commission of a subsequent offense after his parole had been rescinded. In re Forbes, supra; In re Daniels, 110 Cal. App. 638, 294 P. 735.

The running of petitioner's term of imprisonment in the state prison was suspended during the period of time during which he was absent from that institution without authority of the prison officers after his parole was canceled. He has therefore not completed his term of imprisonment at Folsom state prison, and is lawfully held as a prisoner of that institution pursuant to the original judgment of commitment.

The writ of habeas corpus is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

STANDARD OIL CO. OF CALIFORNIA v. JOHN P. MILLS ORGANIZATION, Inc., et al. *

PAINTED HILLS OIL CO. et al. v. SAME. SMITH et ux. v. WRIGHT et al.

Civ. 8989.

District Court of Appeal, First District, Division 1, California.

Dec. 2, 1933.

Rehearing Denied Dec. 30, 1933.

1. Mines and minerals ⇐48.
Oil in place is part of realty.

2. Mines and minerals ⇐73.
Oil lease creates property right in nature of servitude, chattel real, or profit à prendre.

3. Mines and minerals ⇐73.
Oil lease severs title to oil in place from title to surface, and oil when brought to surface becomes personal property, in which lessor and lessee are tenants in common.

4. Mines and minerals ⇐79(1).
Shares in oil when produced may be assigned before actual production.

5. Mines and minerals ⇐79(1).
Deed conveying lot without limiting percentage of grantee's royalty under oil lease covering block gave grantee only percentage applicable to lot where grantor had assigned all remaining proportionate royalty interests in deeds of other lots in block and grantee had actual notice of assignments.

6. Mines and minerals ⇐79(1).
Recordation of assignment of part of oil royalty does not give constructive notice.

7. Mines and minerals ⇐79(1).
Recordation of deeds conveying lots and proportionate shares of oil royalty gave no constructive notice of assignment of royalty interests.

Recordations of deeds did not give constructive notice, since recordation of deed transferring title to real and personal property does not give constructive notice as to personal property.

8. Mines and minerals ⇐79(7).
Evidence in suit involving conflicting claims to royalties sustained finding that grantee of oil-producing lot had actual notice of grantor's conveyance of proportionate royalty interests in deeds to other lots in block.

9. Judgment ⇐714(2).
Judgment quieting title to lot *held* not res judicata in subsequent suit involving conflicting claims under assignments of interests in royalty in oil produced in block.

The judgment quieting title was not res judicata, since the assignment of royalty interest created no interest in personal property and the judgment did not decide the ownership of oil which might be produced from lot, and since only one lot and not the entire block was involved in the judgment quieting title.

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Interpleader action by the Standard Oil Company of California against the John P. Mills Organization, Inc., and others, in which the Painted Hills Oil Company and others intervened, and C. Douglass Smith and wife filed cross-complaint against Constanse R. Wright and others. From the judgment, cross-complainants appeal.

Affirmed.

C. Douglass Smith, of Long Beach, for appellants Smith.

F. G. Smith, of Los Angeles, for respondents.

Lawler & Degnan, of Los Angeles, for plaintiff Standard Oil Co.

Todd, Pawson, Watkins & Anderson, of Long Beach, for plaintiff in intervention Painted Hills Oil Co.

W. I. Gilbert, of Los Angeles, for defendant John P. Mills Organization, Inc.

Bradner & Weil, of Los Angeles, for defendants in intervention Joseph J. Mathe et al.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 797.

GRAY, Justice pro tem.

Standard Oil Company of California commenced this action by filing its complaint in interpleader, seeking an adjudication of conflicting claims to the royalty portion of the purchase price of crude oil, delivered under a contract of May 11, 1926, with Painted Hills Oil Association, a voluntary business trust, and produced from block "V" of Signal Hill in the county of Los Angeles, as per map recorded in book 9, pages 2 and 3 of maps in the office of the county recorder of said county. The numerous and voluminous pleadings presented solely a controversy between appellants, who owned 14½ lots of said block, and respondents, who severally owned the remainder of the 83 lots of said block. Appellants claimed that, because the wells producing the oil were located on two of their lots, they were entitled to all of the royalty, and respondents claimed that, under the facts hereinafter stated, each lot owner was entitled to 1/83 of the royalty upon oil produced from any portion of the block. Judgment was rendered in favor of respondents in conformity with their contention, and appellants appeal.

The following facts, found by the court, are undisputed: On May 31, 1921, the Standard Bond & Mortgage Company, being the then owner of the property, as lessor, executed an oil lease to Signal Hill Syndicate, Inc., a corporation, as lessee, covering said block for a term of 20 years and thereafter as long as oil was produced and at a royalty of 1/6 of all oil produced, saved and sold from said block. This lease was recorded on March 3, 1922. On November 10, 1922, Signal Hill Syndicate, Inc., executed a sublease, which was recorded on January 19, 1923, to said Painted Hills Oil Association, of the block for the remainder of the term. On February 9, 1923, John P. Mills Organization, Inc., acquired title to said block, subject to said lease and sublease, by deed from Standard Bond & Mortgage Company, which was recorded on February 21, 1923, and provided that the grantee acquired any and all right, title, and interest of the grantor under the lease. Thereafter, John P. Mills Organization, Inc., subdivided the block into 83 lots and proceeded to sell the same under a plan whereby the royalty should be divided among the lot owners, each lot receiving 1/83 of the 1/6 interest or 1/498 part of all oil produced, saved, and sold from the block. Before any such sale, the corporation commissioner, upon verified application of John P. Mills Organization, Inc., stating the facts of such lease and sublease and the proposed subdivision, issued a permit authorizing it to sell and issue grant deeds for the conveyance of the 83 lots, together with 1/498 of the oil produced, saved, and sold from the block with each lot. In accordance with the permit, during 1923, John P. Mills Organization, Inc., sold 73 lots, and, subsequently, the remainder. Each deed was recorded, and substantially all contained the following provision: "Together with 1/498th part of all oil and gas produced, saved and sold on said Block 'V' hereinabove referred to."

[1-4] In place the oil was part of the realty and, before the execution of the lease, belonged to the owner of the ground. Merrill v. California Petroleum Corp., 105 Cal. App. 737, 288 P. 721; Stone v. City of Los Angeles, 114 Cal. App. 192, 299 P. 838. As to the lessee, the lease created a property right in the nature of a servitude or chattel real at common law, which might be held and enjoyed as an estate for years or perpetually during production. Richardson v. Callahan, 213 Cal. 683, 3 P.(2d) 927. Or, as was said in Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 297 P. 73, the lease created a profit à prendre. The lease severed the title or right to the oil in place from the title to the surface (see extended note in 29 A. L. R. 586). When brought to the surface, the oil became personal property, in which the lessor and lessee were tenants in common. Merrill v. California Petroleum Corp., supra; Stone v. City of Los Angeles, supra. "It is settled law that the lessee under an oil and gas lease acquires no title to the oil and gas in place as part of the realty, but only a right to enter upon the land, drill wells, and reduce the oil and gas to possession. When reduced to possession, the oil and gas are personal property, and only then can absolute title vest in the lessee. [Cases cited.]" Western Oil & Refining Company v. Venago Oil Corporation (Cal. Sup.) 24 P.(2d) 971, 973. However, since the oil could be potentially possessed, shares in it when produced, might be assigned before its actual production. Western Oil & Refining Company v. Venago Oil Corporation, supra.

[5] In the instant case, John P. Mills Organization, Inc., acquired title to the block, subject to the oil lease, and with an assignment of all the lessor's rights under the lease. It thus became the owner of the ground from which had been severed the right to the oil, and the owner, as personal property, of 1/6 of the oil to be produced under the lease. It then might have sold either separately or together. However, it chose to sell the land and interest in the oil together. This it did by assigning 1/83 interest in its 1/6 royalty to each grantee, in all deeds, except three, conveying title to the 83 lots. These three deeds do not contain the provision, above noted, assigning 1/498 part of all oil produced, saved, and sold on block "V." Two of these deeds conveyed lots, whose owners do not question the judgment. The third conveyed lots Nos. 57, 67, and 68 to appellants' predecessor. The oil from which the royalty involved in this case is due was produced from wells on lots 68 and 83. The deed conveying lot 83 to appellants' predecessor contained the above provision. Before appellants' predecessor acquired

title to lot 68, John P. Mills Organization, Inc., had conveyed all the other lots together with 1/498 interest in oil produced anywhere in the block, except in the other two of the above-noted deeds. Therefore, when such predecessor acquired title to lot 68, since his grantor has disposed of all but 1/83 of the royalty, he could only have acquired such remaining interest. Western Oil & Refining Company v. Venago Oil Corporation, supra. Since John P. Mills Organization, Inc., had assigned its interest in the royalty by the deeds, it is unnecessary to decide what otherwise would have been the respective rights of the lots into which the block, subject to the oil lease, had been subdivided. See notes in 5 A. L. R. 1162; 16 A. L. R. 588; 64 A. L. R. 634.

[6-8] Appellants question certain findings, which, so far as here important, determined that they took title with knowledge of the previous assignments. Since an assignment of part of the royalty conveys no interest in the land, its recordation does not give constructive notice. Black v. Solano Co., 114 Cal. App. 170, 299 P. 843. The recordation of a deed, transferring title to real and personal property, does not give constructive notice as to the personal property. Scott v. Sierra Lumber Co., 67 Cal. 71, 7 P. 131. Although they are not chargeable with constructive notice of the assignment by the recordation of the deeds, they had constructive notice of the lease by its recordation. The evidence also discloses that C. Douglass Smith had actual notice of the assignments in the deeds. Before he purchased any of the 14½ lots, he procured title reports, which each noted the existence of these assignments. He also had been advised by his grantor's agent as to their terms. He, also as an attorney, had discussed with prospective purchasers such assignments before and after he purchased lot 68. His own testimony shows that he always knew that these assignments were included in the respective deeds, although he questioned their legal effect to transfer title.

[9] Although they did not plead it, appellants were permitted to introduce a final judgment of the Los Angeles superior court quieting title to lot 77 in said block "V." The judgment roll discloses that the parties stipulated that the question to be decided was whether the above-noted provision of their deeds gave other lot owners an interest in said lot 77. Since, as above pointed out, the provision of the deeds merely assigned an interest in personal property, to wit, the oil, and did not create an interest in real property, the judgment properly quieted title. The judgment did not decide the ownership of the oil that might be produced from that lot. Furthermore, title to lot 77 alone was quieted. Obviously, the subject-matter of that action is different from the present one, and therefore that judgment is not res adjudicata of the present case.

Judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

135 Cal.App. 535

PEOPLE v. NAVARRO.

Cr. 1294.

District Court of Appeal, Third District, California.

Dec. 1, 1933.

1. Criminal law ⇐620(1).

Consolidation or severance of causes for trial is purely matter of discretion with court.

2. Criminal law ⇐1148.

Order of court severing trial of cases will not be disturbed on appeal, in absence of abuse of discretion.

3. Criminal law ⇐608.

Denial of motion for continuance *held* not abuse of discretion, where no affidavits were filed in support of motion, no evidence adduced, and no adequate showing made on which court was warranted in granting continuance.

4. Criminal law ⇐823(2).

Objectionable language in instruction that duty of determining guilt or innocence of those accused of crime rested finally with jury, and unless they did duty, laws might as well be stricken from statute books, *held* harmless, in view of following statement.

> Objectionable language was harmless, since it was immediately followed by statement that jury should also keep in mind importance to accused of result of their deliberations and be just to him as well as to the people of the state.

5. Criminal law ⇐763, 764(10).

Instruction that jury might consider fact that accused was intoxicated at time in determining intent with which he committed act *held* properly rejected as invading province of jury by declaring as fact that accused was intoxicated.

6. Witnesses ⇐268(1).

Trial judge has duty of restricting cross-examination of witnesses to reasonable limitations.

7. Criminal law ⇐1170½(1).

Permitting witness to refer to slip of paper which he held in his hand to refresh memory regarding name and address which he said paper contained *held* neither prejudicial nor harmful.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

8. Criminal law ⇐1170(1).

Sustaining objection to question to state witness as to whether he was advancing money for brother's defense *held* not prejudicial.

Although answer to such question might well have been permitted, its exclusion was not prejudicial, in that it did not clearly appear that witness was a brother of one of men who was separately charged as participating in burglary for which defendant was convicted, and the very existence of their relationship was sufficient to establish assumption that witness was likely to be prejudiced in favor of his brother.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Joe Navarro was convicted of burglary in the second degree, and he appeals.

Affirmed.

W. L. Shaw, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of burglary of the second degree and sentenced to imprisonment in the state prison at San Quentin. From the judgment of commitment and from an order denying defendant's motion for a new trial, he has appealed.

The defendant and two other individuals were separately charged with participating in the same burglary of certain wearing apparel at a specified time and place. Upon motion of the district attorney, these three cases were consolidated for the purpose of trial. The cases were regularly set for trial for August 9, 1933. A jury was summoned for that date. On the day set for the trial, the district attorney moved to sever the causes for trial. This motion was formally objected to by counsel for the appellant, who then said: "We have gone ahead and arranged a joint defense, and this (severance) just brings confusion to the defendants in their case." The appellant's attorney, Mr. Zarick, further said: "We haven't a strenuous objection to going to trial at this particular time, but we do prefer to go to trial after Mr. Frye has his trial." The case against Frye was in no way related to the present action. The objection to the trial at that time appears to have been chiefly on account of personal convenience of counsel. A motion for continuance was then orally made and denied. This motion was not supported by affidavits and no showing was made which would entitle the defendant to a continuance. In denying the motion for a continuance the trial judge said: "The court is not disposed to grant a continuance unless * * * legal showing is made. * * * The jury is here for the purpose of trying a case today. * * * That is not a legal showing." Thereupon, the cause was tried, and the defendant was convicted of burglary of the second degree. From this judgment and an order denying his motion for a new trial, the defendant has appealed.

It is contended the court erred in denying defendant's motion for a continuance of the trial, and in other rulings with respect to the introduction of evidence during the course of the trial; and the court erred in giving and refusing certain instructions to the jury, and that the verdict and judgment are not supported by the evidence.

[1, 2] The three defendants were separately charged with the commission of the burglary of which the appellant was convicted. It did not constitute error for the court to grant the motion to sever their cases for the purpose of trial. The consolidation or severance of causes for trial is purely a matter of discretion with the court. Except for an abuse of discretion, the order of the court severing the trial of cases will not be disturbed on appeal. Section 1098, Pen. Code; People v. Bringhurst, 192 Cal. 748, 221 P. 897; People v. Ford, 81 Cal. App. 449, 253 P. 966.

[3] Neither was there an abuse of discretion on the part of the court in denying defendant's motion for a continuance of the time of trial. People v. Northcott, 209 Cal. 639, 651, 289 P. 634, 70 A. L. R. 806; section 1050, Pen. Code; 8 Cal. Jur. p. 209, § 281. No affidavits were filed in support of the motion for a continuance, no evidence was adduced, and no adequate showing was made upon which the court was warranted in granting the continuance. There is therefore no merit in the contention that the court erred in denying the motion. It does not appear that the defendant was prejudiced by the denial of this motion.

[4] The appellant charges error in the giving of instructions which were offered by the prosecution on the ground that they are redundant, prolific, and argumentative. With a single exception, no specific instruction is cited as an example of the alleged evil. We have read the entire charge and are unable to say any of the instructions are open to serious criticism. One paragraph taken from a lengthy statement of general principles which were announced as rules to govern the jury's consideration of evidence is challenged. It includes the objectionable statement that with the jury "finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty laws may as well be stricken from the statute books." This language has been criticized by the appellate courts as misleading, objectionable, and in the nature of a warning to

the jury. People v. Harshaw, 128 Cal. App. 212, 16 P.(2d) 1025; People v. Stevens, 78 Cal. App. 395, 409, 248 P. 696. In the present case, however, we think the objectionable language was harmless since it was immediately followed by the statement that, "You should also keep in mind the importance to the accused of the result of your deliberations, and be just to him as well as to the People of the State of California." While the foregoing challenged language should have been omitted from the instruction, we are of the opinion it does not constitute reversible error.

[5] The refusal of the following instruction, which was offered by defendant, is assigned as error. It reads: "Whenever the actual existence of any specific intent is a necessary element to constitute any degree of crime, the jury may take into consideration the fact that the accused defendant Navarro was intoxicated at the time, in determining the intent with which he committed the act, if you should believe the defendant Navarro committed such offense.

This proffered instruction was properly rejected. It invades the province of the jury by declaring as a fact that the accused was intoxicated at the time of the commission of the offense with which he was charged. The jury has the sole province of determining whether the defendant is drunk or sober. Moreover, both the subject of the effect of intoxication and the effect of the intent with which the crime was committed were elsewhere fully covered. The jury was instructed that: "Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." With respect to the subject of intent, the jury was further instructed: "As to the intent or intention with which an act is committed, such intent or intention is a matter entirely within the province of the jury, who must, from a full and careful consideration of the testimony and from all of the circumstances connected with the commission of the act, arrive at a determination as to whether such act was committed with a criminal intent." In the following instruction, the jury was also told that: "To constitute burglary, there must be present the act and the intent. Intent must be proved as a specific element. Intent is not to be presumed from the doing of the act. Intent is a question of fact; it must be proved, as any other fact in the case * * * by evidence, direct or circumstantial." These instructions were as favorable to the defendant as he was entitled to. No reversible error may be predicated on the giving or refusal of instructions.

[6] From an examination of the record with respect to the challenged rulings of the court upon the introduction of evidence, we are satisfied the defendant was not unduly restricted in his cross-examination of witnesses. It does not appear the defendant was prejudiced by the exclusion of any material evidence. It is the duty of a trial judge to restrict the cross-examination of witnesses to reasonable limitations. Nor does there appear to have been any prejudicial error in the rulings of the court upon the introduction of evidence.

[7] From an objection which was made to the witness Tafoya referring to a slip of paper which he held in his hand, it is inferred that he was refreshing his memory regarding some memorandum which it contained. The paper was not offered in evidence. Upon inquiry, the witness said: "This piece of paper here contains the address of some man that gave me information about this defendant." We have no other way of determining the contents of the paper. It does not appear the witness was doing more than to refresh his memory regarding the name and address of a man with whom he had talked about the charge against the defendant. It was neither prejudicial nor harmful for him to merely refresh his memory regarding the name and address which he said the paper contained. Moreover, it does not appear the witness again referred to the paper after the objection was made.

[8] The sustaining of an objection by the district attorney to the following question, to wit: "Q. As a matter of fact, Mr. Tafoya, you were advancing money for your brother's defense, is that not correct?" is assigned as error. This question was asked for the purpose of establishing the interest of the witness so as to discredit his testimony. The answer might well have been permitted. Its exclusion, however, is not prejudicial. It does clearly appear that the witness is a brother of one of the men who was separately charged as participating in the burglary with which the defendant was convicted. The very existence of their relationship is sufficient to establish the assumption that the witness was likely to be prejudiced in favor of his brother. We are not convinced that the exclusion of the further fact that he was contributing money to aid in the defense of his brother would furnish further evidence of added prejudice in his favor. At least, its exclusion is not reversible error.

The defendant appears to have had a fair and impartial trial. The judgment is adequately supported by the evidence. The record indicates there was no miscarriage of justice.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 451

CROW v. BOARD OF SUP'RS OF COUNTY OF STANISLAUS et al.*

Civ. 5055.

District Court of Appeal, Third District, California.

Nov. 25, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

1. Certiorari ⇐69.

Power of appellate court, on appeal from order dismissing petition for writ of review in lower court without hearing thereon, cannot be extended to annul, modify, or affirm any action of board of supervisors (Code Civ. Proc. § 1075).

2. Certiorari ⇐9.

Writ of review is not writ of absolute right.

3. Certiorari ⇐31.

Court, in determining whether writ of review will be granted, will consider whether issuance of writ will lead to inextricable confusion; rule applying also to proceedings in mandamus and certiorari.

4. Counties ⇐191.

In determining increase permitted over preceding fiscal year in fixing county budget, sums listed as unbudgeted reserve and as general reserve fund are not to be included, being carried in budget from year to year as authorized by statute (Pol. Code, § 3714, subd. 3, as amended by St. 1929, p. 1129; Const. art. 11, § 20, adopted in 1933).

5. Counties ⇐191.

"Expenditure," as used in constitutional provision relating to allowable increase over preceding fiscal year, includes all expenditures legally made by county rather than expenditures in enforcement of law only (Const. art. 11, § 20, adopted in 1933).

[Ed. Note.—For other definitions of "Expenditure," see Words & Phrases.]

6. Counties ⇐191.

Exclusion from base upon which calculations were to be made to determine permissible increase in expenditures, of all moneys raised for county high and elementary school purposes during preceding fiscal year, *held* erroneous (Const. art. 9, § 6; art. 11, § 20, adopted in 1933; Const. art. 13, § 15, as amended in 1933).

7. Counties ⇐191.

Board of supervisors, in determining allowable increase in expenditures over preceding year, has right to add such portion of money to any particular item contained in budget (Const. art. 11, § 20, adopted in 1933).

Appeal from Superior Court, Stanislaus County; J. J. Trabucco, Judge.

Petition by C. F. Crow for a writ of review for the purpose of having set aside and annulled the order of the Board of Supervisors of the County of Stanislaus, opposed by W. H. Brink and others, adopting a budget and fixing a tax rate. Judgment of dismissal, and petitioner appeals.

Affirmed.

Dennett & Zion, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., amici curiæ.

R. R. Fowler, Dist. Atty., and F. O. Hoover, Deputy Dist. Atty., both of Modesto, for respondent.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, amici curiæ.

Mr. Justice PLUMMER delivered the opinion of the court.

This proceeding is before us upon an appeal by the petitioner from a judgment of dismissal entered in the trial court, after sustaining a demurrer to the appellant's petition for a writ of review without leave to amend.

The proceeding was instituted in the court below for the purpose of having set aside and annulled the order of the board of supervisors of the county of Stanislaus adopting a budget for the fiscal year 1933–1934, and fixing a tax rate to be levied upon the taxable property of said county.

The petition sets forth that the appellant is a resident, property owner, and taxpayer of the county of Stanislaus; that in the assessment roll of the county of Stanislaus as equalized the value of the taxable property therein was fixed at the sum of $42,757,680. Upon this valuation the respondents fixed a tax rate of $1.95 for each $100. The petition also sets forth that the budget approved and allowed by the respondents for the fiscal year 1933–1934 exceeds by more than 5 per cent. the county expenditures for the fiscal year 1932–1933; that said excess amounts approximately to the sum of $130,414, after allowing 10 per cent. for anticipated delinquencies; that the amount allowed by the board of supervisors is in excess of the amount allowed by section 20 of article 11 of the Constitution as adopted at the special election held June 27, 1933.

The petition further sets forth that the amount proposed to be expended by the respondents for the fiscal year 1933–1934, including the incumbered balance for the preceding year, is the sum of $811,102, after excluding therefrom the amount raised to pay interest and redemption charges upon outstanding bonds, and that the county spent, during the preceding fiscal year, after deduct-

ing the amount expended for interest and redemption charges for bonds, the sum of $648,370; this expenditure being less the amount raised for the purpose of supporting schools now taken over by the state.

It is further set forth in the petition that 5 per cent. of the expenditures for the fiscal year 1932–1933 would amount to the sum of $32,468, giving an allowable expenditure for the fiscal year 1933–1934 of the aggregate sum of $680,788. These figures and conclusions drawn therefrom are all based upon the elimination of expenditures made by the county for high and elementary school purposes, as provided by section 6 of article 9 of the Constitution, in force during the fiscal year 1932–1933. An exhibit is also attached to the petition showing the budget allowances proposed for the fiscal year 1933–1934, in which appears an unbudgeted reserve item in the sum of $13,949, and also a general reserve item of $100,000, which will be referred to later.

[1] No hearing having been had upon the petition in the court below, the power of this court upon appeal cannot be extended to annul, modify or affirm any action of the board of supervisors. All that this court can do is to either affirm or reverse the judgment and direct the lower court to proceed and hear and determine the merits of the petition after a full return has been made by the respondents thereto. Section 1075, Code of Civil Procedure, relates only to the power of the court on hearing after a return has been had.

The record contains nothing indicating the reasoning of the lower court leading to the sustaining of the respondents' demurrer to the appellant's petition without leave to amend. Two vital questions, however, are tendered for our consideration, to wit: First, do the facts show that the petitioner is entitled to a writ of review? Second, did the respondents adopt a correct base upon which to estimate the taxes legally allowable to be raised for the fiscal year 1933–1934, and the expenditures which the Constitution permits?

While the prayer is for an annulment of the tax levy, nothing appears in the petition attacking either the legality or even the regularity of the tax levy. No issue is raised as to the legality of any of the purposes for which the budget expenses have been estimated. The general rule as to the limitation of the rate or amount of taxes to be levied is thus stated in 61 C. J. 152: "A constitutional limitation on the rate or amount of taxes which may be levied in any one year has been held to render illegal and void a tax imposed beyond the constitutional limitation, at least in respect to the excess. The limitation has been held to be a limitation only of the power to provide revenue by taxation on an ad valorem basis, and there is always an implied exception as to taxes levied for the purpose of paying debts contracted before the adoption of the constitutional restriction. Where, by statute, a limitation has been imposed on the rate of taxation, except taxes to meet certain emergencies, any further statute purporting to admit of a departure from the general policy of limitation will be strictly construed."

Again, on page 556 of the same volume, the text reads: "Where taxes are levied to the prescribed limit, the power is exhausted, and any excess taxes levied in excess thereof are illegal and void * * * except where the excess is only slight, in which case it may be regarded as a mere irregularity, * * * and not only the excess, but the whole levy is illegal and void, where the illegal excess is not separable from the part that otherwise would be legal."

As to the remedy, the text-writer, in the same volume, page 578, sets forth the rule as follows: "Certiorari may lie to review the proceedings of a levy board in levying a tax, and to quash the levy so far as it is illegal, but it has been held that such review will be allowed only in exceptional cases, in which the public interests may be jeopardized. Upon such review the proceedings of the boards and corporate bodies in levying a tax may be reviewed and reversed if found void, and the constitutionality of the statute under which the proceedings were had may be inquired into and determined."

Section 1074, Code of Civil Procedure, reads: "The review upon this writ [certiorari] cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer." In commenting upon this section the text-writer in 4 California Jurisprudence, p. 1106, states what we adopt as the correct rule: "It is clear that in such cases the reviewing court has no authority to go beyond the question of jurisdiction, for upon every question, except the mere question of power, the action of the inferior tribunal is final and conclusive, and the reviewing court has nothing to do with the proceedings before the inferior tribunal, except so far as an examination of such proceedings is necessary to determine the question of its jurisdiction. If such tribunal has regularly pursued its authority, the inquiry stops. Errors of law committed by the inferior court in the exercise of its authority cannot be considered, and in such case no matter how erroneous the decision may be, even on the face of the record, the reviewing court has no power to change, annul or reverse it in a proceeding in certiorari."

[2, 3] A writ of review not being a writ of absolute right, another well-settled rule of law has been adopted for the guidance of courts, to wit: Will the issuance of such a

writ lead to inextricable confusion? This rule applies to both proceedings in mandamus and also in certiorari.

In the case of McDonald v. Richards, 79 Cal. App. 1, 248 P. 1049, 1056, this court, in considering the questions here involved, ruled as follows: "The facts before us show that the time has long since gone by when any authority exists to order any change in the tax levy already made. The different sections of the Political Code relating to the levying of county taxes, the making out of the assessment rolls by the different ministerial officers having to do therewith show that the power to direct any other assessment has ceased to exist, and that any levy, if it were possible in this proceeding for this court to so order, would but lead to confusion and that, under such circumstances, mandamus will not issue." The facts in that case were that mandamus was sought to compel the board of supervisors to increase a tax levy after the expiration of the time fixed in the statute for making tax levies. The excerpt from the opinion in the case of McDonald v. Richards, supra, which we have just set forth, was quoted with approval by the Supreme Court in the case of Pasadena Junior College District v. Board of Supervisors, etc., 216 Cal. 61, page 75, 13 P.(2d) 678.

By section 1068, Code of Civil Procedure, a writ of review can only be issued as against an inferior tribunal, board, or officer exercising judicial functions to determine if jurisdiction has been exceeded, nor unless it appears that there is no plain, speedy or adequate remedy otherwise afforded.

The proceeding in certiorari was upheld in the case of Maxwell v. Board of Supervisors of Stanislaus County, 53 Cal. 389. The want of jurisdiction on the part of the board of supervisors appeared upon the face of the record. The contract was let without notice being given as required by law.

The case of Boskowitz v. Thompson, 144 Cal. 724, 78 P. 290, relied upon by the appellant, is not in point for the reason that the case was prosecuted as an injunction suit to prevent the collection of a tax which was declared void because levied for an illegal purpose. Practically the same thing is true in the case of Hughson v. Crane, 115 Cal. 404, 47 P. 120, where the amount of the assessment was held to be excessive. These cases are limited in their application even where the amount of the expenditures is fixed in excess of the legal limit by the case of Beck v. Barnes, 129 Cal. App. 187, 18 P.(2d) 749, where it is held that if it appears that the excess is really negligible as compared to the amount of the tax to be raised, judgment annulling the tax will not be entered. In that case the levy was made for the purpose of raising the sum of $1,250,000. The amount raised was in fact about $23,000 in excess of that sum. It was held that this limited excess did not void the assessment, and judgment nullifying the assessment was denied.

In Mallery v. Griffin, 43 S. D. 71, 177 N. W. 818, 819, in an action to quiet title, the Supreme Court of South Dakota held void a tax deed, following a sale, based upon an excessive levy. The statute in that case provided as follows: "No greater levy of county tax shall be made * * * than will be equal to the amount of such expenses, with an excess of five per cent."

In St. Louis, San Francisco R. Co. v. Andrews, 137 Okl. 222, 278 P. 617, the Supreme Court of Oklahoma held that every tax levy exceeding the legal limit is invalid, unless authorized by a vote, as required by law. That was a case brought for the purpose of recovering tax money paid under protest. The legal limit for the purpose for which the tax was levied was the sum of 4.25 mills. The rate adopted was 5.204 mills.

None of these cases hold that certiorari is a proper remedy, nor is the question of whether the action of the board of supervisors is judicial, legislative, or ministerial in making up a tax budget and levying a tax upon the property of a county considered or passed upon. Section 1068, Code of Civil Procedure, contains a limitation upon the rule which prevails in other states, and authorities from other states can only be considered in the light of this section of the Code. No authorities have been cited holding that the making up of a county budget is judicial in character. In going over the different items of proposed expenditures we can perceive no difference in the action of a board of supervisors than of the Legislature in making appropriations for specific purposes. In both instances it is a matter of legislative discretion as to whether the money shall be expended for a particular purpose, and the amount to be expended is a matter of calculation. This court, in the case of McDonald v. Richards, supra, had occasion to examine the character of the act of the board of supervisors now under consideration, and there said: "In 36 C. J. 1032, we find that the word 'levy,' as applied to taxation, is given a variety of meanings, according to how it is used. It may be used in reference to either the legislative or administrative functions of taxation. It is used to denote the legislative function of charging the collective body of taxpayers with the sum to be raised and also to the ministerial function of estimating the taxes upon the assessment roll showing the amount charged to each individual taxpayer. As applied to the determination of the amount or rate of taxes to be charged to the collective body of taxpayers, it is a legislative function to be exercised only by the state or by some inferior political subdivision thereof. The duty of the other officers in relation to the tax appears to be purely ministerial, and, when used in relation to their

duties, it would seem to be used with that meaning. In the case of McCabe v. Carpenter, 102 Cal. 469, 36 P. 836, we find the following language used: 'But, since the power to levy a tax is purely legislative, it would seem to follow, that the power cannot be vested in any other authority of the local corporation than the body in which is vested the legislative power of such municipal corporation.'"

The opinion in the McDonald Case, citing authorities to support the rule laid down therein, further holds that mandamus is a proper remedy to compel the levying of a tax, which, of course, is based upon the conclusion that the levying of a tax is ministerial (City of Coronado v. City of San Diego, 97 Cal. 440, 32 P. 518), where it is said: "It is recognized as a universal rule that the writ of mandate will issue to compel the levy of a tax, and it will issue for the reason that the act of making the levy is purely ministerial." The remedies available to an aggrieved taxpayer are fully set out in 24 California Jurisprudence, pp. 299–318. See, also, Whitmore et al. v. Brown, 207 Cal. 473, 279 P. 447.

It may also be observed that none of the cases cited by the appellant consider that confusion would follow, or that the regular and legitimate functions of a county government would be interrupted, if not seriously or wholly impaired, as would be the case by allowing a writ of review herein, even if the amount of money realized by reason of the budget and the tax levy as adopted by the respondents produced a sum of money somewhat in excess of the limit specified in the constitutional provisions hereafter considered. Beck v. Barnes, supra.

The question then occurs, if we adopt the views of the appellant, is the amount of the budget allowed for the fiscal year of 1933–1934, by the respondents, so excessive and disproportionate as to nullify the entire budget? On the part of the appellant it is claimed that this excess amounts to a sum somewhat in excess of $130,000. This calculation excludes all moneys raised by taxation during the fiscal year 1932–1933 for high and elementary school purposes. On the part of the respondents the figures are to the effect that even though all school moneys raised by the county during those years be excluded from the calculation, the alleged excess is only about the sum of $16,000, which, in comparison with the amount of money to be raised in the county, is not disproportionate, and is not such an excess as to justify a court in adjudging the budget void.

In making his calculation we think the appellant is in error in including the sum of $13,949 listed as "unbudgeted reserve," and also the sum of $100,000, listed as a "general reserve fund."

[4] In subdivision 3 of section 3714 of the Political Code (as amended by St. 1929, p. 1129), provision is made both for unappropriated reserves and for a general reserve fund. The second and third paragraphs of subdivision 3 set forth purposes for which such funds may be established, and the manner and circumstances under which they may be drawn upon to meet unanticipated contingencies. Those funds are carried in the budget from year to year, and cannot be considered, we think, as within the provisions of section 20 of article 11 of the Constitution, as amended.

[5] Including these items, while we cannot make our figures correspond with those of the respondents, they do establish the fact that the claimed excess is negligible in comparison with the amount of money necessary to be raised to support the ordinary and usual functions of the county of Stanislaus, and the expenditures which can be and must be legally made in support of such functions. The expenditures that may legally be incurred by a county are not limited to what may be commonly understood by the term "governmental functions." An examination of any budget, and of the budget law to which we have referred, confirms this statement. The enforcement of law is not the only expenditure within the contemplation of section 20 of article 11, but that term includes all the expenditures that may be legally made by any county.

[6] Was the base presented by the appellant to the trial court in his petition, the correct one for determining whether the 5 per cent. increase made by the respondents was illegal? The argument presented to us upon appeal corresponds with the allegations of the petition. As stated herein, we find the appellant excludes from the base upon which calculations are to be made, all moneys which were raised by the county of Stanislaus during the fiscal year 1932–1933, under and in accordance with the provisions of section 6 of article 9 of the Constitution. In this we think the appellant is in error. Section 20 of article 11 of the Constitution, as adopted on June 27, 1933, so far as material here, reads as follows: "The expenditures, other than expenditures to pay interest and redemption charges, etc., * * * shall not in any way exceed by more than 5 percentum the expenditures * * * for the preceding year, unless previously authorized by two-thirds vote of the qualified electors of any such county, city and county, district or political subdivision or by a majority vote of the electors of such municipality, voting at an election held for that purpose, or unless previously authorized by the State Board of Equalization in such manner as may be provided by law," etc.

The section further provided that on and

after January 1, 1935, "the legislature shall have power, by two-thirds vote, of all the members elected to each of the two houses, to limit the amount of taxes which may be imposed upon real and personal property, according to the value thereof, for county, or city and county purposes."

The word "expenditure" is thus defined in 25 C. J. p. 172: "The spending of money; the act of expending; disbursement; expense; money expended; a laying out, as of money; payment."

At the time of the adoption of section 20 of article 11 of the Constitution just referred to, section 15 of article 13 of the Constitution was amended to provide that thereafter all moneys required to be raised by counties under the provisions of section 6 of article 9 of the Constitution for county high and elementary school purposes should be provided by the Legislature.

Section 15 of article 13, supra, as amended, contains the following proviso: "Provided, however, that all sums so apportioned shall be considered as though derived from county and city and county school taxes for the support of county and city and county government and not money provided by the state within the meaning of said section, nor shall any revenues so apportioned be regarded as appropriations from the funds of the state within the meaning of section 34a of article 4 of this Constitution." While this proviso has been considered and argued at length by the respective parties to this proceeding, we do not find that it has any further application to the questions tendered for our solution, further than to state that the money so raised and provided by the state, while considered as though derived from county, and city and county school taxes for the support of county and city and county government, and not money provided by the state, etc., is not money raised by a tax burden levied upon the property owners of any particular county, and while it would seem to be deducible from the language used that such sums are not to be considered hereafter as coming within the provisions of section 20 of article 11 limiting expenditures, that question is so far outside of the issues tendered for our determination that we are not to be considered as expressing any opinion thereon. The question then occurs, what was within the contemplation of the Legislature and the people of the state in adopting section 20 of article 11 as a part of the Constitution?

Taking the different sections as a whole, adopted on June 27, 1933, the conclusion is unescapable that it was the intent and purpose of the several amendments to shift the burden of school taxes to some extent from the counties to the state, and also to limit the expenditures of the several counties for the period of two years. In doing so a base was provided for determining the extent to which counties might increase expenditures. That base was and is fixed at 5 per cent. upon the expenditures of the previous year, with certain exceptions to which we have referred. The previous year set forth in the section must in this case refer to the expenditures made or incurred during the fiscal year 1932–1933. We do not think the Legislature contemplated going back to any year preceding, for the simple reason that the section further provides "that if any political subdivision of this state that decreases the amount of its expenditures in any year or years, may increase in any subsequent year or years, the amount of expenditures by the amounts, or any fraction thereof, so reduced," etc. The "succeeding year" precludes the idea of any retroactive effect.

In applying the provisions of section 20 of article 11 to the instant case, three rules of construction are to be observed: (1) The language of the section; (2) the intent or purpose sought to be accomplished; (3) the effect of provisions or exceptions contained in the section.

Observing the first rule, the word "expenditures" is broad enough to include every item of payment and every dollar of money paid out by the county, irrespective of the source from which the money is obtained. The proviso in the section under the third rule, excluding interest and redemption charges on bonds, would fall under the expression that the exclusion of one item of expenditure would include all other items of expenditure. Thus, the base established following this rule for determining the 5 per cent. increase would include moneys received from the state derived from the gasoline tax, and apportioned to the respective counties according to the method provided by the Legislature for use upon county roads. However, we think that both the general language used in the section and the rule relating to the proviso must give way to the enforcement of the intent or purpose sought to be accomplished, to wit: The lessening of the burden of taxation upon the respective counties and its assumption by the state, and therefore that the section relates only to moneys derived from county taxation, and not from gasoline money distributed by the state. Gasoline taxes are in no sense of the word county taxes. While distributed in proportion to the number of registered motor vehicles in counties, it cannot be said that this burden is borne proportionately by the citizens of the respective counties, for the simple reason that the amount of the tax depends upon the quantity of gasoline consumed, and the citizens of one county, though having no greater number of motor vehicles, may consume a much larger quantity, and therefore indirectly add to the expenditures for county road purposes in other counties.

With this limitation upon the first and third rules which we have set forth relative to the construction of statutes, we reach the conclusion that for the purpose of determining the base upon which a 5 per cent. increase may be calculated by the board as contemplated in the section, it has reference to and includes all moneys raised by county taxation, which would include all moneys heretofore raised for school purposes, as provided for in section 6 of article 9 of the Constitution. As a base for calculating the amount of the 5 per cent. increase only, we approve the rule and adopt the illustration found in the argument of Honorable R. W. Harrison, chief deputy attorney general, made in correcting an opinion formerly given, to wit: "Here is where I think, and I am willing to admit an error entered into the calculation. As certainly $35,000.00 is not county expenditures hereafter, so, for this purpose, that corresponding sum should not be regarded as county purposes for 1933–1934. That being so, what should have been the process? It should have been to deduct $35,000.00 from the $100,000.00, which would have left the initial base of $65,000.00, and adding 5 per cent, gives the figure of $68,250.00 as the proper allowable limit of expenditures." This illustration took the figure of $100,000, upon which, for the preceding year, the county would have raised by taxation the sum of $65,000, and the state would have contributed $35,000. The $35,000 not being a burden upon the county is not to be considered within the purview of section 20 of article 11, and therefore, while the county would not be entitled to raise $65,000 by way of taxation for school purposes, having made such expenditures in the previous year it would be entitled to take the $65,000 as a part of the base upon which to calculate the 5 per cent. allowable increase in the taxes to be raised.

While not stated in the record, budget reports advise us that the money raised for high and elementary school purposes by the county of Stanislaus for the fiscal year 1932–1933, was between $400,000 and $450,000. The petitioner's method of calculation excludes this sum. We see no escape from the conclusion that this item of expenditure should have been included. It may be further observed that while the singular includes the plural, the section reads "expenditures" which is an all-inclusive term.

[7] In taking into consideration the 5 per cent. allowable increase, we are of the opinion that the board of supervisors had the right to add such portion of the money to any particular item contained in the budget that appeared to them necessary or best adapted to carry on the various county functions allowable by law. This means that the aggregate of the budget items should not exceed the legal limit, and not that each particular item of expenditure should be measured by the same yardstick, and also necessarily leads to the conclusion that only moneys raised by county taxation can be considered by the board of supervisors in complying with section 20 of article 11 of the Constitution.

Section 3714b of the Political Code (as added by St. 1933, c. 839) not being involved in this action, we express no opinion as to whether it is mandatory, directory, constitutional, or unconstitutional.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

135 Cal.App. 355

CHRISTY v. HERBERT M. BARUCH CORPORATION et al.

Civ. 8049.

District Court of Appeal, Second District, Division 2, California.

Nov. 17, 1933.

Hearing Denied by Supreme Court Jan. 15, 1934.

1. Automobiles ⇐309(1).

In suit by motorist running into ditch-digging machine after entering obstructed intersection, charging statute making it prima facie negligence to exceed 15-mile speed limit in crossing obstructed intersection *held* error, since statute is to protect persons using intersection, and evidence showed no one was near intersection (St. 1923, p. 553, § 113(a), (b) (2), (c), as amended by St. 1927, p. 1436, § 30).

2. Appeal and error ⇐1015(2).

On motion for new trial, choosing between conflicting conclusions is exclusive province of trial judge.

3. Automobiles ⇐285.

Motorist running into ditch-digging machine could not assume that roadway would be clear at night merely because it was clear in morning when motorist drove over it.

4. Automobiles ⇐285.

Motorist *held* negligent as matter of law, when colliding with ditch-digging machine placed in intersection, in view of uncontradicted testimony of high visibility of machine.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Ann Christy against the Herbert M. Baruch Corporation and another. From an order granting plaintiff's motion for a new trial, after verdict and judgment in favor of defendants, defendants appeal.

Reversed.

Hearing denied by Supreme Court; WASTE, C. J., and CURTIS, J., dissenting.

Kidd, Schell & Delamar, of Los Angeles, for appellants.

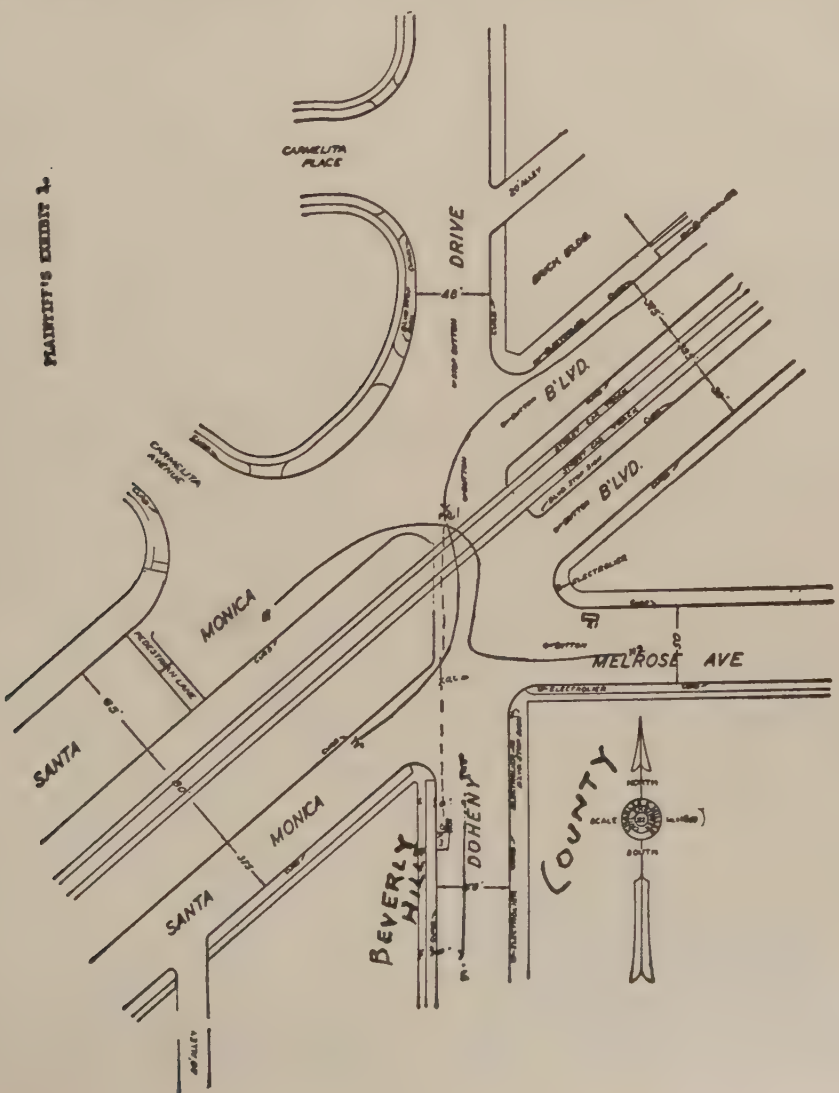
Bernard Potter, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From an order granting plaintiff's motion for a new trial after verdict of the jury and judgment in favor of defendants, the latter have appealed.

Plaintiff, driving a Ford coupé, was returning home from her work at the studios shortly after 11 o'clock in the evening of August 12, 1930. Going west on Santa Monica boulevard on the north roadway thereof, she came to its intersection with Doheny drive. There is such an intricate combination of intersections of streets near this point that the situation can only be adequately portrayed by a drawing introduced as an exhibit by plaintiff, copy of which we here show:

Plaintiff drove slowly into the intersection of such north roadway with Doheny drive, passed the traffic button, and turned left on Doheny. Before crossing the street railway tracks, she came to a full stop, then started forward in second gear and proceeded to cross the tracks. It is to be observed that after she crossed the tracks on Doheny drive she faced the intersection made by the south roadway of Santa Monica boulevard, Doheny drive, and the converging of Melrose avenue from the south with Doheny, and was faced with possible cross-traffic on both such streets. Plaintiff testified that, as she came "down across the tracks," she "watched the traffic in Melrose and on this side of Santa Monica, and I was watching the traffic until I got well past the center of the street and started up and was ready to go into third, and my lights were on this ditch-digging machine and I was right on top of it, and I put my brakes on as fast as I could



and tried to turn off of this machine, but I didn't have time enough, didn't have room enough, and I crashed into it," that she "couldn't have been going more than about 20 or 25 at the most" (apparently at the time she saw the danger), and that, as a result of the collision, she received certain injuries. The evidence shows that there was a filling station on the triangle where Melrose avenue and the south roadway of Santa Monica boulevard intersect, and the map shows a brick building at the northeast corner of Doheny drive and the north roadway of Santa Monica boulevard. Plaintiff passed over this same route in the morning going to work. At that time the ditch digger was not there, but on the east side of Doheny, in the block in which the accident happened, large concrete sewer pipes 60 inches in diameter were placed end to end, obstructing the east side of the drive to such an extent, as one witness expressed it, that, after the ditch digger was placed there, but about 20 feet of the street was open for travel.

[1] The court instructed the jury by reading section 113(a) and subdivision (b) (2) of the California Vehicle Act (Stats. 1927, c. 752, p. 1436, § 30), relative to the rate of speed being 15 miles per hour at intersections where the driver's view is obstructed and advising the jurors that, if they found that plaintiff violated such provisions, she would be guilty of negligence, and that, if they further found that such negligence contributed to the happening of the accident to any extent whatever, plaintiff could not recover. In granting the motion for a new trial, the court stated that such action was taken by reason of prejudicial error in the giving of "an instruction complained of by the plaintiff on her motion for a new trial," which there was no evidence to support.

Appellants urge that the map showing the brick building mentioned, as well as the testimony of plaintiff as to the filling station, supports the giving of such instruction, and that, if plaintiff had been going at the lawful rate of speed prescribed, she would have been able to stop her car after seeing the ditch-digging machine, and in consequence her negligence was the proximate cause of the accident. So far as the brick building is concerned, it obstructs the view of the intersection of said north roadway with Doheny drive only.

The evidence shows that the filling station referred to was "a partial frame and partial glass" structure, "with a roof on it" and "pumps out in front with a canopy over it," and perhaps a battery shop, etc., immediately back of it. Plaintiff on cross-examination was asked: "So that this building here obstructed to some extent your view into Melrose, did it not?" Her answer was: "Yes, you have to watch there very carefully."

We must assume that plaintiff's view was partially obstructed by the filling station, and that such intersection was one of obstructed vision within the meaning of said section. The question still remains as to whether or not, the collision having been with a stationary object from 20 to 75 feet south of the intersection, such section applies so as to make a prima facie case of negligence on plaintiff's part by reason of the fact that she was admittedly exceeding the limit of 15 miles per hour in crossing a part of such intersection, at least.

Negligence has been said by the Supreme Court, quoting from Cooley on Torts, to be "the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." Barrett v. Southern Pacific Co., 91 Cal. 296, 302, 27 P. 666, 667, 25 Am. St. Rep. 186. There would seem to be no question but that section 113 of the California Vehicle Act, subd. (b) (2), was enacted to protect the interests of those persons properly using so-called "blind" or "obstructed" intersections, by expressly making speed across such a place in excess of the limits fixed prima facie evidence of a violation of section 113 (a), which denounces the driving of a vehicle on a public highway at a speed "greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway," or "at such a speed as to endanger the life, limb or property of any person." Subdivision (c). Certainly such a violation would only make a prima facie case of negligence in a civil action if that is the effect in a criminal action where the party is charged. That being the case, and the evidence showing in this proceeding that neither the defendants or any one else except plaintiff was using or attempting to use such intersection, there would seem to be no person's right or interest to be protected by said subdivision (b) (2). From this it would seem to follow that the question of plaintiff's violation of law should be determined by the prohibition of said section 113 (a), under the facts of the case. In our opinion when plaintiff approached such intersection, entered it, and saw no one in or near it, as the evidence shows, there was no one whose "interest" or "rights" were under the protection of the subdivision mentioned, and, so far as defendants are concerned, the question of her negligence was one resting on the facts, and was not to be imputed from a prima facie violation of law not intended for their protection.

In the case of Wiley v. Cole, 67 Cal. App. 762, 228 P. 550, 552, a similar instruction, given at the request of defendant, was held to be prejudicially erroneous, not only because the intersection was not shown to be one of obstructed view, but because "of the

fact that the accident unquestionably occurred at a point outside the intersection." In that case the plaintiff was traveling in a northerly direction and the defendant in a southerly direction on the same street. Plaintiff crossed the intersection in question at the rate of 20 to 25 miles per hour, and the collision occurred 15 feet north of the northerly line of the intersecting street.

Appellants urge that the case of Botti v. Savill, 97 Cal. App. 524, 275 P. 1029, 1031, is authority for their contention that the section is applicable, even though the accident did not occur in the intersection. We cannot so read it. In that case the appellant's decedent was struck 10 feet outside of an intersection not shown to be obstructed, and there was "sufficient evidence in the record for the jury to have found that defendant was free from fault and that the negligence of the deceased was the proximate cause of the accident." The appeal was from a judgment in favor of defendant. The court in that case apparently stresses the fact that, inasmuch as "all the evidence in the case showed that the accident occurred north of the intersection," and, there being no evidence that the view was obstructed, the submission of the question of the public or private character of the lane forming the intersection to the jury "was more favorable to appellants than prejudicial." An instruction similar to the one given here was offered by the appellant, but the jury found for defendant notwithstanding. Here, however, in our opinion, such an instruction, in view of plaintiff's testimony as to the rate of speed at which she traveled over a portion of the intersection, amounted almost to a charge to the jury to find for defendants; and in our opinion the trial court was correct in deciding that it should not have been given.

[2] It is urged that, even if it was error to have given the instruction above mentioned, nevertheless, under section 4½ of article 6 of the State Constitution, the judgment should not have been set aside, as no miscarriage of justice is shown by the evidence to have resulted therefrom, in view of the fact that there is no evidence of the negligence of defendants proximately contributing to plaintiff's injury and that the accident was the result of plaintiff's own negligence. We are of the opinion that the evidence is sufficient to support the conclusion that defendants were responsible for the placing of the machine where it was, and that the trial court might well have concluded that placing it in such close proximity to such an intricate combination of street car tracks and streets was in itself negligence, regardless of whether or not defendants were negligent in their maintenance of warning lights. The opposite conclusion, both as to that and as to the question of negligence in maintaining lights, might also be drawn. However, as has often been said, on a motion for new trial it is the exclusive province of the trial judge to choose between conflicting conclusions. This court cannot.

[3, 4] Plaintiff testified that she did not look to the front until after she passed the intersection of Melrose and the south roadway of Santa Monica boulevard, and indicated a point on the map marked "ac2" as the place where she "looked straight forward." By looking at the map it will be seen that the point marked is apparently where the south line of Melrose extended intersects the course plaintiff was traveling, and is about one-third of the distance across the south roadway of Santa Monica boulevard, which is 37½ feet wide measured on a right angle, but considerably more—though how much we do not know—on the angle at which Doheny drive crosses it. It will be seen then that plaintiff was at such point somewhat more than 25 feet—two-thirds of 37½—north of the south line of Santa Monica boulevard. The ditch digger was from 20 to 75 feet south of such line. Plaintiff then, at the time she apparently first looked down Doheny drive was from 45 to 95 feet away from the huge piece of machinery. Mr. Powers, who was following plaintiff on Santa Monica boulevard, turned to the right on that thoroughfare and drove 50 or 60 feet further, when he heard the crash. On looking over he saw the ditch digger, even without assistance of the lights of his auto, and evidently from such point no red lights were visible. Mr. Miller and Mr. Kaden, both witnesses for plaintiff, who about an hour or so earlier came down Melrose and stopped at Doheny to make a right turn, saw the machine. It will be seen from the map that the place where they stopped before making the turn was at least as far from the ditch digger as was plaintiff when she stopped before crossing the street-car tracks on Doheny. The lights were then out on the east and north of the machine.

Mr. Wright, a witness for defendants, saw the machine from the same intersection. Another of defendants' witnesses, Mr. McDonald, drove into Doheny drive at the intersection north of Carmelito place, and about 400 feet from the ditch digger, between 9:30 and 10 o'clock p. m., saw the outlines of the machine as well as the red lights at that time, and could tell it was a ditch digger. Mr. Wallace, who set out the lights at about 6 p. m. that evening, went with his wife to a picture theater, about 200 feet west of Doheny on Melrose, at about 9:15 p. m., and, as they had seen the picture then showing, they walked about 100 feet west of the theater, and while conversing looked over toward the machine. Wallace testified that they could see the machine "clearly," and that he even pointed out parts of it to his wife. The evidence also shows that the night was clear

and that the electroliers at the corner of Melrose and Doheny drive, each fitted with two 400 candle power lamps, were lighted at the time of the accident. It would seem that there is no conflict in the evidence concerning the fact that the huge machine, 10 to 12 feet wide and about the same height, and 20 to 22 feet long, was plainly visible to plaintiff at all times while she was on Doheny drive if she had but looked forward, and we are forced to the conclusion that, even if the red lights above referred to had been burning, she would not have seen them before she did actually see the machine, as she did not look. Nor could she assume that the roadway would be clear at night merely because it was clear in the morning when she came over it; and the presence of the cement pipes on the east side of the road and the fact that the pavement was broken up for a width of seven or eight feet was a warning of possible danger that should have made one exercising reasonable care take at least one look ahead in ample time to have stopped if the roadway was not in fact clear.

We are forced to the conclusion that, with the absence of conflict in the evidence on the question of visibility of the machine at the time in question, a jury could only conclude that plaintiff was negligent, and that no miscarriage of justice resulted in so instructing the jury.

Order reversed.

We concur: STEPHENS, P. J.; CRAIG, J.

135 Cal.App. 351

DARMOUR PRODUCTIONS CORPORATION v. HERBERT M. BARUCH CORPORATION et al.

Civ. 8126.

District Court of Appeal, Second District, Division 2, California.

Nov. 17, 1933.

Damages ⇐144.
Master and servant ⇐340.

Complaint by moving picture producer for loss resulting from personal injuries to leading actress, allegedly caused by defendants' negligence, *held* to show actress was "servant" of producer, authorizing recovery by producer, but was demurrable for uncertainty as to damages resulting (Civ. Code, §§ 2009, 3523, and § 49, subd. 4).

The word "servant" has a broad significance, and embraces all persons, of whatever rank or position, who are in the employ and subject to the direction or control of another in any department of labor or business, and may in most cases be said to be synonymous with "employee."

[Ed. Note.—For other definitions of "Employee" and "Servant," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the Darmour Productions Corporation against the Herbert M. Baruch Corporation and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Bernard Potter, of Los Angeles, for appellant.

Kidd, Schell & Delamer, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Plaintiff's amended complaint alleges that on and prior to August 12, 1930, it was engaged in the production of a certain moving picture and had in its employment and under contract a large number of persons as actors therein, among whom was one Ann Christy; that up to the time mentioned said actress had taken leading parts in said picture and appeared in various scenes and portions thereof already photographed and completed; that plaintiff had expended large sums of money on said production; that said Ann Christy "is of a special and unique type of motion picture actress whose appearance, action and characteristics cannot *easily* be duplicated or represented by any substitute or double whom plaintiff might *easily* employ for the completion of said picture" (italics ours); that on said date said Ann Christy was injured by the negligence of defendants, as specified, by reason whereof she was unable to continue in said employment, and that as a direct result of such injury plaintiff was deprived of her services to its damage in the sum of $20,000. A demurrer on both general and special grounds was interposed to such complaint, and was sustained with leave to amend. Plaintiff elected to stand on its amended pleading, and final judgment in favor of defendants was entered, from which this appeal is taken.

Appellant urges that the complaint is not obnoxious to either the general or special demurrers, and that the right of action involved here exists by statute.

Section 49 of the Civil Code provides that "The rights of personal relations forbid: * * * 4. Any injury to a servant which affects his ability to serve his master." One of our legislative maxims of jurisprudence provides that "For every wrong there is a rem-

edy." Section 3523, Civ. Code. "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." Section 2009, Civ. Code. "The word *servant* in our legal nomenclature has a broad significance and embraces all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business. Indeed, it may in most cases be said to be synonymous with 'employee.'" Wood, Master & Servant, § 1. The relation of master and servant has been held to exist between the medical adviser of an accident insurance company and such company (Tompkins v. Pacific Mutual Life Ins. Co., 53 W. Va. 479, 44 S. E. 439, 62 L. R. A. 489, 97 Am. St. Rep. 1006), between a railroad company and a physician employed to conduct a physical examination of an employee of the company (New York Central Ry. Co. v. Wiler, 124 Ohio St. 118, 177 N. E. 205), between the general manager of a business and the owner (Kramer v. Wolf Cigar Stores Co., 99 Tex. 597, 91 S. W. 775), and between the superintendent of agencies of a company and such company (Texas Life Ins. Co. v. Roberts, 55 Tex. Civ. App. 217, 119 S. W. 926); so we have no hesitation in holding, not only that such right of action exists in California, but that the relationship of master and servant existed between the injured motion picture actress and plaintiff in the instant case.

Coming back to the complaint, we find that it sufficiently alleges the existence of such relationship between plaintiff and Ann Christy, the injury of said actress through the negligence of defendants, preventing her from continuing in plaintiff's employment, and that as a direct result thereof plaintiff was deprived of her services to its damage in the sum of $20,000. In our opinion those are the ultimate facts required to be alleged to state such a cause of action for the recovery of general damages. The complaint does not allege that all or any of the work done was lost to plaintiff by reason of the accident, and it does in effect allege that a "double" could be found for her, though not "easily." If one could have been easily found, no substantial damages could be proved. Any expense necessarily incurred in securing a substitute would seem to be the direct and necessary consequence of the alleged negligence. No loss of profits is alleged, nor do we see how such loss could be alleged under the circumstances shown, as they would seem to be highly speculative.

The special demurrer alleged that the complaint was uncertain, in that it could not be ascertained therefrom how or in what manner plaintiff was damaged in the sum alleged. The fact that plaintiff was engaged in producing a picture, a part of which had been completed, and had spent large sums of money thereon, would seem to sufficiently inform defendants that it was necessary to find a substitute to prevent great loss. The complaint also alleges that plaintiff had in employment a large number of actors "under contract." It is not clear just why it is alleged that such actors were under contract. That a large number had been employed on the picture and large sums of money expended, with the other facts alleged, would seem to make any expense necessary to secure a substitute in order to complete the picture a necessary result of the alleged negligence, as we have said. The insertion in the complaint of the words "under contract," in relation to such other employees, does in our opinion lend some uncertainty as to what items plaintiff might intend or attempt to prove as general damages. If plaintiff was obliged by such contract to pay salaries to such other employees while securing such substitute, and expects to recover such expense, the complaint should contain averments showing such fact, as such expense would not be a natural consequence of the fact alleged, viz., that such employees were under contract. The contract might provide that the employee was to work on the picture when required by the employer, in which case such a loss would not necessarily follow from the injury under the allegations of the complaint, and yet under the pleading before us defendants might very well be uncertain as to whether or not plaintiff intends to claim such a loss. In our opinion defendants are entitled to have the complaint made certain in its terms as to just what plaintiff expects to show as elements of its damage in this as well as other particulars of uncertainty which the language suggests. The demurrer on the ground of uncertainty was therefore properly sustained.

Judgment affirmed.

I concur: CRAIG, J.

STEPHENS, Presiding Justice (concurring).

I concur. In concurring with the opinion and in the judgment, I am constrained to remark that there should be legislative action limiting the sum possible of recovery in some cases of negligence. Under conditions that gave rise to the common law, the recovery by an employer for an injury to a servant through negligence could not have reached a very high figure. Under the prevailing contractual value of specialists and of artists, an injury to such an one would not only impose a duty upon the tort-feasor of compensating dependents, but of compensating those interested in the contract. Examples could readily be given. The law of negligence is not generally punitive; and, even if it were, an injury to an artist of great ephemeral popularity should not present the possibility of finan-

cially wrecking an ordinarily successful citizen. Reasonable protection by insurance in these days of accidents is practicable only against the payment of damages for injuries inflicted upon persons in the ordinary strata of life.

135 Cal.App. 411

ARMAS et al. v. CITY OF OAKLAND et al.*

Civ. 8905.

District Court of Appeal, First District, Division 2, California.

Nov. 24, 1933.

Rehearing Denied Dec. 23, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

1. Negligence ⇐136(26).

Issue of contributory negligence is ordinarily one of fact determinable by court or jury.

2. Appeal and error ⇐1010(1).

Determination by court of issue of contributory negligence cannot be disturbed on appeal if supported by any substantial evidence.

3. Municipal corporations ⇐79.

General statutory regulations governing operation of vehicles on public highways do not control operation of authorized emergency vehicles when latter are operated by chartered city in performance of governmental functions of controlling fires or policing city (St. 1923, p. 517, as amended).

4. Municipal corporations ⇐64.

Organization, maintenance, and operation of police and fire departments by chartered city is municipal affair and as such not subject to control of Legislature.

5. Automobiles ⇐187.

Statute imposing liability on chartered city for damage arising out of operation of motor vehicle in its governmental capacity does not apply to authorized emergency vehicles operated in performance of governmental function of controlling fires or policing city (Civ. Code, § 1714½, as added by St. 1929, p. 565).

6. Statutes ⇐239.

Statute in derogation of settled rule of law requires strict construction.

7. Master and servant ⇐332(5).

Where master is sued for negligence of his servant in case where master has committed no moral wrong and has not expressly instructed particular matter for doing of which negligence is charged, verdict or judgment absolving employee necessarily exonerates principal.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Frank Armas and others against the City of Oakland and others. Judgment for plaintiffs, and defendant named appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

C. Stanley Wood, City Atty., and John W. Collier, Senior Deputy City Atty., both of Oakland, for appellant.

L. R. Weinmann, George P. Tobin, and George J. Lacoste, all of Oakland, amici curiæ.

Allen C. Cunha, of Oakland, and Edward A. Cunha and Dean Cunha, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for damages as heirs of Louise Armas, who was killed when struck by an automobile operated by a member of the fire department of the defendant city. The cause was tried by the court without a jury and the plaintiffs had judgment for $5,000. The appeal is taken on typewritten transcripts.

The appellant presents four grounds of appeal: Insufficiency of the evidence to support the finding of negligence; insufficiency of the evidence to support the finding that deceased was not guilty of contributory negligence; excessive damages; and that section 1714½ of the Civil Code (as added by St. 1929, p. 565) imposes no liability on cities for negligence in the operation of authorized emergency vehicles.

The motor vehicle causing the death was the property of the city of Oakland and was operated by the fire department of the city, being assigned to the battalion chief of the department. At the time of the accident it was being operated by a member of the department named Wainwright, who was carrying Chief Kispert to a fire in the Key Route Inn, located at Twenty-Second and Broadway in the city of Oakland. The accident occurred at 3 o'clock in the afternoon of December 8, 1930, with the visibility clear. The chief and his assistant in response to a fire call were proceeding north on Broadway with the siren on the vehicle sounding continuously from the time they left the city hall. As they reached Nineteenth street they found the east side of Broadway at Twentieth completely blocked by numerous automobiles and by two streets cars standing on the easterly rails. The westerly rails of the street car line were clear, as was the westerly half of Broadway, excepting the portion close to the westerly curb where some automobiles were parked. Soon after crossing Nineteenth street, the fire car turned to the left, or westerly side of Broadway, and passed the standing street cars on the left-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 28 P.(2d) 422.

hand side. After the fire car had crossed to the west side of Broadway, two automobiles entered the intersection of Twentieth and Broadway, one entering from the west on Twentieth street and making a turn on Broadway where it was double parked about twenty feet south of Twentieth street. The other car entered the intersection from the north at the same time that the deceased appeared from in front of the standing street cars at a point which might be called the pedestrian lane crossing Broadway on the southerly side of Twentieth street. These two automobiles and the deceased all came into the view of the driver of the fire car when he was approximately seventy-five feet south of the intersection. He immediately applied his brakes, but the car collided with the second machine entering the intersection and struck the deceased with such force that she died soon after. There is no material conflict in the evidence. Some witnesses disagreed as to whether the chief's car struck the automobile before it struck the deceased, but this is immaterial, as all witnesses agreed that the striking by both was almost simultaneous and that from the time that the driver of the chief's car saw these parties in the intersection he used every possible means to avoid a collision with all of them.

[1, 2] It is difficult to reconcile the finding of want of contributory negligence with the undisputed facts in the record. At the time of the accident a great fire was burning within two blocks of the intersection. The vicinity of Twentieth and Broadway was thickly congested with an unusual number of people congregated on the sidewalks and on the easterly side of Broadway; though the electric traffic signals displayed the green light for crossing Broadway at the time the people were crossing Twentieth in such numbers that the deceased had difficulty in breaking through the crowd in order to leave the curb and enter the intersection. The fire car was painted a brilliant red and was sounding the siren continuously from the time it left the city hall. Witnesses standing near the intersection of Twentieth testified that they heard the siren when the car was three or four blocks distant; others testified that the street being clear of all other traffic, the fire car was seen coming as far as six blocks distant. There is not a word of testimony which tends to show that the deceased used any precaution for her own safety. A police officer was standing at a point near the easterly rail of the north-bound track on Broadway at what would be termed the southerly pedestrian lane; as the fire car approached from Fourteenth street the people on the easterly side of Broadway surged into the street to see the approaching car; the officer ordered them back; the deceased pushed through the crowd, passed the officer and the standing street cars, stopped at a point on the southerly car tracks which were clear of all traffic, backed away momentarily, then went forward, changing her directions twice before she was struck by the approaching car. We are familiar with the rule that the issue of contributory negligence is ordinarily one of fact which is to be determined by the court or jury and that such determination cannot be disturbed on appeal if there is any substantial evidence supporting it. Here the evidence shows a complete want of ordinary or any care on the part of the deceased; a total failure to use any precaution for her own safety. But more than this, the evidence shows that the deceased, while in a position of safety, after having been fully warned of the approaching danger, left the position of safety without care or caution for her own safety and entered the place of greatest peril. If the deceased knew, or in the exercise of ordinary prudence should have known, that the fire car was approaching on the westerly or left-hand side of the street, her conduct in attempting to cross the street in face of the peril was clearly negligent. The standing street cars and automobiles and the crowd of people blocking the easterly side of the street would seem to be sufficient to cause her to know that the fire car would have to pass the intersection on the westerly side of Broadway.

But the judgment must be reversed upon grounds not related to the issue of the contributory negligence of the deceased. The liability which is sought to be imposed upon the city rests upon the doctrine of respondeat superior, which respondent argues is found in section 1714½ of the Civil Code. This liability, it is claimed, arises out of the asserted negligence of the fire car, which in turn rests solely upon the disregard of certain traffic regulations covering the operation of motor vehicles in general on the public highways and found in the California Vehicle Act (St. 1923, p. 517, as amended). Section 1714½ of the Civil Code, which was enacted in 1929, was designed to remove the state and all political subdivisions and municipal corporations from the well-settled rule of nonliability in cases of tort arising out of purely governmental functions. This section declares that the state and every county, municipal corporation, and political subdivision of the state "owning any motor vehicle shall be responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by any officer, agent, or employee * * * and such person may sue the state * * * municipal corporation. * * * In every case where a recovery is had under the provisions of this section against the state * * * municipal corporation * * * the state, or the * * * municipal corporation * * * shall be

subrogated to all the rights of the person injured, against the officer, agent or employee, as the case may be, and may recover from such officer, agent or employee, the total amount of any judgment and costs recovered against the state * * * municipal corporation * * * in such case. * * *" This section was added to the Code by chapter 260, p. 565, of the Statutes of 1929. Chapter 263, p. 568, of the same statutes provides that no member of a fire department or police department maintained by a county, city, and county, incorporated or unincorporated city "shall be held liable in any civil action for damage to persons or property occasioned by any act of such member arising out of the operation, in line of duty, of a motor vehicle of such department while responding to an alarm of fire or an emergency police call."

By chapter 253, p. 509, of the Statutes of 1929, section 8½ was added to the California Vehicle Act, defining an "authorized emergency vehicle" as "every vehicle publicly owned and operated by a police or fire department or traffic law enforcement officer in responding to emergency calls or in traffic patrol duty and a vehicle owned and operated by the chief or one assistant chief of an organized fire department in answering fire alarms * * * only when responding to emergency, accident or fire calls." Section 120 of the California Vehicle Act, as amended in 1929 (St. 1929, p. 539), declares that the provisions of that act relating to the speed of vehicles should not apply to "authorized emergency vehicles," but that the provisions of this section should not "relieve the driver of any authorized emergency vehicle * * * from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of the privileges declared in this section." Section 132 of the California Vehicle Act, as amended at the same time, provides that the driver of a vehicle upon a public highway shall yield the right of way to any "authorized emergency vehicle" when the driver thereof sounds audible signal by siren. This section also contains the same provision relative to the duty and responsibility of the drivers of such vehicles which is found in section 120.

The charter of the city of Oakland, in conformance with section 6 of article 11 of the Constitution, reserves to the city all powers given under the Constitution and confers upon the city council power to make and enforce local police, sanitary, and other regulations, to organize, provide, maintain, and operate police and fire departments and to regulate the speed with which and the manner in which persons may drive automobiles or other vehicles along any of the streets of the city.

From these various statutory and charter provisions two questions arise in this case: First, do the general statutory regulations governing the operation of vehicles in general upon public highways control the operation of "authorized emergency vehicles" when the latter are operated by a chartered city in the performance of its governmental functions of controlling fires or policing the city? Second, do the general provisions of section 1714½ of the Civil Code imposing liability upon a chartered city for damage arising out of the operation of a motor vehicle in its governmental capacity apply to an "authorized emergency vehicle" which is operated by a chartered city for the purpose heretofore stated?

[3] The first question must be answered in the negative because the general provisions of the California Vehicle Act relating to the operation of motor vehicles generally will not be held to have application to an authorized emergency vehicle operated by a municipality for these purposes without an express declaration in the statute of the legislative intention to so apply them. Balthasar v. Pacific Electric R. Co., 187 Cal. 302–306, 202 P. 37, 19 A. L. R. 452. Here the Legislature by section 8½ of the California Vehicle Act created a special class of vehicles when used for a specified purpose. That is to say, the Legislature declared that every vehicle as defined in section 2 of the act (as amended by St. 1925, p. 399), when used for the special purposes specified in section 8½, should be treated in a class by itself. If it was not the intent that vehicles used for these purposes should be exempt from the general provisions of the act applicable to "any vehicle" there is no purpose in making the distinction found in section 8½. This position is strengthened by the fact that section 120 of the act expressly exempts "authorized emergency vehicles" from the provisions of the act relating to speed. There are many other traffic regulations and rules of the road too numerous to mention which must be disregarded if these vehicles are to function in the performance of the duties which the law imposes upon the police and fire departments. The case of respondent is not aided by the provisions of section 144 of the California Vehicle Act (St. 1923, p. 563), declaring that the act is applicable to the drivers of all vehicles operated by the state or by any incorporated city subject to such specific exceptions as are set forth in the act. This section was added in 1923 when no provision was made for an "authorized emergency vehicle" and no provision was made imposing liability upon municipalities for damage arising out of the performance of governmental functions and no exemptions from liability were given the drivers of these emergency vehicles.

If we are in error as to the legislative intention to apply these traffic regulations to the operation of vehicles of this character,

then the statute to that extent must be held unreasonable and void or at least inapplicable to municipalities while engaged in these governmental functions. In the Balthasar Case the Supreme Court, while holding that an exception of such vehicles from the general provisions of the act must be implied, said (page 308 of 187 Cal., 202 P. 37, 39): "It follows that the general rules of the road relating to speed and to the turning of corners contained in the Motor Vehicle Act do not apply to fire or police apparatus. We have only to consider the utter absurdity of requiring peace officers to observe the arbitrary speed limits fixed by the Motor Vehicle Act when pursuing criminals, who may be fleeing in high-power cars at twice the legal limit, to make manifest that the Legislature did not have in view such a limitation on peace officers. And it is equally clear that they did not contemplate retarding the speed of fire apparatus in going to a fire." Though the court's judgment was placed on this ground, it cited State v. Sheppard, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305, and City of Kansas City v. McDonald, 60 Kan. 481, 57 P. 123, 45 L. R. A. 429, to the point that if an implied exception is not read into the statute then it must be held unreasonable and void for reasons which are aptly stated in the foregoing quotation from the Balthasar opinion. We can find no substantial change in the amendments of 1929 to the California Vehicle Act from those considered by the Supreme Court in that case, and we are forced to conclude that the legislative intention as expressed in sections 120 and 132 of the act is that the driver of such a vehicle is not to be controlled by the general traffic regulations relating to the operation of motor vehicles generally, but that he should not be protected from "an arbitrary exercise of the privileges." In the case before us the complaint did not charge and the court did not find that the driver of the vehicle causing the injury was guilty of an arbitrary exercise of these privileges.

[4] Though the point is not argued in full, we are satisfied that if it should be held that the legislature intended these regulations to apply to a vehicle operated under these circumstances and if it should be held that such regulations were not unreasonable as applied to the state and political subdivisions under the control of the legislature then it must be held that such regulations are not applicable to a municipal corporation operating under a freeholders' charter. It has been uniformly held that the organization, maintenance, and operation of a police and fire department by a chartered city is a municipal affair and as such not subject to the control of the legislature. In Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, our Supreme Court held that traffic regulations in general were matters of state-wide concern and therefore not subject to local control. In Balthasar v. Pacific Electric R. Co., 187 Cal. 302–312, 202 P. 37, 19 A. L. R. 452, our Supreme Court, after referring to Ex parte Daniels, expressly reserved the question as to the relative authority of the state and city over the control of fire apparatus in the public streets of a chartered city.

[5-7] Upon somewhat similar lines of reasoning we are constrained to hold that section 1714½ of the Civil Code does not confer a right of action against the municipality upon one who has suffered damage by reason of the operation by the municipality of an "authorized emergency vehicle." This section of the Code is a departure from a well-settled common-law rule of nonliability for damage arising out of the performance of strictly governmental functions. Such a statute in derogation of a settled rule of law requires a strict construction. Upon the principles of construction heretofore discussed and based upon the rule of the Balthasar Case, it must be said that the Legislature significantly failed to express an intention to include "authorized emergency vehicles" in the section. A cause of action in tort is created against the state and all the public bodies named therein for any damage arising out of the negligent operation of any motor vehicle owned by any such public body or "of any other motor vehicle" by an officer, agent, or employee while acting within the scope of his duties. The effect of the section is to place upon these public bodies a liability for tort whether the damage arises in the performance of governmental or proprietary functions. In thus casting upon these public bodies a liability for damage arising in the performance of purely governmental functions, the Legislature inextricably linked this obligation with the right of subrogation against the officer, agent, or employee whose negligence caused the damage; but though this right of subrogation is an integral part of the section, it was immediately taken away from every county, city, and district by the enactment of chapter 263, which relieved every member of a fire or police department of such public bodies from liability for damage arising out of the operation of an "authorized emergency vehicle." Bearing in mind that the latter act, the amendments to the California Vehicle Act, and section 1714½ were all enacted at the same time, we must conclude that the Legislature did not intend in the enactment of the code section to include damage arising out of the operation of these "authorized emergency vehicles."

We are forced to this conclusion for the additional reason that a contrary interpretation of the section would be unreasonable. The organization, operation, and control of municipal fire and police departments being a matter of local concern, any move on the part of the Legislature tending to interfere

with or destroy the effective performance of those governmental functions would be contrary to the express limitations of section 6 of article 11 of the Constitution except where such matters are of general public or state concern. The control of fires and the policing of the city for the benefit of all its citizens is the primary consideration. In the performance of these functions it is essential that the city have complete supervision and control over its officers and employees. If the Legislature had intended by these statutes to create a liability against the city arising out of the performance of these functions, and at the same time relieve its officers and employees from liability, the city's supervision and control over these agents would be seriously handicapped. There is a well-settled rule of law that when a master is sued for the negligence of his servant in a case where the master has committed no moral wrong and has not expressly instructed the particular matter for the doing of which the negligence is charged, a verdict or judgment absolving the employee necessarily exonerates the principal. Bradley v. Rosenthal, 154 Cal. 420–423, 97 P. 875, 129 Am. St. Rep. 171; Triano v. F. E. Booth & Co., 120 Cal. App. 345–348, 8 P.(2d) 174; Duell, Inc., v. Metro-Goldwyn-Mayer Corp., 128 Cal. App. 376–383, 17 P.(2d) 781. This principle seems to have been rested generally on the doctrine of estoppel and in some cases on the doctrine of res judicata. We have found no case holding that when the Legislature expressly absolves the employee under such circumstances the master may claim exoneration for the act of his servant. On principle it would seem that where there is no moral wrong on the part of the master and no direction as to or knowledge of the manner in which the acts are performed by the servant the equities would demand that when the law expressly absolves the servant from liability for his negligent acts the master, who is without wrong, should not be held accountable for the acts of such servant. It must be assumed that the Legislature had these rules of law in mind, and that when it expressly excused the acts of those members of a fire or police department operating an "authorized emergency vehicle" it did not intend to place a liability upon the city for damage arising out of those acts. The proper interpretation of section 1714½, as we understand it, is that the public bodies named therein are liable in tort for damage arising out of the negligent operation of any motor vehicle by any officer, agent or employee thereof and against whom the public body named may have the right of subrogation of the person damaged. That in those cases where, because of other statutes controlling, this right of subrogation may not be enjoyed and the negligence of the officer or employee is expressly excused, the provisions of the section do not impose any liability upon the city or other public body named therein.

We have not discussed the question whether the right to sue a chartered city in any case arising from the negligence of its servants is a matter of general state concern or a municipal affair to be governed by the city charter.

We do not discuss the question of excessive damages raised by the appellant because the judgment must be reversed for the reasons heretofore stated and this question will not again arise.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

135 Cal.App. 562

PEOPLE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9346.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1933.

Criminal law ⇐1218.

Trial court must sentence defendant convicted of attempted grand theft, with two prior convictions of other offenses, to term in state prison, and cannot sentence him to county jail (Pen. Code, §§ 489, 664).

Application by the People of the State of California for writ of mandate prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles, and Ruben S. Schmidt, Judge thereof, to require respondents to vacate a judgment of conviction and pronounce a new judgment according to law.

Peremptory writ granted.

Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

PER CURIAM.

In an action against one Oliver, the defendant was convicted of attempted grand theft, with two prior convictions of other offenses. Respondent court sentenced Oliver to a term of one year in the county jail. It is the contention of the district attorney that under the

circumstances of the case, the court was without authority to impose a misdemeanor sentence, and that the punishment required to be imposed is by way of sentence to a term in the state prison.

Apparently the respondent has been convinced that it was in error, for we have presented to us a stipulation that the peremptory writ of mandate may issue. On examination of the authorities—particularly referring to Penal Code, §§ 489 and 664, and People v. Superior Court, 116 Cal. App. 412, 2 P.(2d) 843, and Ex parte Hope, 59 Cal. 423—we are satisfied that this court should approve the stipulation thus made.

Let the peremptory writ issue.

135 Cal.App. 613

RINALDO v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

Civ. 9067.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1933.

1. Physicians and surgeons ⇐11(3).

Medical examiners had jurisdiction to determine validity of physician's license from foreign state where complaint before examiners charged that physician represented reciprocity certificates were true, knowing them to be false.

2. Prohibition ⇐32.

That medical examiners intended to try charges against petitioner while alternative writ of prohibition prohibiting examiners' revoking petitioner's license was in force *held* not to entitle petitioner to permanent writ in view of more appropriate remedy.

Appeal from Superior Court, Los Angeles County; Emmett H. Wilson, Judge.

Proceeding by Eugene J. Rinaldo for writ of prohibition to be directed to the Board of Medical Examiners of the State of California and others. From a judgment denying the writ, petitioner appeals. On defendant's motion to dismiss appeal or affirm judgment.

Judgment affirmed.

L. E. Dadmun, of Los Angeles, for appellant.

Oscar Richard Cummins and Bayard R. Rountree, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

On motion of respondents, under rule V, subdivision 3, for an order dismissing appeal or affirming the judgment.

This is the second appeal arising out of this proceeding. On the former appeal (123 Cal. App. 712, 12 P.(2d) 32) it was decided that the petition for the writ of prohibition did not state facts sufficient to authorize the issuance of the writ, and therefore that the demurrer to the petition should have been sustained. By that decision it was determined that the complaint on which the board of medical examiners was proceeding against Rinaldo stated facts which, assuming the truth of the allegations, would authorize the board to cancel the license of said Rinaldo to practice medicine and surgery within the state of California.

The judgment thus having been reversed, the petitioner was by the superior court permitted to file an amended and supplemental petition, to which respondents demurred and the demurrer was sustained. Thereafter, in due course, judgment was entered denying the application for peremptory writ of prohibition. The present appeal is from this last judgment.

[1] The contention by appellant that one of the members of the board of medical examiners was disqualified to sit and hear and determine the charge against petitioner presents practically the same question which was decided adversely to appellant's contention in the case of Dyment v. Board of Medical Examiners, 93 Cal. App. 65, 268 P. 1073. Appellant next contends that the writ should have been granted upon the ground that the board of medical examiners has no jurisdiction "to delve into and determine" whether the Missouri license of petitioner is valid. On this point the record before us is not materially different from that presented upon the former appeal. The record shows now, as it did then, that the complaint before the board, in addition to its other allegations relating to the reciprocity certificates, alleges that Rinaldo did represent that such certificates were valid and existing and that the facts set forth therein were true, whereas to his knowledge none of them was true. Rinaldo v. Board of Medical Examiners, 123 Cal. App. 712, 717, 12 P.(2d) 32.

[2] Finally it is contended by appellant that because the amended and supplemental petition stated, and the demurrer necessarily admitted, that the board of medical examiners intended to try the charges against petitioner on the 18th day of October, 1932, notwithstanding that the alternative writ of prohibition was still in force, this fact entitled appellant to the demanded permanent writ of prohibition. There is

no merit in this point. If by proceeding at that time the board was violating any command contained in the alternative writ, there was another and more appropriate available method of enforcing the authority of the court.

As there appears to be no merit in the appeal, and no question presented which would justify further discussion, the motion to affirm should be granted.

For the foregoing reasons the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

137 Cal.App.Supp. 775

KAHN v. WELLS FARGO BANK & UNION TRUST CO.

No. 424.

Appellate Department, Superior Court, City and County of San Francisco, California.

Dec. 1, 1933.

Trusts ⇐272(1).

Corporate bond interest which became payable at first interest period following death of life beneficiary under trust *held* properly apportioned between her estate and remaindermen, since interest on coupon bonds accrues from day to day.

Appeal from Municipal Court of City and County of San Francisco; Joseph M. Golden, Judge.

Action by Irving H. Kahn against Wells Fargo Bank & Union Trust Company, as executor of the last will and testament of Cordelia Friedman Kahn, deceased. From a judgment for defendant, plaintiff appeals.

Affirmed.

Bacigalupi, Elkus & Salinger, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, for respondent.

GOODELL, Judge.

The late Cordelia Friedman Kahn created a trust in certain bonds of the face value of $71,000, and in some secured notes, stock, and cash. During her lifetime the net income of the trust estate was to be paid to her, and upon her death certain specific sums of money out of the trust estate were to be distributed to certain beneficiaries, and the residue to Henrietta Kahn Wildberg and Irving H. Kahn. While Mrs. Kahn lived, the bond interest was paid to her as the coupons became payable; and, when the first coupons became payable after her death, the trustee apportioned the interest, and paid to her executor as much thereof as the number of days she lived after the last preceding interest date bore to the total number of days covered by the coupons. This suit, to recover from the estate the $1,134.08 so paid, was brought by plaintiff in his own right and as assignee of Mrs. Wildberg, both residuary beneficiaries of the trust, and it presents the question whether such apportionment can be made in California in the absence of statutory authority.

The plaintiff's position is stated by counsel as follows: "These coupons, not having been due at the time of the death of Mrs. Kahn, should have been turned over to the beneficiaries under the trust," and, further, "upon coupons there is no such thing as an accrual, and only when the coupon becomes due is anything due. In other words, it [bond interest] does not accrue from day to day." In support of this contention, plaintiff relies, to a large extent, upon Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 261, and Union Safe Dep., etc., Co. v. Dudley, 104 Me. 297, 312, 72 A. 166. The defendant relies chiefly upon Wilson's Appeal, 108 Pa. 344, 56 Am. Rep. 214. There is no reported decision in this state upon the subject.

Mr. Perry in his work on Trusts and Trustees (7th Ed.) § 556c, says: "Interest-money upon notes, bonds, mortgages, and similar securities accrues from day to day although it is not payable until a fixed day; it is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives." The editor's annotation to this text is particularly apposite in view of the reliance placed by plaintiff on the Dexter Case, and by defendant on Wilson's Appeal. He says: "The English courts used to distinguish between interest on debts or notes and interest on the public funds, holding that the latter is not apportionable at common law, being within the class of payments coming due at fixed times. The Massachusetts court has followed the English rule as to interest on the public debt, except in cases coming within the Massachusetts statute of apportionment, and has applied the rule to interest on coupon bonds, including those of private corporations. The court reasons that each coupon is a separate contract to pay a definite amount at a certain time and represents an obligation distinct from the bond and from every other coupon" (citing Dexter v. Phillips, supra, and Union Safe Dep., etc., Co. v. Dudley, supra). The editor then adds, "In Pennsylvania and New York, a different view seems to have been taken" (citing Wilson's Appeal, supra,

and U. S. Trust Co. v. Tobias, 4 N. Y. S. 211, 21 Abb. N. C. 393).

The opinion in Dexter v. Phillips was written by Chief Justice Gray, and is in two parts. The first deals with rents of real estate and interest on United States bonds, and contains a comprehensive review of the English and American cases. The early English cases of Pearly v. Smith, 3 Atk. 260, and Sherrard v. Sherrard, 3 Atk. 502, are cited to the point that in England interest on the public debt was not apportionable. The early Pennsylvania case of In re Earp's Will, 1 Pars. Eq. Cas. 453, 467, is therein cited with the following commendation: "On the other hand, a court of like jurisdiction in Pennsylvania, after a careful review of the earlier English cases, held that not only interest on the debt of the United States, but also interest on the funded debt of a canal corporation, was not apportionable."

A further hearing was granted in the Dexter Case, and the second part of the opinion deals with different securities. The court held that no valid distinction could be made between government bonds and those of the state or "bonds or certificates of counties, cities or towns, or of railroad corporations" as long as there were interest coupons attached and that the interest was not apportionable.

In Wilson's Appeal, supra, the question presented was whether interest was apportionable on bonds of the City of Pittsburgh and the Philadelphia & Reading Coal & Iron Company in the absence of an apportionment statute. The court in a well-reasoned opinion written by Justice Paxson reviewed the English cases, including Pearly v. Smith and Sherrard v. Sherrard, and had this to say:

"The reasoning of the English cases goes upon the ground that the interest does not accrue day by day, which is entirely true of their consols. In Pearly v. Smith, supra, Lord Hardwicke stated it as tersely as it can be put, when he says: 'If the security had continued a mortgage, the claimant would have been entitled to the demand he now makes, because there interest accrued every day for forbearance of the principal, though notwithstanding it is usual in mortgages to make it payable yearly.' The same distinction between mortgages and funded debt is recognized in Sherrard v. Sherrard, supra, and many other English cases. And it is an obvious distinction as applied to South Sea annuities, and British consols generally. But the distinction between a mortgage, and bonds of the City of Pittsburg, and the bonds of The Philadelphia & Reading Coal & Iron Company secured by a mortgage, is difficult to see. In either case it is a loan, and the interest accrues from day to day as the consideration of the forbearance. That the principal is not due is not to the point, for money is loaned for a term of years upon mortgages as well as city or corporation bonds."

In Dexter v. Phillips, it will be remembered, the early case of In re Earp's Will was cited with approval.

In Wilson's Appeal, however, it was pointed out that the court in Earp's Case had failed to recognize "the peculiar character of the English consols," and, after a careful consideration, the court expressly overruled it.

Wilson's Appeal holds, in brief, that "the interest on these municipal and corporation bonds does accrue de die in diem precisely as in the case of an ordinary bond and mortgage." The court said that it was "wholly unable to distinguish one from the other in principle."

Earlier herein we set out the contention of the plaintiff that "upon coupons there is no such thing as an accrual, and only when the coupon becomes due is anything due. In other words, it [bond interest] does not accrue from day to day." In Adams v. Adams (1885) 139 Mass. 449, 1 N. E. 746, 747, the question was presented whether interest on bonds was apportionable under the Massachusetts statute, and in holding that it was the court had this to say with respect to bond interest: "The coupons are promises to pay certain sums of money at certain times expressly as interest on the bond. They differ from the ordinary promises to pay interest semi-annually, contained in promissory notes, only in their capacity of being detached from the bond, and thus acquiring all the incidents of a distinct negotiable written promise." And again: "But coupons attached to bonds are absolutely due and certain to become payable at a fixed time, and although the amount payable, in the technical language of the law, cannot be said to accrue from day to day, as rent does not accrue from day to day, yet the proportionate part of the coupon which at any time within the half year covered by it is earned as interest on the principal sum of the bond can be exactly computed, and its character as interest becoming due is not and cannot be changed by subsequent events so long as the coupons remain attached to the bond, or are held by the same person who holds the bond, and as a part of the same purchase or investment."

In the absence of authority in this state, we are at liberty to follow either of the two authorities which have been discussed. We have no hesitation in following Wilson's Appeal rather than Dexter v. Phillips. As said in Wilson's Appeal, referring to the nonapportionment rule: "That this rule is inequitable, and to some extent arbitrary, may be assumed from the fact that modern legislation and judicial decision have steadily tended to narrow the rule and enlarge the excep-

tions." The reasons given by Justice Paxson appeal to us as sound, and he shows in an unanswerable way why the rule of the English cases respecting interest on the public debt is not controlling and should not be followed as to interest on the bonds of private corporations. Just what justification there was for extending what is characterized by Justice Paxson in Wilson's Appeal as "a common law rule admittedly obnoxious to equity," and applying it to interest on the bonds of private corporations, does not appear from the Dexter Case or from the comment or annotation found in Perry on Trusts and Trustees. Even in the Massachusetts case of Adams v. Adams, supra, the contention of the plaintiff with respect to interest is answered and we think what was said in the earlier Massachusetts case of Dexter v. Phillips respecting coupons was modified. Moreover, it cannot be said with any degree of certainty from the Dexter Case what kind or type of bonds was involved, which renders it difficult, if not impossible, to say whether the bonds herein are comparable. Wilson's Appeal, on the other hand, deals with bonds of a private corporation such as those herein involved, as well as with municipal bonds.

But, over and above all that has been said, the weight of Mr. Perry's authority is on the side of a day-to-day accrual of interest on coupon bonds, and therefore of apportionment. We are satisfied that, being the fairer and more equitable of the two rules, it should be followed.

Some of the securities in the trust in the case at bar are promissory notes and corporate stock. None of the income in question, however, is derived from the stock; and so it becomes unnecessary to discuss the rule with respect to ordinary dividends of corporate stock. There seems to be unanimity of opinion respecting such dividends; they are held to be not apportionable because "profits of a business do not accrue at a steady rate from day to day, and are therefore incapable of apportionment." Perry (7th Ed.) § 556b and note.

Other cases than those herein discussed were cited in the briefs, but it is not necessary, in the view we take of the case, to discuss them. Union Safe Dep., etc., Co. v. Dudley, supra, contains no discussion of the subject, but simply follows and applies the rule announced in the Dexter Case to the bond interest there involved. The only point presented on this appeal has, we think, been fully discussed.

For the reasons given herein, we are satisfied that the judgment of the trial court was correct, and should be affirmed.

JOHNSON, P. J., and CONLAN, J., concur.

219 Cal. 503

ADAMS v. BELL.

L. A. 12797.

Supreme Court of California.

Dec. 11, 1933.

1. Appeal and error ⇐708.

On appeal from order denying motion to quash execution, contention that execution was improperly issued because complaint failed to state cause of action could not be sustained where neither findings nor evidence were included in record (Civ. Code § 3391, subd. 2).

2. Execution ⇐163.

In passing on motion to quash execution, which was collateral attack, court assumed in support of judgment that all issues necessary thereto were presented and tried without objection.

3. Execution ⇐60.

Issuance of execution is ministerial act pursuant to judgment or otherwise as authorized by law, as regards issuance by clerk of court.

4. Execution ⇐72.

Where judgment under which execution is sought is conditional, better practice is to present to court facts showing nonfulfillment of condition and to obtain order directing issuance of execution.

5. Execution ⇐72.

Where judgment entitled defendant to exercise election within 10 days after service of notice of entry of judgment, proof of service of such notice on information and belief of affiant *held* insufficient to authorize issuance of execution.

In Bank.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Thelma Louise Adams against Belle F. Bell. From an order denying a motion to recall and quash an execution, defendant appeals.

Order reversed.

A. N. Soliss, of Compton, and L. V. Beaulieu, of Los Angeles, for appellant.

Hamish B. Eddie and George F. Rankin, both of Los Angeles, for respondent.

SHENK, Justice.

Appeal from an order denying a motion to recall and quash an execution. The motion was made on the ground that the judgment pursuant to which the execution was issued was not a final judgment and was otherwise void, and that the issuance of the execution was unauthorized by law.

The action was for specific performance of an agreement to exchange real property. The court found in favor of the plaintiff and entered judgment that deeds be exchanged and as an alternative that, if the defendant should fail to execute and deliver a deed to the plaintiff as required within ten days after service upon her of notice of entry of judgment, then the plaintiff have judgment against the defendant for the sum of $4,500, which was found by the court to be the excess in the plaintiff's favor in the values of the respective properties. More than ten days after the entry of judgment an affidavit, made by the father of the defendant, was filed with the clerk stating that the defendant had failed to execute and deliver the required deed to the plaintiff and averred on information and belief that notice of the entry of judgment had been served on the defendant more than ten days prior to the execution of the affidavit.

Upon the filing of the foregoing affidavit the clerk of the court, without leave or order of court, issued an execution directing the sheriff to levy upon sufficient property of the defendant to satisfy the judgment of $4,500, costs, etc. The notice of motion to recall and quash said execution was then filed. Upon the denial of the motion this appeal was taken.

[1-4] It is first contended by the defendant that the execution was improperly issued for the reason that the complaint fails to state a cause of action in that it fails to allege that the contract as to the defendant was just and reasonable, citing section 3391, subdivision 2, of the Civil Code. This contention cannot be sustained on the state of the record. Neither the findings nor the evidence taken at the trial are included in the record. In this collateral attack (see 23 C. J. p. 537; 34 C. J. p. 524) it must be assumed, in support of the judgment, that all the issues necessary to a decree in specific performance were presented and tried before the court without objection. The judgment settled the rights of the parties and was a final determination thereof and no appeal therefrom has been taken. It offered the defendant the option to convey as directed or to suffer a money judgment to be entered against her. State v. Smith, 98 Wash. 100, 167 P. 91, 169 P. 468. If the defendant has made her election as claimed, the plaintiff is entitled to the money judgment. The question then is: Who is to ascertain whether the condition specified in the judgment has or has not been performed? The issuance of an execution is a ministerial act pursuant to a judgment or otherwise as authorized by law. Santini v. Justices' Court (Cal. Sup.) 24 P.(2d)

761; 11 Cal. Jur. p. 42; 23 C. J. p. 365. When the judgment is in the ordinary form and unconditional, there is no discretion in the clerk to refuse its issuance. When, as in the present case, the judgment is conditional, the authorities appear not to be in entire harmony. 23 C. J. p. 367. But the better and safer practice would seem to be to present to the court the facts showing nonfulfillment of the condition and obtain an order of court directing the issuance of the execution. We think such a procedure should have been followed in the present case.

[5] But assuming that the clerk was vested with authority to ascertain the facts, the proof thereof must necessarily be satisfactory and complete. Here the proof of the necessary fact of service of notice of the entry of judgment was not by a direct averment of such fact, but upon the information and belief of the affiant. This was mere hearsay and insufficient upon which to establish that service of the notice had been made at any time or at all. See Murphy v. Shea, 143 N. Y. 78, 81, 37 N. E. 675.

In any event, therefore, there was no authority on the part of the clerk to issue said execution and the motion to recall and quash the same should have been granted.

The order is reversed.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

219 Cal. 506

GURY v. GURY.

L. A. 14249.

Supreme Court of California.

Dec. 11, 1933.

Rehearing Denied Jan. 8, 1934.

1. Divorce ⇐299.

Plaintiff in divorce action was not required to show change of conditions subsequent to entry of decree to warrant order providing working arrangement for enforcement of right to see children in accordance with interlocutory decree.

2. Trial ⇐9(1).

Fact that divorce proceeding was permitted to go off calendar after partial hearing did not deprive judge of jurisdiction to restore it to calendar and finally determine case in accordance with assignment conferring authority.

Assignment of judicial council conferred upon judge authority to act in superior court and its several departments not only during calendar year, but thereafter until all matters heard or partially heard, or submitted to him had been disposed of, so that, after partially hearing divorce proceeding during calendar year, it was his duty under said assignment to complete it.

3. Appeal and error ⇐883.

Party to divorce proceeding could not complain of lack of notice of transfer of proceeding effected at his own request.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge.

Action by Zaida Gury against Chester Gury. From an order authorizing plaintiff wife to have minor children of parties on stated occasions made on motion styled a motion to modify interlocutory decree permitting plaintiff to visit and have the minor children, defendant appeals.

Affirmed.

Hugh G. Maddox, of Long Beach, for appellant.

Charles E. Hobart, of Los Angeles, for respondent.

PRESTON, Justice.

In this cause, after prolonged hearings upon a motion styled "motion to modify interlocutory decree permitting plaintiff to visit and have the minor children," the court made its order authorizing plaintiff wife to have with her the two minor children of these parties, properly clothed and equipped, on stated occasions, to wit, on each first and third Saturday and Sunday of the month, one month during vacation each year, and alternate holidays. Defendant appealed. Despite the title of plaintiff's motion, it was not in reality an attempt to modify the decree or change the custody of said children, but was in effect a proceeding to compel appellant to comply with certain terms of said interlocutory decree and the property settlement therein incorporated.

[1] The interlocutory decree of divorce in favor of plaintiff was entered July 2, 1928; final decree October 29, 1931. The interlocutory decree, among other things, awarded custody of the two minor children to appellant, but it also approved, and by reference incorporated, a property settlement agreement which, in providing for appellant to have custody of said children, reserved to plaintiff the right to "take one or both" of them "upon due notice and by agreement of the parties," and "to visit said children." Efforts of plaintiff to exercise this latter

right without undue interference on the part of appellant resulted in numberless, indeed continual, controversies. See, in this connection, In re Gury, 103 Cal. App. 738, 284 P. 944. Plaintiff therefore instituted this proceeding to invoke the aid of the court to provide a working arrangement for enforcement of her right to see the children under harmonious conditions. There is, therefore, no substance in appellant's several contentions based upon the theory that, to modify a decree determining the fitness of parties to have the custody and care of minor children, it is necessary to show a change of conditions subsequent to entry of the decree.

The voluminous evidence before us abundantly supports the action of the court below. Although the interlocutory decree adjudged that plaintiff was not a fit and proper person to have custody and control of said children, this provision appears to have crept into the record through inadvertence. An effort of the trial judge to correct it by filing amended findings and an amended decree proved futile. Gury v. Gury, 114 Cal. App. 460, 300 P. 81. In fairness to plaintiff, we should say that, if it had been necessary for her to show a changed or proper character and fitness, the evidence would leave no doubt of the success of such endeavor. It establishes that her conduct at all times was exemplary, above reproach, and that she is in every respect a fit and proper person to visit and associate with her minor children in the manner decreed by the order of the court.

Appellant complains that the Honorable Charles B. MacCoy, judge of the municipal court of the city of Los Angeles, sitting by assignment in the superior court to try and determine this cause, was without jurisdiction to make said order, having permitted the cause to be put off calendar for some ten months and to be thereafter transferred from the Los Angeles to the Long Beach department of said superior court, where he resumed the hearing, his assignment to the superior court having meanwhile expired. The facts with reference to this situation are:

In March, 1932, plaintiff's motion came on for hearing before Judge MacCoy. On March 1, 2, 3, 4, and 12 evidence was taken. The hearing was continued from time to time until April 27th, when the cause was "ordered off calendar to be restored on motion of either party." On May 4th, before Judge MacCoy, further hearing was, on motion of plaintiff, set for May 12th, on which date the cause was again ordered "off calendar." On October 7, 1932, appellant filed a substitution of attorneys, and thereafter, upon due notice, the hearing was set for November 9th, at which time Judge MacCoy, at appellant's request, continued it to December 12th. On November 14th Judge McComb, sitting in said superior court, heard and granted a motion of appellant to transfer the cause to Long Beach. On January 6, 1933, counsel stipulated that "further hearing on the order to show cause, heretofore partially heard by Honorable Charles B. MacCoy, Judge Presiding, and now set for January 9, 1933 * * * be continued to the 24th day of January, 1933. * * * Notice of the continuance of the above mentioned hearing is hereby waived."

On said stipulated date, January 24th, counsel for both parties being present, the court ordered the hearing to proceed over vigorous objections of appellant's attorney to the effect that the cause had not properly reached a place on the calendar and notice of trial had not been served as required by statute. Nevertheless, additional evidence was received on said day and also on January 27th, when the matter was concluded by a ruling from the bench which was transmuted into the formal order of February 1, 1933.

[2, 3] The trial court was not in error in ordering the hearing to proceed on January 24th. The assignment of the judicial council conferred upon Judge MacCoy authority to act in the said superior court and its several departments, not only during the calendar year 1932, but thereafter until all matters heard, or partially heard, or submitted to him had been disposed of. After partially hearing the instant cause in March, 1932, it was his duty, under said assignment, to complete it. The fact that the matter was permitted to go off calendar after partial hearing did not deprive said judge of jurisdiction to thereafter restore it to the calendar and finally hear and determine it. Nor may appellant complain that proper notice was not given after the transfer to Long Beach. This transfer was effected at appellant's own request. Furthermore, by the stipulation above quoted, notice of continuance of the hearing was expressly waived. Lastly, appellant was in court with his counsel when the case was called on January 24th; he had every opportunity to produce such evidence as he desired; and it clearly appears that he was not prejudiced in any manner.

The order is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.

219 Cal. 513

RILEY, State Controller, et al. v. JOHNSON, State Treasurer.

S. F. 15062.

Supreme Court of California.

Dec. 13, 1933.

1. States ⇐136.

Statute providing for registration of unpaid warrants drawn on state treasurer, and for payment thereof with interest, *held* not invalid as beyond general powers of Legislature (St. 1933, c. 605).

2. States ⇐136.

Indorsement and registration of unpaid warrants drawn on state treasurer, although not personally signed by treasurer, *held* valid, where either printed signature or facsimile of signature of treasurer was added (St. 1933, c. 605).

3. States ⇐131.
Statutes ⇐205.

Legislature, in making appropriations, need not follow any particular form, and legislative intention must be ascertained from entire statute.

4. States ⇐131.

Statute providing for registration of unpaid warrants drawn on state treasurer, and for payment of principal and interest from unapplied moneys in general fund as received, *held* sufficient legal appropriation (St. 1933, c. 605).

5. States ⇐142.

That statute providing for registration of unpaid warrants drawn on state treasurer made appropriation of only $150,000 for payment of interest which was concededly insufficient *held* not to preclude payment of interest on registered warrants from unapplied moneys in general fund (St. 1933, c. 605).

6. States ⇐131.

Statute making appropriation is not objectionable on ground of uncertainty, if Legislature fixes extent to which treasury will be drawn upon.

7. Statutes ⇐47.

Statute providing for registration of unpaid warrants drawn on state treasurer, and for payment of principal and interest thereon from unapplied moneys in general fund as received, *held* not objectionable on ground appropriation is void for uncertainty (St. 1933, c. 605).

8. States ⇐131.

State revenues may be appropriated by Legislature in anticipation of receipt as effectually as when such revenues are physically in state treasury.

9. States ⇐115.

Statute providing for registration of unpaid warrants drawn on state treasurer, when outstanding warrants represent amount in excess of unapplied money in general fund, *held* not invalid as creation of "indebtedness or liability" in excess of $300,000, although principal and interest on unpaid registered warrants exceeds, or will exceed, such amount (St. 1933, c. 605; Const. art. 16, § 1).

[Ed. Note.—For other definitions of "Indebted; Indebtedness," see Words & Phrases.]

10. States ⇐132.

Under statute providing for registration of unpaid warrants drawn on state treasurer, and making appropriations from unapplied money in general fund as received for payment of principal on registered warrants, with interest thereon, Legislature could not thereafter repeal or render ineffectual appropriation as against warrant holders by repealing appropriation, or by appropriating moneys which would otherwise accumulate to other purposes (St. 1933, c. 605).

11. States ⇐138.

That registered warrants drawn on state treasurer, with interest and principal payable out of general fund, have no definite maturity date, *held* not to render warrants invalid (St. 1933, c. 605).

12. States ⇐141.

Registered warrants drawn on state treasurer *held* redeemable in order of issuance when sufficient unapplied moneys accrue in general fund to pay interest and principal thereon (St. 1933, c. 605).

13. States ⇐141.

Statutory duty of state controller to notify state treasurer when he deems unapplied money in general fund sufficient to pay registered warrants outstanding *held* not to vest uncontrolled discretion in controller as to when warrants shall be redeemed (St. 1933, c. 605).

14. States ⇐136.

State controller, in appropriate proceedings, may be made to conform to spirit and intent of statutory provision for registration of unpaid warrants drawn on state treasurer and redemption thereof (St. 1933, c. 605).

In Bank.

Original application by Ray L. Riley, as State Controller, and another, for a writ of mandate prayed to be directed to Charles W. Johnson, as State Treasurer, requiring him

to advertise that a certain registered interest-bearing warrant of the state is redeemable as required by St. 1933, c. 605.

Alternative writ of mandate previously issued made peremptory.

U. S. Webb, Atty. Gen., and Robert W. Harrison and H. H. Linney, Deputy Attys. Gen., for petitioners.

Webb Shadle, of Sacramento, for respondent.

PER CURIAM.

Petitioners have applied for a writ of mandate to compel the respondent state treasurer to publish notice, as required by Statutes of 1933, c. 605, that a certain registered warrant is now redeemable as to both principal and interest. One of the petitioners is the state controller and the other is the owner and holder of the warrant in question. The petition alleges that on November 1, 1933, the controller duly and regularly drew and signed the warrant in question, directing the treasurer to pay out of the general fund in the state treasury the sum of $6.77 to F. W. Baude, petitioner herein; that the amount stated in the warrant was at that time due and owing and unpaid from the state to the payee therein named; that the warrant, when drawn, represented an amount in excess of the unapplied money in the general fund; that for that reason the controller, pursuant to chapter 605 of the Statutes of 1933, upon the date the warrant was drawn, presented the same to the state treasurer, who, thereupon, pursuant to the provisions of the same statute, indorsed upon the back thereof that the same was unpaid for lack of funds and bore interest at the rate of 5 per cent. per annum from the date of the registration to the date upon which the treasurer should first advertise that the warrant is payable upon presentation; that the treasurer's name was printed on the back of said warrant as part of the indorsement; that the warrant here involved was the first warrant to be registered; that, after the warrant was so registered, it was returned to the controller for distribution, and thereafter the warrant was delivered to the payee Baude, who is now the owner and holder thereof; that on November 1, 1933, and subsequent thereto, and pursuant to law, the controller duly and regularly drew, and signed other warrants upon the state treasury directing the treasurer to pay out of the general fund the amounts stated in the warrants to the payees therein named; that no money was available to pay these warrants, and the same were registered by the treasurer and distributed to the payees by the controller, as provided in chapter 605 of the Statutes of 1933; that on some of these warrants, as part of the indorsement and registration of the same, there was printed the treasurer's name (as in the case of the Baude warrant), while, in the case of others, there was printed a facsimile of the treasurer's signature; that all of the matter included in such indorsement and registration, including the printed or facsimile signature of the treasurer, was placed thereon by the authority of the treasurer; that on December 4, 1933, there was, and the controller deemed there was, sufficient unapplied money in the general fund, after making due allowance for the paying of all demands upon such fund which are given priority by the Statutes of 1933, c. 605, to pay the Baude warrant, being warrant No. 1 in order of registration; that on December 4, 1933, the controller notified the respondent treasurer of the number of the warrant to be redeemed, and requested the treasurer to publish notice immediately that said warrant is now redeemable, as required by chapter 605 of the Statutes of 1933, but the treasurer refused, and still refuses, to publish said notice, on the ground that there is no valid law requiring him to publish the notice or to pay the interest on or the principal of such warrant, and that chapter 605 of the Statutes of 1933, which purports to require him to do so, is unconstitutional and void; that the question involved is of great public importance; that warrants totaling several millions of dollars have already been drawn and issued to payees; that the financial condition of the state treasury now is, and for some time will continue to be, such that additional warrants totaling several millions of dollars will be drawn, registered, and issued to the respective payees, awaiting receipt of money in the treasury to pay the same; that great uncertainty exists as to the legal sufficiency of such warrants. A copy of the warrant, together with all indorsements thereon, is attached to the petition as an exhibit. The relief prayed for is that respondent be compelled to publish notice, as required by law, and to redeem the warrant and to pay the holder thereof the interest and principal thereon.

The answer and return of the respondent alleges that the petition does not state facts sufficient to constitute a cause of action, that there is no authority in law for the registration and indorsement of interest-bearing warrants, and that chapter 605 of the Statutes of 1933, purporting to authorize the registration of such interest-bearing warrants, is unconstitutional and void, for reasons that will be hereinafter discussed.

The controversy thus presented is the result of the passage by the last Legislature of a bill providing for the registration and indorsement of interest-bearing warrants. St. 1933, c. 605. This bill was passed by the Legislature in contemplation of the fact that the general fund would be exhausted before the end of the present biennium, and that it would therefore become necessary to register warrants. This contingency has now occur-

red. The section involved purports to confer on the treasurer and controller the power to register warrants and to pay 5 per cent. per annum interest thereon, and to provide in detail a method of issuing, registering, and ultimately redeeming said warrants. It is the constitutionality of this section that is challenged in this proceeding.

[1] The first contention of respondent is that the Legislature has no power to provide for the registration of warrants, and that, even if such power exists, the Legislature is powerless to pay interest on such registered warrants. These contentions are without merit. There is no prohibition against the registering of warrants or the payment of interest thereon found in the Constitution of this state. It is well-settled law that, in the absence of constitutional limitation, the Legislature has the power to provide for the registration and indorsement of warrants unpaid for the lack of funds. Rhea v. Newman, 153 Ky. 604, 156 S. W. 154, 44 L. R. A. (N. S.) 989; State v. State Board of Examiners, 74 Mont. 1, 238 P. 316; 59 Cor. Jur. 270, § 408. It is equally well settled, in the absence of express constitutional restriction, that the Legislature may provide for the payment of interest on unpaid warrants. Hays v. McDaniel, 130 Ark. 52, 196 S. W. 934; State v. Barret, 25 Mont. 112, 63 P. 1030; 59 Cor. Jur. 269, § 405. There can be no doubt, therefore, that the Legislature was well within its general powers in passing the bill in question, unless the provisions thereof are invalid for other reasons.

[2] The act provides that, whenever the controller draws his warrant upon the treasurer, payable out of the general fund, and the warrant represents an amount in excess of the unapplied money in the fund, the controller shall present such warrant to the treasurer, "who shall indorse upon the back thereof the date of presentation by the Controller and that the same is not paid for want of funds and bears interest at the rate of five per cent per annum from the date of such registration to and including the date upon which the State Treasurer first advertises that said warrant is payable upon presentation. Indorsement by the Treasurer in the manner herein above described shall constitute the registration of such warrant." Respondent does not complain that the indorsement printed on the back of the Baude warrant or any subsequent warrant is not complete in all details, but he does contend that the indorsement and registration are not valid because not personally signed by the treasurer. The treasurer did add to the indorsement either his printed signature or a facsimile of his signature. We find no requirement that the treasurer shall personally sign the indorsement. All that is required is that the treasurer strictly follow the terms of the statute. The statute requires that certain information be contained in the indorsement and registration, but does not expressly or impliedly require the treasurer to sign his name thereto. As long as the indorsement indicates that it is the treasurer who is making the same, that is all that is required, and the printed or facsimile signature indicates this with sufficient certainty. It is an admitted fact that the indorsement here involved was placed upon the back of the Baude warrant with the authority of the treasurer. Moreover, the act itself provides a check on all warrants registered and indorsed thereunder. After providing what the indorsement shall contain, the act provides: "The State Controller shall furnish the State Treasurer with a separate warrant register for warrants which are registered under this section, and the State Treasurer shall stamp on said warrant register the date on which any warrant is registered and the date on which said warrant is first advertised as payable." The procedure herein outlined has been fully complied with.

[3-5] The next contention of respondent is that the provisions of chapter 605 of Statutes of 1933 do not constitute a valid appropriation of moneys from the general fund, as such moneys are received (subject to the priorities mentioned in the statute). There can be no doubt that the provisions of the act requiring such warrants with interest to be paid from the unapplied moneys in the general fund, subject to the priorities therein provided, as such moneys are received into such fund, constitute a legal appropriation of so much money as will be necessary to make such payment. State v. McCauley, 15 Cal. 430; People ex rel. McCauley v. Brooks, 16 Cal. 11. No particular form is required for an appropriation. In determining whether an appropriation has been made, the intention of the Legislature is to be ascertained from the entire statute. Proll v. Dunn, 80 Cal. 220, 22 P. 143; Irelan v. Colgan, 96 Cal. 413, 31 P. 294. Respondent also contends that, since by the provisions of chapter 605 of Statutes of 1933 but $150,000 per year have been appropriated for interest payments, the same to lapse each year if not used, and since it is conceded that this amount will be insufficient, the excess interest over the amount of the specific appropriation cannot be paid from the general fund as moneys therein accrue. This point is also without merit. A reading of the entire act clearly indicates that it was the intent of the Legislature that interest and principal of registered warrants should be a charge on the unapplied moneys in the general fund, as they accrue, and that when each warrant is redeemed, it shall be redeemed in its entirety; that is, both the principal and interest shall be redeemed in one payment. Section 3 of the act provides that such interest as may be due to the warrant holders is to be

paid by the treasurer "when registered warrants are paid by him." The act contemplates but one payment by the treasurer with relation to any one warrant—one payment of an amount which represents principal and interest due. That amount has been appropriated by chapter 605 of the Statutes of 1933 to pay these warrants. While the Legislature may have believed that the $150,000 appropriated for interest was sufficient, yet it clearly did not intend that the warrant should remain unpaid if the specific interest appropriation was deficient. The act creates a special fund of $150,000 yearly for interest, and appropriates the remaining unapplied moneys, as they accrue, for principal and any further interest, as needed. In effect, the act constitutes an appropriation from the unapplied moneys, as they are received, of such amount as will be required to pay the registered warrants in full, both as to principal and interest, though, in effecting such interest payment, the funds from the specific interest appropriation are to be first exhausted.

[6, 7] Respondent suggests that, if this be the proper interpretation of the act, it then is void for uncertainty, for the reason that the exact amount thus appropriated cannot now be ascertained. All that is necessary is that the Legislature fix in the appropriation bill the extent to which the treasury will be drawn upon. This it has done in the instant case. The amount appropriated from the unapplied moneys in the general fund by the act in question is limited by the extent of the principal of the warrants, which, in turn, is limited by the various appropriations made by the Legislature. The amount of interest on the warrants is limited by the amount of principal of the warrants, and can be ascertained by applying a simple mathematical formula to the amount of the principal. This renders the appropriation sufficiently certain. Irelan v. Colgan, supra.

[8, 9] The respondent next contends that the registration and indorsement of interest-bearing warrants at a time when there are no unapplied moneys in the general fund to meet either the principal or interest thereof constitute the creation of an indebtedness or liability in excess of $300,000, in violation of article 16, § 1, of the Constitution. It is an admitted fact that both the principal and interest on the unpaid registered warrants now exceeds, or in the future will exceed, $300,000. It is our opinion that no indebtedness or liability is created, within the meaning of the constitutional provision in question, when, as here, the Legislature, at the time of authorizing the obligation, appropriates money to meet such obligation. We have already held that the provisions of chapter 605 of the Statutes of 1933 constitute an appropriation of the unapplied moneys in the general fund of a sufficient amount of money to pay the interest and principal of the registered warrants. It is well settled in this state that revenues may be appropriated in anticipation of their receipt just as effectually as when such revenues are physically in the treasury. The appropriation of such moneys and the issuance of warrants in anticipation of the receipt of revenues in effect operates in the nature of a cash payment, and therefore does not create an indebtedness or liability within the meaning of the debt limitation clause. State v. McCauley, supra; People v. Pacheco, 27 Cal. 175; Bickerdike v. State, 144 Cal. 681, 78 P. 270.

[10] Respondent also suggests that subsequent Legislatures may repeal the statute or appropriate for other purposes the unapplied money in the general fund, and thus exhaust the general fund, and thus create an indebtedness or liability in violation of the clause in question. This point is likewise without merit. Inasmuch as we have already held that the statute contains an appropriation from the unapplied moneys in the general fund of such amount as will be necessary to pay such registered warrants, with interest thereon, the Legislature could not hereafter repeal or render ineffectual such appropriation as against warrant holders by repealing the appropriation act or by appropriating to other uses any part of such moneys as would otherwise accumulate in such fund and be applicable to the payment of such registered warrants. People ex rel. McCauley v. Brooks, supra.

[11] The argument that, since the warrants have no definite maturity date, they are invalid, is without merit. Although the lack of a definite maturity date may render the warrants nonnegotiable, it in no way affects their validity.

[12-14] The last argument urged by respondent is that the act confers on the controller uncontrolled discretion as to when such warrants shall be redeemed, and permits him to determine which warrants shall be redeemed, and thus to accord priority over prior registered warrants to subsequently registered warrants. These contentions find no support in the act. Chapter 605 of the Statutes of 1933 intends, subject to the priorities therein contained, that the warrants shall be redeemed in the order of their issuance, when sufficient unapplied moneys accrue in the general fund to pay the interest and principal thereon. The duty imposed on the controller to notify the treasurer when he "deems that there are sufficient unapplied moneys in the general fund in the state treasury to pay all or some of the registered warrants outstanding against said general fund" does not vest in the controller uncontrolled discretion as to when such warrants shall be redeemed. The duty to notify the treasurer when such a state of facts exists

is ministerial, and the controller could not properly refrain from notifying the treasurer because he deemed it best to have such unapplied moneys devoted to other uses. By chapter 605 of the Statutes of 1933, the Legislature has determined that such registered warrants, subject to the preferences and priorities therein stated, shall have first call upon such unapplied moneys. The controller could be compelled in an appropriate proceeding to conform to the spirit and intent of the act.

For the foregoing reasons, it follows that the alternative writ of mandate heretofore issued should be made peremptory.

It is so ordered.

219 Cal. 510

HARTMAN v. CITY NAT. BANK OF SAN FRANCISCO et al.

S. F. 14839.

Supreme Court of California.

Dec. 12, 1933.

Corporations ⇐80(2).

Corporation which stamped its name on bonds obtained by its agent in exchange for stock and paid agent commission *held* chargeable with liability for agent's fraud in inducing exchange.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Suit by John Henry Hartman against the City National Bank of San Francisco and others. From that portion of a judgment rendered in favor of defendant Frederick Vincent & Co., a copartnership, and the individual partners thereof, plaintiff appeals.

Reversed and remanded, with directions.

Edwin H. Williams, of San Francisco, for appellant.

Richard M. Lyman, Jr., and Howard C. Ellis, both of San Francisco, for respondents.

PRESTON, Justice.

This plaintiff sought to rescind a transaction whereby he was induced, through the false and fraudulent representations of defendant Sam Schweitzer, to exchange valuable bonds for stock of such small comparative value as to mark the transaction on its face with probable taint of fraud. The action may be treated as one counting upon fraud and deceit. The court rendered judgment against said Schweitzer and in favor of plaintiff for the sum of $2,320.42, but gave judgment in favor of the other defendants. Plaintiff has appealed from that portion of said judgment which is in favor of defendant Frederick Vincent & Co., and the individual defendants composing that copartnership, to wit, Frederick Vincent & Co., a copartnership composed of Frederick Vincent and George Stratton, and Frederick Vincent and George Stratton, individually, hereinafter styled the respondents.

That the agent Schweitzer was guilty of making fraudulent representations to plaintiff, which induced the transaction, is not disputed, and the agent has not appealed. At the argument of the cause respondents conceded the necessity of a reversal of the judgment exonerating them and they have filed no reply brief. Their contention, however, is that the reversal should be an open one and not a reversal with directions to enter a judgment against them. But the record leaves us in no doubt as to the soundness of appellant's contention that, under undisputed evidence as well as the findings, he should have had judgment also against said respondents. The facts material to this discussion, as established by the evidence and found by the court, are as follows:

Defendants Vincent and Stratton, composing said Vincent Company copartnership, and defendant Sherman, were all directors of each of the defendant corporations City National Bank of San Francisco, City National Corporation, and Merchants Ice & Cold Storage Company. Defendant Schweitzer was a duly licensed agent and salesman for the Vincent Company, selling and dealing in securities. He was also licensed to act as agent and salesman for City National Corporation. In his dealings with plaintiff, he introduced himself as a representative of City National Bank of San Francisco. It was stock of this bank which plaintiff accepted for his bonds. Following oral negotiations with plaintiff, defendant Schweitzer undertook to prepare written agreements for consummation of the exchange. In so doing he filled in with the necessary data blank printed forms of the City National Corporation and executed them by signing under the printed words "City National Corporation by" his name "S. Schweitzer." Plaintiff also executed these agreements. But, as a matter of fact, City National Corporation was never a party to the transaction.

The agent Schweitzer delivered to his principal, Vincent & Co., the bonds secured from plaintiff and the said agreements, whereupon that company, without the knowledge or consent of plaintiff, changed the agreements by crossing out, wherever it appeared, the printed name of "City National Corporation" and stamping over it the name "Frederic Vincent & Co." Said company retained possession of the bonds as owner thereof and exercised com-

plete dominion over them. The stock delivered to plaintiff in consideration of these bonds was the property of said company. Furthermore, it paid to Schweitzer $750 for his commission on the deal. Thus the company ratified the acts of its agent, paid him his commission and, with knowledge of said gross discrepancy in the value of the securities exchanged, it retained the benefits of the transaction. How then can it seek to evade responsibility for fraud of the agent? And how can it avoid the consequences of its own act in materially altering the said written instruments to insert thereon its own name as a principal in the transaction? Under these plain facts it requires no citation of authority to demonstrate that this company, as well as its agent, is charged with liability for the said fraud.

That portion of the judgment appealed from is reversed and the cause as to respondents is remanded with directions to enter judgment in favor of the plaintiff and against said respondents, Frederick Vincent & Co., a copartnership composed of Frederick Vincent and George Stratton, and Frederick Vincent and George Stratton, individually, for the sum of $2,320.42 and costs of suit.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

135 Cal.App. 561

PEOPLE v. EGAN et al.

Cr. 2441.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1933.

Criminal law ⇐912.

Defendant's second motion for new trial, made after judgment and denial of similar motion, *held* properly denied for lack of jurisdiction (Pen. Code, § 1182).

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Homer D. Rogers was convicted of murder in a proceeding by the People against Dallas Egan and others, and from an order denying his second motion for a new trial, defendant Rogers appeals.

Affirmed.

Gladys Towles Root and George B. Bush, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

Appellant, with two others, was accused of the crime of murder. Appellant Rogers appealed from the judgment and from an order denying his motion for a new trial. Both the judgment and order were affirmed by decision filed July 3, 1933 (23 P.(2d) 1042), and remittitur was sent down August 3, 1933. On July 31, 1933, pursuant to notice given by appellant, he presented to the superior court a second motion for a new trial, which motion on August 4th was by said court "denied for lack of jurisdiction to entertain or pass upon said motion." It is from this order that defendant Rogers now appeals.

It appears to be certain that appellant had no right to a second motion for a new trial, and that the court was without jurisdiction to grant the same. The fact that the motion was made after pronouncement of judgment is itself an answer to this appeal. "The application for a new trial must be made before judgment, and the order granting or denying the same must be immediately entered by the clerk in the minutes." Pen. Code, § 1182. As was said in People v. Paysen, 123 Cal. App. 396, 11 P.(2d) 431, 432, "When the trial court has made its order denying a motion for a new trial, 'the right to move for a new trial had thus been exercised and exhausted.'" (Citing numerous cases.)

The order is affirmed.

135 Cal.App. 654

PEOPLE v. THOMAS.

Cr. 1762.

District Court of Appeal, First District, Division 2, California.

Dec. 8, 1933.

Hearing Denied by Supreme Court Jan. 6, 1934.

1. Homicide ⇐281.

Whether conspiracy between codefendants to commit robbery was of scope sufficient to make them coconspirators in commission of murder of officer attempting arrest *held* for jury.

2. Criminal law ⇐553.

In murder prosecution, jurors were entitled to base verdict upon reasonable inferences to be drawn from testimony offered by prosecution, and were not bound to accept evidence offered by defense in opposition to such inferences.

3. Criminal law ⇐829(1).

Refusing instruction amply covered by instructions given *held* not error.

4. Criminal law ⇐761(2).

Refusing defendant's instruction, in murder prosecution, assuming that if conspiracy existed it was for perpetration of single robbery and terminated upon completion of single offense, *held* not error where such issue was contested.

5. Criminal law ⇐800(3).

Use of term "res gestæ" in proposed instruction without explanation justified refusal of such instruction (Code Civ. Proc. § 185).

6. Criminal law ⇐622(1), 1148.

Granting or refusing separate trials rests largely within discretion of trial court, and its ruling denying separate trial will not be disturbed in absence of clear showing of abuse of discretion (Pen. Code, § 1098, as amended by St. 1921, p. 90).

7. Criminal law ⇐622(2).

Denial of separate trials sought on ground that codefendant's confession would be prejudicial, that joint trial would limit right to peremptory challenges, that defense theories were conflicting, and that defendants quarreled over such theories, *held* not abuse of discretion (Pen. Code, § 1098, as amended by St. 1921, p. 90).

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Sam Thomas was convicted of murder in the second degree, and he appeals.

Affirmed.

R. R. Sischo, of Merced, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, Justice.

Defendant Sam Thomas and one Joseph Matlock were jointly charged with the murder of John Buck, a police officer. Defendant Sam Thomas moved for a separate trial, which motion was denied. The jury found Joseph Matlock guilty of murder in the first degree with recommendation of life imprisonment, and found defendant Sam Thomas guilty of murder in the second degree. From the judgment of conviction and the order denying his motion for a new trial, defendant Sam Thomas appeals.

Appellant contends: (1) That the evidence was insufficient to sustain his conviction; (2) that the trial court erred in giving and refusing certain instructions; (3) that the trial court erred in denying appellant's motion for a separate trial; and (4) that the trial court erred in denying appellant's motion for a new trial. We shall consider these contentions in the order stated.

Officer Buck was fatally shot by Matlock in the city of San Jose on the evening of February 27, 1933. The shooting immediately followed the stopping of a Ford automobile by the officers, in which automobile appellant and Matlock were riding. The prosecution charged both men with murder upon the theory that they were coconspirators and that the shooting was done in furtherance of the conspiracy. We will outline some of the evidence upon which the prosecution relied to sustain that theory.

[1] Appellant, who resided in Mariposa county, was a nephew of his codefendant, Matlock. The latter had a criminal record, having suffered his last conviction of a felony in 1925. He was released upon parole in 1932 with five years yet to serve. Following his release he worked in Mariposa county for a time and subsequently worked in Monterey. On or about February 19, 1933, he arrived at appellant's home in Mariposa county, where he remained for two nights. Thereafter he and appellant went to Colterville, where Matlock obtained a pistol from a storekeeper. They then proceeded to Sonora, where appellant, on February 22, purchased a Ford sedan upon which appellant made a down payment. After purchasing the car appellant and Matlock drove to Red Bluff, where they picked up Matlock's paramour and her small child, and they all drove to San Jose, arriving there on February 23. On February 25 appellant and Matlock went to a secondhand store in San Jose where appellant purchased a revolver. On the evening of February 26 appellant and Matlock held up the occupants of a Japanese ice cream parlor in San Jose and obtained the sum of $5.05, which they divided between them upon returning to their auto camp on the highway leading to Oakland. In perpetrating this robbery Matlock held a pistol on the persons present while appellant searched their pockets and rifled the cash register. They remained in the auto camp throughout the next day, and at 9 o'clock in the evening appellant and Matlock again drove into San Jose. As they were passing a gasoline station in the vicinity of Thirteenth and Julian streets, two police officers in a radio patrol car observed that they were driving very slowly and that both appellant and Matlock were carefully scrutinizing the gasoline station. This aroused the officers' suspicions and they followed while appellant and Matlock drove along the following course: From Thirteenth street they turned west into Julian; proceeded along Julian to Twelfth street, where they turned south; proceeded along Twelfth street to Santa Clara, where they turned

west; proceeded along Santa Clara to Eleventh street, where they turned south; proceeded along Eleventh street to San Antonio, where they turned west; proceeded along San Antonio to Seventh street, where they turned north; proceeded along Seventh street to San Fernando, where they turned west; proceeded along San Fernando past First street to Market, where they turned north; proceeded along Market to Post street, where they turned west. Having memorized the license number of the Ford, the officers signaled the occupants to stop in order to question them. Appellant, who was driving, stopped the Ford, while the police car stopped just behind and to the left. Officer Buck got out on the right side of the police car, went behind appellant's car and along the right side thereof. According to the testimony of Officer Moon, who had been driving the police car, the firing started immediately after Officer Buck had gone around to the right side of appellant's car. Officer Buck dropped to the pavement mortally wounded and appellant's car started forward. Officer Moon got out of the police car and started firing at Matlock, who was running to catch up with appellant's car. Four shots struck Matlock, who dived on the running board of appellant's car and fell between the motor and the fender. Appellant drove away, making several turns before stopping to assist Matlock into the car. Appellant and Matlock then drove to their auto camp, and after Matlock's paramour had bandaged his wounds, they all got into the Ford car and proceeded toward Oakland. On the road they were overtaken by a radio patrol car. The officers ordered appellant to stop and appellant obeyed. Appellant got out first and was ordered to get the other occupants out. After assisting Matlock, appellant took the pistol which he had purchased in San Jose two days before and placed it on top of the automobile. The police did not notice this and the pistol apparently fell to the ground when the Ford car was turned around. It was found there later by a bus driver and was subsequently identified by appellant. Appellant stated that, "When he seen that Matlock was not going to shoot it out with the second pair of officers they encountered, that he put his gun that was loaded on top of the car."

In contending that the evidence was insufficient to sustain his conviction, appellant argues that: "There was only one robbery perpetrated, and that at the time of the shooting the appellant was not engaged in the commission of any felony or the perpetration of any crime, but, on the contrary, the only robbery perpetrated had been completed, and the shooting of Officer Buck was an independent act of the defendant Matlock and not in furtherance of the common design or conspiracy between the parties, to-wit, the robbery of the Japanese store." In other words, appellant's argument is based upon the claim that the evidence was insufficient to show that the conspiracy between the parties extended beyond the single robbery which had already been perpetrated. In our opinion, however, the evidence was ample to support the inference that the conspiracy between appellant and Matlock was far broader in its scope and that it included a common design to commit not only one but a series of robberies and to resist arrest with the weapons with which they armed themselves. The question of the scope of the conspiracy was therefore essentially a question for the jury to determine. As was said in People v. Kauffman, 152 Cal. 331, at page 335, 92 P. 861, 863: "If, as matter of law, it can be said that the criminal combination embraced no more than this contemplated burglary, and that the shooting of Robinson was not within the reasonable and probable consequences of the common unlawful design, it would follow that no case was made out against the appellant. But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury. Bowers v. State, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865 [17 N. E. 898]. And, if there be any evidence to support the finding of the jury on this question, its determination is conclusive." In People v. Woods, 147 Cal. 265, at page 272, 81 P. 652, 655, 109 Am. St. Rep. 151, the court said: "* * * The jury would have been justified in concluding that a part of the common design was to resist arrest by the use of the pistols with which the defendants armed themselves."

[2] Appellant lays great stress on the testimony offered by the defense. This testimony tended to show that no conspiracy existed; that the robbery on the previous night was the independent act of Matlock, while appellant through fear merely served as Matlock's pawn; that the shooting of Officer Buck was the independent act of Matlock; and that appellant was not armed either at the time of the robbery or at the time of the shooting. This evidence was submitted to the jury, but was apparently disbelieved by them. The jurors were entitled to base their verdict upon the reasonable inferences to be drawn from the testimony offered by the prosecution and were not bound to accept the evidence offered by the defense in opposition to such inferences. People v. Turco, 104 Cal. App. 59, 285 P. 349; People v. Sotelo, 102 Cal. App. 688, 283 P. 388.

[3-5] Appellant contends that certain instructions given to the jury were misleading. While one of the instructions complained of may be subject to criticism, a reading of the entire charge shows that the jury could not have been misled thereby. The trial court very fully and fairly instructed the jury on the subject of conspiracy, clearly instructed the jury that it was their duty to determine the guilt or innocence of each defendant separately and also instructed the jury that the question of whether a conspiracy existed and, if so, the scope thereof, were matters for the jury to determine. The jury was further cautioned that the trial court was not intimating that any conspiracy did exist or that any act was done within the scope of any conspiracy. Taking the instructions as a whole no juror could have gained the impression that appellant could be held responsible for the act of Matlock unless such act was done within the scope of an existing conspiracy and in furtherance thereof. Appellant further complains of the refusal of the trial court to give certain requested instructions. In so far as these instructions were proper they were amply covered by the instructions given. Furthermore, these proposed instructions assumed that if any conspiracy existed, it was for the perpetration of a single robbery and terminated upon the completion of the single offense. It may also be noted that one of the instructions contained the phrase "within the res gestae of the intended crime," but no explanation of the meaning of the term "res gestae" was included therein. Section 185 of the Code of Civil Procedure requires that proceedings in our courts be conducted in the English language, and this requirement should be strictly observed when instructing juries. The term "res gestæ" is not a term of which the meaning is generally known and its use in a proposed instruction without explanation would alone justify the refusal of such instruction.

[6, 7] We find no error in the trial court's ruling denying appellant's motion for a separate trial. Since the amendment in 1921 of section 1098 of the Penal Code (St. 1921, p. 90), defendants jointly charged are no longer entitled to separate trials as a matter of right. The granting or refusing of separate trials now rests largely, if not wholly, within the discretion of the trial court, and it is well settled that the ruling of the trial court denying a motion for a separate trial will not be disturbed in the absence of a clear showing of an abuse of discretion. People v. Dowell, 204 Cal. 109, 266 P. 807; People v. Perry, 195 Cal. 623, 234 P. 890; People v. Erno, 195 Cal. 272, 232 P. 710; People v. Roderick, 118 Cal. App. 457, 5 P.(2d) 463; People v. Burdg, 95 Cal. App. 259, 272 P. 816; People v. Nelson, 90 Cal. App. 27, 265 P. 366; People v. Wilson, 76 Cal. App. 688, 245 P. 781; People v. Swoape, 75 Cal. App. 404, 242 P. 1067. Appellant's motion was in written form and specified four grounds: (1) That Matlock's confession would be introduced in evidence and would be prejudicial to appellant; (2) that on a joint trial, appellant's right to exercise peremptory challenges would be limited; (3) that each of the defendants had his own theory of defense and that said theories were conflicting; and (4) that defendants had recently quarreled over their conflicting views on the conduct of the trial. Practically all of these grounds were urged in support of the motions for separate trials made in the cases above cited, but they were held insufficient to show any abuse of discretion in denying the motions. We find no abuse of discretion in the present case.

The last contention of appellant relates to the denial of his motion for a new trial. No grounds other than those already discussed were urged in support of said motion, and it follows that the motion was properly denied.

The judgment and order denying the motion for new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

135 Cal.App. 616

BAKER et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9212.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1933.

Rehearing Denied Dec. 30, 1933.

Hearing Denied by Supreme Court Feb. 5, 1934.

1. Master and servant ⇐417(7).

Industrial Accident Commission's decision, founded on substantial evidence of record, in case within its jurisdiction, is final and cannot be disturbed by appellate court (St. 1917, p. 876, § 67, subd. (c).

2. Master and servant ⇐417(7).

Industrial Accident Commission's award, based on findings without evidentiary support, must be annulled, notwithstanding statute declaring its fact findings final and not reviewable (St. 1917, p. 876, § 67, subd. (c).

3. Master and servant ⇐417(7).

Industrial Accident Commission's finding against great weight of evidence can be maintained because of conflict therein only where evidence supporting it so materially contradicts testimony on other side as to leave room in fair and reasonable mind to find fact either way (St. 1917, p. 876, § 67, subd. (c).

4. Master and servant ⇐417(5).

Findings of Industrial Accident Commission, which exercises judicial functions, should conform to and be judged on review of its awards by same general rules applicable to court's findings.

5. Master and servant ⇐403.

Case is not within Industrial Accident Commission's jurisdiction, in absence of evidence that employee's disability or death proceeded from industrial injury.

6. Master and servant ⇐405(4).

Physician's testimony that employee might have contracted tuberculosis without prior injury and that theory that lowered resistance caused by injury was inducing cause of such disease was "purely speculative" *held* insufficient to support Industrial Accident Commission's finding that disease was not caused by injury on theory of conflict with same witness' positive testimony that disease was directly traceable to injury.

7. Master and servant ⇐374.

Lowered resistance, caused by injury to employee, may be inducing or predisposing cause of tuberculosis causing his death, so as to justify award of compensation therefor by Industrial Accident Commission.

8. Master and servant ⇐398.

Claim for compensation for employee's death *held* not barred because death occurred over year after injury and more than year and nine months after last payment of compensation for disability caused thereby, where such disability continued until date of death (St. 1917, p. 841, § 11 (b), subd. 2).

Certiorari to Industrial Accident Commission.

Proceeding by Rosie Baker, also known as Rosie Dzerounian, and another, for adjustment of their claim for compensation under the Workmen's Compensation Act for the death of Peter Baker, employee, opposed by the Long Turner Corporation, employer, and the Ocean Accident & Guarantee Corporation, insurer. To review an order of the Industrial Accident Commission denying compensation, claimants bring certiorari.

Order annulled, and cause remanded to the Commission.

Astor Elmassian, of Los Angeles, for petitioners.

A. I. Townsend and Everett A. Corten, both of San Francisco, for respondent Industrial Accident Commission.

Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondent Ocean Accident & Guarantee Corporation.

HOUSER, Justice.

In this proceeding, the return to a writ of review heretofore issued by order of this court discloses the essential facts that on April 29, 1929, one Peter Baker, who was the husband of one of the petitioners herein, was injured in the course of, and arising out of, his employment, at which time he was taken to a hospital for treatment for said injuries and where he remained and received treatment therefor during the ensuing period of about six weeks, at the expiration whereof he left the hospital; following which, for an additional interval next thereafter ensuing of approximately four months, he received further treatments; that thereafter he resumed employment, and until about eleven months had expired after the date of his injury he was given "check up" treatments, at the expiration of which period his permanent disability was officially rated at 16¾ per cent. For and on account of such disability, during a period of 67 weeks following the date of his injury, Baker was paid compensation. Two months after such disability rating was made, although symptoms of pulmonary tuberculosis were noted by an attending physician as constituting a feature of Baker's physical condition, such diagnosis was not

regarded as positive. However, within the two weeks next thereafter ensuing, notwithstanding the fact that no "blood sputum" was apparent, "an X-ray of the lungs showed several cavities and wide dissemination of soft shadows. These changes were thought to be tuberculous and the patient was referred to the Los Angeles General Hospital." At about that time Baker permanently discontinued his employment, and for a space of practically two years next thereafter he was engaged in an unsuccessful endeavor to be cured of his ailment. Approximately three years after he sustained the original injury he died "from pulmonary tuberculosis in an advanced stage."

Within one year following the date of the death of Baker, and within 240 weeks from the date of his injury, his widow and his minor son, who are the petitioners herein, filed an application with the respondent Industrial Accident Commission for adjustment of their claim arising out of the conditions and circumstances hereinbefore outlined. To such application, Baker's employer and its insurer filed an answer by which in effect, on the facts alleged, their general liability was denied; and, in addition thereto, the defense of the statute of limitations was interposed. Following the hearing of the matter, after a recitation of the jurisdictional facts, but without making any finding with reference to the issue regarding the statute of limitations, the respondent commission found: "The said Peter Baker died from pulmonary tuberculosis in an advanced stage, said condition not being caused by, aggravated or accelerated by his said injury of April 29, 1929, * * *" and thereupon ordered "that the applicants take nothing from said defendants and that said defendants be, and they are hereby relieved from liability upon the claim herein asserted and dismissed herefrom."

A petition for a rehearing of such decision having been regularly denied by the respondent commission, and thereupon in due course, at the instance of petitioners, a writ of review having issued herein, the legality of the decision rendered by the respondent commission is presented for consideration by this court.

[1] The pivotal issue necessarily concerns the question of jurisdiction of the respondent commission to render the decision which is the subject of inquiry; and in that regard the broad governing rule would seem to be that, admitting the existence of jurisdictional facts, if from the record of the proceedings it may be discerned that the decision in question was founded upon substantial evidence, the conclusion reached is final and may not be disturbed by an appellate tribunal. Concretely, in the instant matter the primary question which the respondent commission was called upon to answer was whether the death of Baker from pulmonary tuberculosis was caused, or accelerated, by his original injury. In that connection, and for the purpose of establishing the affirmative thereof, the testimony of two witnesses, who testified in person, together with certificates or reports from either the attending, or the consulting physicians to Baker, were received in evidence. On behalf of neither the employer nor the insurer, was any direct evidence offered.

Further details of the evidence adduced on the hearing before the respondent commission of the application for adjustment of the claim of the applicants, show that prior to the particular injury sustained by Baker, "he never had any doctor in all his life; only the insurance company examined him before he got his insurance policy, * * * about six or seven years before he got hurt; * * * he was in good health" up to the time of his injury; when he left the hospital at which he was treated for his injury, the fact that he had begun to lose weight was noticed by his wife. From that time on until he permanently quit work, "he was very bad; he was getting worse every day; could not sleep; could not eat; could not talk ever to nobody; was nervous." But it was not until more than one year had elapsed after Baker sustained the injury that any physician made a diagnosis of Baker's condition that would indicate that he was suffering from the effects of tuberculosis. It appears that on May 24, 1930, which was approximately thirteen months after Baker sustained his injury, Dr. Roberts reported "that there were some symptoms of tuberculosis * * *." On June 10, 1930, Dr. Mason was consulted. His report was: "He stated that the present illness began three months previously with cough. No bloody sputum. Thinks he has had fever off and on. His temperature was 101° F. An X-ray of the lungs showed several cavities and wide dissemination of soft shadows. These changes were thought to be tuberculous and the patient was referred to the Los Angeles General Hospital."

Approximately three months after Dr. Mason examined Baker he was admitted as a patient in the Olive View Sanitarium; and thereafter and during a period of many months and until the date of his death, Baker was under the personal care of Dr. Rachmel, who testified that on his first examination of Baker he discovered that "he was suffering from,—the diagnosis would be, far advanced tuberculosis, with cavitation in both lungs; * * * the lesions were perhaps about a year in duration. * * * The flare-up may have taken place any time between April and December (the injury having occurred on April 29th), and yet the individual not know it; because of the fact that he was suffering from his injury, which focused his entire attention on his injury." In connection

with the predisposing cause of the disease of tuberculosis, Dr. Rachmel testified that: "The prevailing theory of tuberculosis is that at some time or other in the life of nearly every individual, some theories have stated as high as 90% of all people have been inoculated with tuberculosis; that this inoculation has never in a great percentage of individuals flared up, but has lain dormant in the trachea, or the bronchial glands, and that at some time later, in after life, due to any one of a number of conditions, these dormant lesions may flare up, and some of the conditions which cause the flaring up *is anything which will lower the resistance of the individual* * * *. It is known that any type of work, of working under conditions which are detrimental to the general health of an individual, or any work which will lower his resistance, is the cause of lighting up of these latent conditions of tuberculosis." He also testified that usually it is "not true that many people develop tuberculosis with no previous history of anything that would indicate lowering of their bodily resistance"; that he subscribed to the theory "that anything that would materially lower a person's vital resistance would make him more susceptible to the tuberculosis germs."

The following questions and answers illustrate the probability of the correctness of the opinion not only that tuberculosis is frequently the result of a lowered resistance in the individual, but as well that lowered resistance caused by the injury sustained by Baker was responsible for the disease from the effects of which he lost his life, to wit:

"Q. But are you willing to admit that it is more of a theory than a demonstrated fact, or do you contend that it can be demonstrated that there is an absolute connection between the two conditions? A. From the light of past experience in the study of tuberculosis we readily could assume that it is a fact, that is in the study of thousands of cases and thousands of reports, the discussion of tuberculosis cannot be considered as an exact science as you would along physics, and facts and determinations are made in the light of past experience and reports. * * *

"Q. Now, how do you connect up Mr. Baker's tubercular condition with his employment? A. From the facts as stated regarding his history I believe that many doctors will agree, and I think the majority will agree that any injury which results in causing a condition which will cause waste of tissues and high temperatures for any period of time are sufficient to lower the resistance to the extent that the tubercle bacilli which have been latent in that individual will result in a flaring up of the processes.

"Q. Well, putting it this way; do you feel that this man's remaining in the hospital for the period of time that he did, did so lower his resistance so that the tuberculosis processes lowered his resistance? A. I believe that it did, to the extent that his injury caused lowering of resistance, so that the tuberculosis process developed and demonstrated itself, let us say, several months after his injury.

"Q. Would the mere fact that persons confined to the hospital under the circumstances under which he was confined, per se result in a lowered resistance? A. I think it would.

"Q. Now, how much of your answer in this case is based upon what the man may have told you, and how much is based on your idea that such a history as stated would per se lower the man's resistance? A. Considering this case simply from the standpoint of an injury of that type being a predisposing cause of tuberculosis.

"Q. You feel that that alone would be sufficient to account for the appearance of tuberculosis? A. I really believe so. * * *

"Q. Doctor, so far as the hospital records are concerned from your own knowledge what is the cause of the death of Mr. Baker? A. The cause of death was far advanced pulmonary tuberculosis, and my opinion in this particular instance is that the predisposing cause of the pulmonary tuberculosis was this particular injury. That is simply my opinion in this particular case, treating this as an individual."

In addition to the opinion of Dr. Rachmel, which primarily was based on the facts regarding Baker's history, as well as from his own observations, a statement made by Dr. Smart was corroborative of the theory that the disease of tuberculosis was the direct result of the injury sustained by Baker. That statement was as follows: "This is to certify that I, Elliott P. Smart, M. D., have been working and specializing in tuberculosis for over fifteen years; that it is common knowledge among those working in this specialty that inoculation with tubercle bacilli may occur either through cuts, abrasions and wounds of the skin, as well as by the usual way through the respiratory or digestive tracts and cause pulmonary tuberculosis."

On the other hand, as hereinbefore has been stated, at the hearing of petitioners' application by the respondent commission, the respondents therein introduced no direct or positive evidence. The finding of fact that "the said Peter Baker died from pulmonary tuberculosis in an advanced stage, said condition not being caused by, aggravated or accelerated by his said injury * * *," if sustained, must therefore depend upon evidence that was presented by the petitioners. In that regard, the only evidence to which attention is directed is the following:

"Q. When he was in good health working, would he have contracted tuberculosis without this injury? A. Well, he could have; he

could have contracted tuberculosis without an injury.

"Q. Without any other ailment? A. The way the question is put is this: That tuberculosis can be present in any individual under any circumstances, and the question as to the time it is discovered is simply due to how much, or—let me change that; instead of how much, how many or how little symptoms occurred. In other words, I mean that it does not necessarily take an injury to produce the tuberculosis. * * *

"Q. Now, doctor, you speak about lowered resistance. What is resistance? A. Resistance as applied to an individual could be expressed as that ability to overcome infection and maintain health.

"Q. Is it measurable? A. It is measurable in definite individuals.

"Q. How do you measure resistance definitely in an individual? A. I did not say you measure resistance definitely; I said you measure resistance in definite individuals. That is, take an individual and make a thorough examination from all standpoints, and subject them to the ordinary stress and strain of life, and if he goes through that particular stress and strain he is considered an individual of good health or average resistance.

"Q. But it is purely speculative, is it not, doctor? A. Well, you can say that the whole practice of medicine is speculative.

"Q. No, I am asking you about this theory of lowered resistance; it is purely speculative, is it not? A. Yes, sir.

"Q. In other words, when a man does not get sick, he has good resistance? A. Yes, sir.

"Q. If he does, his resistance is poor? A. At that particular moment.

"Q. Now, that is attributable to mental operations, the matters of habit, and diet also, is it not? A. Yes, sir. * * *

"Q. Doctor, this basis upon your theory of lowered resistance; now, is it not a fact that every individual in the world at one time or another, from one cause or another, has a lowered resistance? A. Yes, sir.

"Q. And it is purely speculative as to what the particular thing is that lowered his resistance; is that not so? A. Surely. * * *

"Q. Are there not just as many people who have tuberculosis that do not have injuries, than those that do? A. I think there are more people that have tuberculosis without injuries than those who have injuries."

But in connection with the foregoing questions and answers, Dr. Rachmel also made the following statements: "I would like to say this about the practice of medicine. There are sixteen hundred million individuals in the world, and apparently no two are alike, and therefore the practice of medicine cannot be classified as an exact science, as you would, let us say, physics or geometry. Those sciences are exact; as we know, if you mix certain elements you always get certain results, while in medicine you get no two persons alike, and you never get the same result. * * * The only way I feel about making a positive statement on anything is if you have the same thing happen a good many times in the course of your own experience, you begin to feel that that particular thing is an established fact, and you are willing to go on record as being positive that that is so."

Reduced to more simple terms the testimony of Dr. Rachmel upon which the finding in question depends was that, without first sustaining any injury, Baker *might* have contracted tuberculosis; that because "the practice of medicine cannot be classified as an exact science," not only the theory of lowered resistance, but also "what the particular thing is that lowered his (Baker's) resistance," was "purely speculative"; and that he thought "there are more people who have tuberculosis without an injury than with injuries." Giving credit to such evidence every force and power to which it may be entitled, nevertheless it does no more than suggest a conflict between the facts to which the witness testified, which were favorable to the applicants, and other testimony which was given by him, which, by considerable straining or violence, might appear to be favorable to the employer or the insurer. In such a situation, the question then arises whether in this proceeding the finding of fact made by the respondent commission, to which reference hereinbefore has been had, is binding and conclusive upon this tribunal.

[2, 3] Notwithstanding the general language of subdivision (c) of section 67 of the Workmen's Compensation Act (St. 1917, p. 876) to the effect that "the findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review," repeatedly it has been ruled that where the findings made by the commission are without evidence to support them, the award based thereon must be annulled. 27 Cal. Jur. 575 et seq.; 1928 Supp. thereto, p. 1619; and 1932 Supp. thereto, p. 1122 et seq.; and authorities there respectively cited. On appeal from a judgment, a ruling which ever since its pronouncement has been consistently followed by the courts of this state, was made in the case of Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377, 379, as follows: "A finding against the great weight and preponderance of the evidence can be maintained on the doctrine of 'conflict' only where the alleged conflict rests upon evidence, either direct or circumstantial, *which so materially contradicts the testimony on the other side, or is so radically inconsistent with it, as to leave*

room in a fair and reasonable mind to find the fact either way."

See, also, California R. E. Co. v. Walkup, 27 Cal. App. 441, 447, 150 P. 385; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 693, 227 P. 723; Gardiner v. Holcomb, 82 Cal. App. 342, 350, 255 P. 523; Barton v. McDermott, 108 Cal. App. 372, 380, 291 P. 591; 2 Cal. Jur. 929; 1928 Supp. thereto, 179; 1930 Supp. thereto, 83.

[4, 5] In the case of Smith v. Industrial Accident Commission, 26 Cal. App. 560, 563, 147 P. 600, 601, it is said: "The Industrial Accident Commission exercises judicial functions; it sits as a court to try the matters pertinent to issues within its jurisdiction. There is every reason for saying, therefore, that *its findings should conform to, and be judged by, the same general rules as are applicable to findings made in courts of justice.* * * *" And the general rule has been applied in all its fullness to cases arising on review from awards made by the industrial accident commission in the exercise of its jurisdiction. United States F. G. Co. v. Industrial Acc. Comm., 95 Cal. App. 186, 190, 272 P. 589; Thoreau v. Industrial Acc. Comm., 120 Cal. App. 67, 73, 7 P.(2d) 767. See, also, Gen. Acc., F. & L. Assur. Corp. v. Industrial Acc. Comm., 186 Cal. 653, 200 P. 419. The actual principle asserted is that without evidence tending to prove that the disability or death proceeded from an industrial injury, the case presented cannot be a case within the jurisdiction of the commission.

[6] With so much authority for a review of the evidence upon which the award of the respondent commission depended, the question now arises as to its sufficiency. Reverting to the résumé of the testimony given by Dr. Rachmel relative to the possibility that, without first sustaining an injury, Baker *might* have contracted tuberculosis, and that owing to the inexactitude of the science of medicine, the theory that lowered resistance caused by the injury was the inducing cause of the disease of tuberculosis, became "purely speculative," nevertheless in the face of the positive testimony of the same witness, supported by the other evidence to which reference hereinbefore has been had, to the effect that the disease of tuberculosis, from which Baker died, was directly traceable to the injury sustained by him—in accordance with the legal principles last hereinbefore set forth, this court is of the opinion that the assumed conflict in the evidence amounted to nothing more than a "mere pretense" (Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 578, 93 P. 377), and as such was insufficient to support the finding by the respondent commission in substance that, although Peter Baker died from pulmonary tuberculosis in an advanced stage, the said condition was not "caused by, aggravated or accelerated by his said injury of April 29, 1929."

[7] That the theory of lowered resistance is recognized by the courts of this state as an inducing or predisposing cause of the disease of tuberculosis, is attested by the ruling in the case of Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953, 954, which in its general aspects, both as to physical facts and the testimony given by the attending physician, bears a close resemblance to the situation presented in the instant case. In the cited case, it also may be observed that on behalf of the defendant therein it was argued, as in effect is here argued, that "the verdict of the jury, with its implied finding that the death of the deceased proximately resulted from the injury caused by defendant, rested, not upon the firm foundation of satisfactory evidence, but rather upon conjecture, surmise and speculation." Among other pertinent language employed by the court in rendering its decision, the following may be noted: "It was not necessary for the plaintiff, in order to recover, to show that the tuberculosis was traumatic in origin. If, on account of the depleted and weakened condition of a person caused by an injury, he is rendered more susceptible to germs than if he had not been injured, or if, because of his debilitated condition, he is unable to resist the attack of germs present in his system, then the disease resulting from the germs is a natural sequence to his condition resulting from the injury, and the injury is the proximate cause of his death, and the disease is but one of the links in the chain of causation. Robinson v. National Life & Acc. Ins. Co., 76 Ind. App. 161, 129 N. E. 707; Larson v. Boston Elev. Ry. Co., 212 Mass. 262, 98 N. E. 1048, 1050; Crane El. Co. v. Lippert, 63 F. 942, 11 C. C. A. 521; Jones v. City of Caldwell, 20 Idaho, 5, 48 L. R. A. (N. S.) 119, 116 P. 110; Ohio & M. Ry. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297."

To the same effect, see the similar case of Mullane v. Industrial Accident Commission, 118 Cal. App. 283, 5 P.(2d) 483.

[8] But on behalf of the respondent commission herein it is asserted that the claim of the applicant for adjustment of compensation was barred because the death of Peter Baker did not occur within one year next following the injury, and not until more than one year and nine months after the last payment of compensation was made. Subdivision 2, § 11, Workmen's Compensation Act (St. 1917, p. 841). However, by the terms of the cited statute, in effect it is provided that proceedings for the collection of a death benefit may be maintained if commenced "within two hundred forty weeks from the date of the injury * * * when it appears * * * that the injury causing death also caused disability which continued to the date

of the death and for which a disability payment was made. * * *" Clearly, the facts of the instant case bring the situation thus presented within such provisions of the statute. The case of Western Ind. Co. v. Industrial Accident Commission, 176 Cal. 776, 169 P. 663, is directly in point.

From the foregoing it necessarily follows that the award made by the respondent commission herein should be annulled. It is so ordered. It is further ordered that the cause be, and it is, remanded to the respondent commission for such action in the premises as may be fit and proper.

We concur: CONREY, P. J.; YORK, J.

DAUGHERTY et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 9328.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1933.

Hearing Granted by Supreme Court Feb. 8, 1934.

Master and servant ⇐405(4).

Opinions of physicians, not accepting undisputed fact of employee's fall, that his death was not due to injury so caused, *held* insufficient to produce conflict in evidence warranting Industrial Accident Commission's denial of compensation for his death.

Proceeding by Minnie Daugherty and another for compensation under the Workmen's Compensation Act for the death of Charles A. Daugherty, employee, opposed by J. B. Quinn, trustee in bankruptcy for A. H. MacFarland, employer, and the Pacific Indemnity Company, insurance carrier. To review an order of the Industrial Accident Commission denying compensation, claimants bring certiorari.

Order annulled, and cause remanded.

Doyle, Clark, Thomas & Johnson and V. Betty Doheney, all of Long Beach, for petitioners.

Everett A. Corten, of San Francisco, for respondent Commission.

CONREY, Presiding Justice.

The petitioners herein are the widow and minor daughter of Charles A. Daugherty, who died on the 22d day of January, 1932. On the 24th day of August, 1931, Daugherty had been employed as a helper at an oil well plant in Long Beach, at which time he received an accidental injury arising out of and in the course of the employment. The petitioners made application to the Industrial Accident Commission for an award of compensation to be paid by the employer or his insurance carrier. After hearing said matter, the commission ordered that the applicants take nothing. This order was based upon findings that "the evidence does not establish as a fact that the disability to the said Charles A. Daugherty from and after August 24, 1931, and his death on January 22, 1932, was caused by, aggragated or accelerated by, any injury sustained by the said Charles A. Daugherty or by reason of his employment as herein alleged." A rehearing of said order or award having been denied by the commission, the petitioners applied to this court for a writ of review. The writ was allowed, and, after return duly made and argument thereon, the matter has been submitted for decision.

It is the claim of petitioners that the injury to the employee Daugherty, and his subsequent death, were caused by an accident which occurred on the morning of August 24, 1931. There was only one witness to that accident. The testimony of this witness, Mr. Hawley, stands uncontradicted. From that testimony it appears that, while Daugherty was walking down the steps of a stairway alongside of an oil tank, he stumbled and fell; "it looked like his foot, you know, his heel or something got caught and he went back, like that, you know." When Hawley went to the man, he seemed to be "dazed," and Hawley led him to a place where he could sit down. No wounds were observed, except that one of Daugherty's fingers was bleeding. After about fifteen minutes, Hawley left Daugherty sitting there, and did not see him again. Apparently, Daugherty's work was night work, for the accident occurred at 7 in the morning; and his wife's testimony is that he came home at about 7 o'clock that morning, and that this was his usual time of arrival.

The history of this man, prior to August 24, 1931, is that of a man 48 years old who had always been in good health. On arriving at home on this morning, he went to bed as usual, but got up in about an hour and complained of "a terrible headache." At about noon, "he had convulsion, which was his first attack of the kind." Then follows a history of continued illness, of which the details need not be stated here. He was placed under the care of physicians, and spent some time in a hospital. Later he went back to his former home in Texas. The trip was made in an automobile; his wife doing all of the driving. His health continued to fail, and on January 22d he died. According to the certificate of the attending physician

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 959.

at the time of the death, the cause of death was "epilepsia caused by clog on brain."

The decision herein must follow the answer to one question: "Is there any substantial evidence in the record tending to uphold the decision of the commission that the disability and death of Charles A. Daugherty were not caused by any injury sustained by him, arising out of and in the course of his employment?" The physicians who examined the employee, and gave him attention on or after August 24, 1931, were of the opinion that Daugherty's death was caused by intracranial trauma and concussion followed by intracranial hemorrhage as the result of the accidental fall.

As opposed to the foregoing evidence, respondents rely upon the reports of other physicians, who, after stating the facts upon which they based their conclusion, gave it as their opinion that (in the words of Dr. George W. Jones) "the record does not show that the employee's death was due to an injury sustained on August 24, 1931." Drs. Ruddock and Doyle, in their joint report, arrived at the same result. They gave it as their opinion "that the symptoms and signs presented by Daugherty between August 24, 1931, and his death on January 22, 1932, as derived from the records at our disposal, was not due to the fall which took place on August 24, 1931, and that the fall was the result of a 'petit mal' type of seizure which was the initial symptom of a preexisting lesion in the cerebrum. Finally, it is our opinion that Daugherty suffered and died from a preexisting tumor of the brain."

If the opinions of these physicians, Drs. Ruddock and Doyle, and Dr. George W. Jones, were correct in their assumptions of fact, unquestionably they would support the decision of the commission. But they are faulty in this, that they do not include an acceptance of the uncontradicted facts about the accidental fall which marks the beginning of the pathological history of the case. In Dr. Jones' statement he said, in his only reference to the accident: "In coming down a flight of stairs, it is questionable whether he really fell, as Mr. Hawley went to him immediately and found him standing." The undisputed testimony of Hawley was: "I saw him stumble and fall, and he did not get up very quick. * * * It looked like his foot, you know, or his heel or something got caught and he went back, like that, you know." In the report of Drs. Ruddock and Doyle they said: "The most striking symptom which is presented in this case is the occurrence of convulsions. These began definitely on August 24, 1931. On this same date the patient fell a short distance. No evidence has been presented that any head injury of any character occurred at this time." This statement failed to recognize the evidence that the first convulsion occurred several hours after the accident and was the first that had ever happened, so far as has been ascertained, during the patient's life. The reference to "head injury" must have been intended to mean that there was no evidence of external injury, such as a bruise or cut. Drs. Ruddock and Doyle came to the conclusion that "it seems more logical to assume that Daugherty suffered a 'petit mal' type of seizure as the initial symptom of the syndrome which ended with his death." In a supplement to their report, these physicians further stated: "It is obvious that to bring about concussion of the brain and intracranial hemorrhage, it is necessary for a patient to sustain, directly or indirectly, adequate trauma. In our opinion Daugherty's record is singularly devoid of reference to any injury which might be construed as adequate. It is not our contention that it is necessary for a patient to receive a direct blow to the head in order to sustain intra-cranial damage."

From the foregoing, it is demonstrated that these three physicians, all of them, declined to accept as a fact included in the stated case the unquestioned and undisputed fact that on the occasion in question Daugherty fell backward, against either the steps or the ground. Referring again to Hawley's testimony, we find this: "You mean he fell backwards flat on his back against those steps?" "Yes."

We have here a case where the only foundation for the commission's decision consists of opinions of expert witnesses, based upon assumed facts which are different from the established facts in relation to a most vital problem which these witnesses were expected to solve. Under such circumstances, the opinions thus expressed are not sufficient to produce a conflict in the evidence. "Said opinions, being based on a state of facts not shown by the record to exist, are not in conflict with the opinions of the doctors whose statements were based on the facts actually shown to exist by the evidence of petitioner and the doctors who attended her." Winthrop v. Ind. Acc. Comm., 213 Cal. 351, 355, 2 P.(2d) 142, 144; Nielsen v. Ind. Acc. Comm., 125 Cal. App. 210, 13 P.(2d) 517; Nielson v. Ind. Acc. Comm. (Cal. App.) 21 P.(2d) 445.

For the foregoing reasons, the award is annulled, and the cause is remanded for further proceedings in accord with this decision.

We concur: HOUSER, J.; YORK, J.

135 Cal.App. 522

PEOPLE v. McBRIDE.

Cr. 2349.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1933.

Rehearing Denied Dec. 13, 1933.

Hearing Denied by Supreme Court Dec. 29, 1933.

1. Criminal law ⇐48.

That "insanity" may be available as a defense to crime charged, it must appear that defendant, when act was committed, was so deranged and diseased mentally that he was not conscious of wrongful nature of act committed.

[Ed. Note.—For other definitions of "Insane; Insanity," see Words & Phrases.]

2. Criminal law ⇐48.

Accused, who had reasoning capacity sufficient to distinguish between right and wrong when he committed robbery and had consciousness that what he was doing was criminal and punishable, cannot be relieved from responsibility because he was insane with respect to certain facts present at the time.

3. Criminal law ⇐1159(5).

Verdict finding accused sane at time when he committed robbery is conclusive, where supported by evidence.

4. Criminal law ⇐311.

Rebuttable presumption exists that accused was sane beyond reasonable doubt when he committed crime.

5. Criminal law ⇐331.

Accused had burden of establishing defense of insanity at time he committed robbery by preponderance of evidence.

6. Criminal law ⇐1186(4).

Accused must show that error in admitting testimony and exhibits in robbery prosecution was so prejudicial as to result in miscarriage of justice, to warrant reversal of conviction (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

George A. McBride was convicted of robbery, and, from the judgments convicting him and finding him sane, and from orders denying his motions for new trial, he appeals.

Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howle, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals to this court from three judgments which followed his conviction on each of three accusations of the crime of robbery, as well as from a judgment by which he was found to have been sane at the time when each of said crimes was committed; also from three orders by which his motion for a new trial with respect to each of said judgments was denied.

The principal point presented by appellant as a sufficient reason for a reversal of said judgments is that "the verdicts of the jury finding defendant and appellant sane, are erroneous and not sustained by the evidence."

Without herein setting forth a detailed statement of the evidence adduced on the trial of the action, it may suffice to state that from an examination of the record herein it would seem clear that, by a preponderance of the evidence, on the dates represented by the occasions when each of the several crimes of which defendant is accused was committed, apparently he was insane with respect to one or more facts or situations either then present or which were suggested to defendant for his consideration. But, with reference to the pertinent question of his insanity in the manner, or to the degree, that it would legally absolve him from responsibility for the commission by him of criminal acts, and in particular for the crime or crimes of which he was charged by the information, the evidence, which was substantial in its nature, was equally preponderating to the effect that, at the time when each of the offenses was committed, defendant was possessed of reasoning capacity sufficient for him to clearly distinguish between right and wrong, had consciousness that what he was then doing was criminal in its nature, and fully appreciated the fact that, if he were pursued to conviction therefor, punishment would result.

[1, 2] In the case of People v. Willard, 150 Cal. 543, 554, 89 P. 124, 129, a general rule, which ever since its pronouncement has been consistently followed by the courts of this state, and which it is thought governs the situation here presented, was announced as follows: "That insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct. Although he

may be laboring under partial insanity, as, for instance, suffering from some insane delusion or hallucination, still if he understands the nature and character of his action and its consequences, if he has knowledge that it is wrong and criminal and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts."

To the same effect see People v. Sloper, 198 Cal. 238, 244 P. 362; People v. Troche, 206 Cal. 35, 273 P. 767; People v. Lizarraga, 108 Cal. App. 152, 291 P. 434, and authorities there respectively cited.

[3] Considering the status of the evidence as being as hereinbefore has been indicated, by a host of authorities, including those to which reference just has been had, the rule is settled in this state that, based upon evidence in effect such as was adduced herein, a verdict returned by a jury by which the defendant is found to have been sane at the time or times in question cannot be disturbed on appeal from the ensuing judgment pronounced against him. See, also, 8 Cal. Jur. 278, and 1928 Supplement thereto, 641.

[4, 5] It is also contended by appellant that, where the "defense" of insanity is interposed by a defendant in a criminal action, the burden of proving his sanity is placed upon the people. With reference to such contention, a résumé of the law of this state, with abundant and appropriate authority therefor, is succinctly stated in 8 California Jurisprudence, 30, as follows: "But the law presumes all men sane, with full mental capacity to commit any crime or degree of crime. This presumption is the full equivalent of proof of it as a fact, and, until the contrary is shown, the prosecution, by the presumption, has proved the sanity of the defendant beyond a reasonable doubt. It then devolves upon a defendant relying upon the defense of insanity to establish it. He must prove insanity of such a character as in point of law amounts to a defense, and he must do so by a preponderance of the evidence. This rule does not shift the burden of proof; it merely shifts the burden of introducing evidence and declares the quantum of evidence which he must produce to overthrow the presumption and show his insanity." See, also, 1928 Supp. to Cal. Jur., p. 586; 1930 Supp. to same, p. 369; and 1932 Supp. to same, p. 310; and authorities there respectively cited.

In connection with his "defense" of insanity, appellant urges the point that "a person cannot be punished while insane." Although, if preceding or during the trial of the action a "doubt" had arisen "as to the sanity of the defendant," by the terms of section 1368 of the Penal Code it would have become the duty of the trial court to "order the question as to his [defendant's] sanity to be submitted to a jury" [People v. Vester (Cal. App.) 26 P.(2d) 685], by no reference to the record herein does it appear that at any time other than on each of the occasions when the several criminal offenses of which defendant was charged were committed was the sanity of defendant ever questioned, or that any "doubt," such as is contemplated by the provisions of the statute, ever arose regarding his sanity at any time, either preceding or during the trial of the action. Nor does it appear that since the conclusion of such trial any "doubt" has arisen, or that any proceedings have been instituted respecting an inquiry into his mental condition. Manifestly, in the face of the record, the point suggested by appellant is not pertinent to the instant appeal.

Appellant also presents the point that the evidence was insufficient to support either of the several verdicts returned by the jury against him. In that regard, an examination of the evidence impels the conclusion that it was so overwhelmingly against the innocence of defendant that it approached a demonstration of his guilt.

[6] Prejudicial error is alleged to have been committed by the trial court in the making of each of several orders by which were overruled certain objections interposed by defendant to the introduction in evidence of specified facts; also exhibits of "shells," a pair of "glasses," and a hat. However, in any event, without at all conceding the correctness of the position assumed by appellant, but regarding it as tenable, and consequently that neither of the several facts to which appellant has referred, nor either of the exhibits to which attention has been directed, should have been introduced in evidence, it does not follow that because of the commission of such assumed error or errors, the judgment or judgments should be reversed. It is not only the duty of appellant to show that error has been committed, but as well that it was so prejudicial to the substantial rights of defendant as to result in a miscarriage of justice. Section 4½, art. 6, Const. With so much in mind, and comparing the mass and weight of other undisputed and practically conclusive evidence of the guilt of defendant with the probable effect of the alleged errors of which complaint is made, it becomes apparent to this court that such asserted errors cannot suffice as a reason for an order by which the judgments or any of them may be reversed.

The rulings hereinbefore indicated dispose of all other specifications of error suggested by appellant.

It is ordered that the judgments and the orders be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

135 Cal.App. 744

CALICO-ODESSA MINING CO. v. BRITT.

Civ. 1407.

District Court of Appeal, Fourth District, California.

Dec. 14, 1933.

1. Appeal and error ⇐1010(1).

Findings of trial court, if supported by any material and competent evidence, cannot be disturbed by appellate court.

2. Appeal and error ⇐994(3), 1012(1).

Trial judge is authorized to weigh and determine sufficiency of evidence and credibility of witnesses.

3. Appeal and error ⇐1011(1).

Appellate court cannot disturb judgment supported by evidence merely because conflicting testimony of witness, if believed and accepted, would have resulted in different judgment.

4. Mines and minerals ⇐38(15).

In action involving validity of lode mining locations, evidence *held* to support finding that plaintiff's assignees had not lawfully located mining claims prior to location of defendant's claims.

Appeal from Superior Court, San Bernardino County; G. R. Freeman, Judge.

Action by the Calico-Odessa Mining Company against Henry W. Britt. From a judgment for the defendant, the plaintiff appeals.

Judgment affirmed.

Emery B. Tyler, of San Bernardino, for appellant.

Benjamin S. Crow, of Los Angeles, for respondent.

MARKS, Justice.

This is an action involving the validity of lode mining locations in the Calico Mining District in San Bernardino county. Appellant claims through deeds executed by J. R. Lane and L. B. Lane, his wife, to the Bismark and Veto mining claims. Respondent claims under locations which he made in September and October, 1924, of the argentum No. 1, argentum No. 2, and argentum No. 3. While the properties overlap, their boundaries do not correspond. Mrs. Lane made her locations in July, 1925, and it is admitted that, if respondent's locations were valid, appellant's case must fail as respondent remained in possession and did his required assessment work on the properties. Appellant virtually concedes that respondent's locations were valid against the claims of Mrs. Lane and her successor in interest, unless the locations of the Bismark and Veto claims by J. R. Lane on July 1, 1923, were lawful, which would defeat the locations by respondent in 1924.

[1] The trial court concluded that neither Mr. nor Mrs. Lane had lawfully located the claims. The only question necessary for our consideration is whether there is any material and competent evidence in the record supporting this conclusion. If there is, we cannot disturb the judgment, even though it seems to us that the greater weight of the evidence is in favor of the cause of appellant.

J. R. Lane testified that on July 1, 1923, after 12 o'clock noon, he built substantial rock monuments at each corner of the two claims and placed his location notices in tin tobacco cans in the monument at the southeast corner of the Bismark, and the northwest corner of the Veto claims, which is the common point of juncture of the two properties. A witness for respondent testified that he was over the two claims in the fall of 1923 and that there was no monument at the southwest corner of the Bismark claim. Other witnesses testified that later they were over the properties and there were no monuments at the places Lane claimed to have built them; that they particularly searched the common corner of the Bismark and Veto claims; that the monument described by Lane as built by himself was not there; that they searched for location notices and found none signed by him; that they found two location notices signed by Mrs. Lane, one dated in January, 1921, and the other in July, 1921. Neither Mr. nor Mrs. Lane had done any assessment work on either of the properties prior to 1927.

[2-4] While the evidence offered by respondent rebutting the testimony of Mr. Lane on the time and manner of his location of the two claims is negative in character and largely circumstantial, it is competent and material in that it supports the conclusion that his locations were not lawfully made. Lane testified that he located a number of claims on July 1, 1923, and built numerous rock monuments on a number of them. Some of the claims were separated from the others by considerable distances. His testimony might well have suggested to the trial judge the physical impossibility of making all these locations and building all these monuments in the short time within which he claimed to have performed these operations. This might have created a serious doubt in the mind of the judge on the question of Lane's veracity, or at least his recollection, and have been largely responsible for the conclusions reached. The trial judge is given the right to weigh and determine the sufficiency of the evidence and the credibility of the witnesses. We cannot disturb a judgment supported by evidence simply because the conflicting testimony of a witness, if believed and accepted as

true, would have resulted in a different judgment.

The conclusion reached in the court below that the two mining locations made by J. R Lane on July 1, 1923, were not legally and lawfully made, left the ground open for other locators. Respondent having properly located his claims in 1924, and having done his assessment work, the property was not open for location by Mrs. Lane, so that she had nothing to convey to appellant.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

135 Cal.App. 731

NELSON v. WASHINGTON FIDELITY NAT. INS. CO.

Civ. 4974.

District Court of Appeal, Third District, California.

Dec. 14, 1933.

1. Insurance ⇐525.

Insured, rendered completely helpless by paralytic stroke, *held* "necessarily, totally and continuously confined to bed" within health and accident policy, though occasionally lifted out of bed and placed in wheel chair to be taken into sun or to physician for treatment.

Record disclosed that insured had to be lifted in and out of bed, and for weeks at a time would not be placed in wheel chair at all, but would be in bed entire day, and that, when it was necessary to take insured to physician for treatment, insured had to be carried in and out by two people, and at no time was insured able to leave bed voluntarily and unassisted.

[Ed. Note.—For other definitions of "Confined to Bed," see Words & Phrases.]

2. Insurance ⇐146(3).

Insurance policies are to be construed liberally in favor of insured.

3. Insurance ⇐146(3).

Insurance policies are, if reasonably possible, to be construed so as to prevent forfeiture.

4. Insurance ⇐621.

Insured *held* not required to wait until recovery from illness before suing for indemnity payments, though health and accident policy required affirmative proof of loss after termination of period for which company was liable.

5. Insurance ⇐558(1).

Any conduct on part of insurer tending to create belief in mind of claimant under policy that notice need not be given or that proofs of loss will be unnecessary operates as waiver of policy provision requiring such notice or proof.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Nellie M. Nelson against the Washington Fidelity National Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

J. F. Riley, of San Francisco, for appellant.

Irwin T. Quinn, of Eureka, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

While plaintiff herein was the holder of what is commonly called a health and accident policy with Washington Fidelity National Insurance Company of Illinois, she became ill.

It appears from the evidence that on January 28, 1932, plaintiff, by reason of a paralytic stroke, was completely incapacitated and was taken to the Scotia Hospital at Scotia, Humboldt county, a regularly incorporated and licensed hospital, where she remained until the 14th day of February, 1932, when she was removed to her home, where she had remained up to and including the date of the trial of the action, confined to her home in bed. Appellant insurance company demurred to the complaint upon the grounds it did not state a cause of action under the contract of insurance, that the court had no jurisdiction of the subject of the action, and that the action was prematurely brought.

[1] The policy which was issued to plaintiff December 15, 1930, and upon which she had made the necessary payments to keep the same in force, contained various provisions, but we are most vitally concerned with paragraphs D and E. The essential requirement of paragraph D is that the insured, in order to be entitled to the indemnity specified in the policy, must be necessarily, totally, and continuously confined to bed and visited at least once in every seven days by a legally qualified physician, by reason of sickness or illness, which illness was contracted and began during the life of the policy and after thirty days from the date of its initiation.

Paragraph E provides that in case the insured is necessarily, totally, and continuously confined to the house and receives at least

once in seven days, the attendance of a legally qualified physician, by reason of sickness or disease, which was contracted and began during the life of the policy and thirty days after the date of its inauguration, she would be entitled to one-half of the monthly rate provided in the preceding paragraph, for a period of not to exceed two months.

The complaint, among other allegations, sets forth the illness of the plaintiff and that by reason thereof she was confined in the hospital at Scotia, and was thereafter removed to her home in South Fork, Humboldt county, Cal., where she remained and was confined to her home and in bed; that she was totally disabled and unable to attend to her personal needs, was unable to move without the assistance of others, and that such condition would probably continue to exist in the future.

It is also alleged that written notice of the illness of plaintiff was given to the Washington Fidelity National Insurance Company, defendant herein, within ten days after the commencement of plaintiff's disability, to the authorized agent of defendant at the city and county of San Francisco, as provided in the policy, which written notice was given by and upon behalf of plaintiff as soon as it was reasonably possible for her to do so after becoming disabled. Also affirmative proof of loss was furnished by the plaintiff to defendant upon a form furnished by defendant for that purpose, on the 14th day of February, 1932.

It is further averred that plaintiff has furnished to defendant, every thirty days or thereabouts, a report in writing from her attending physician, fully stating the condition of the insured and the probable duration of disability. As to the latter fact, the physician testified at the trial that plaintiff was still incapacitated and he could make no final report.

The demurrer interposed by defendant was overruled and the cause was tried, the appellant offering no evidence at the trial, the defense apparently being the insured was not confined to her bed and that the final proof of loss as required by the policy was a condition precedent to payment and had not been given. The evidence shows without contradiction that on January 28, 1932, the insured suffered a paralytic stroke and that she was confined to the hospital at Scotia for a time, and thereafter, and was at the time of trial, continuously confined to her bed, except as hereinafter stated.

Dr. C. C. Cottrell, her attending physician, testified that when he first saw her on January 28, 1932, she was paralyzed on the left side of her body and the right side of her face and was unable to walk or talk and was completely incapacitated; that he saw her once a week from the middle of February to the middle of May, at her home and that she was absolutely helpless; that during that period she was practically bedridden. From the middle of May to the date of the trial, November 2d, Dr. Cottrell continued to see Mrs. Nelson every week. When she was taken to his office, she had to be carried and could not assist herself, it being necessary to lift her out of the machine and then place her in a wheel chair.

After Mrs. Nelson was removed to her home from the hospital, she had trained and practical nurses, all of whom testified she was paralyzed and was unable to take care of herself, and in order that she might be taken out into the sun a part of each day as a part of her treatment, she was placed in a wheel chair, she being unable to assist herself in any way.

After the early part of April, Mrs. Thomas, who succeeded as nurse, testified that Mrs. Nelson was helpless and had to be lifted in and out of the bed and that for weeks at a time she would not be placed in the wheel chair at all, but would be in bed the entire day.

Upon occasions when it was necessary to take the patient to Eureka for treatment she would be carried in and out and placed in the car, "lifted as one would a baby."

Mrs. Thomas was succeeded by Mrs. Jennings, who had the care of plaintiff from August to the date of the trial. She testified that Mrs. Nelson was confined to her bed all of the time, and that she was never off of the bed, except for the purpose of changing the linen of the bed; that when she was taken to Eureka for treatment she had to be carried in and out by two people, and at no time was she ever able voluntarily and unassisted to leave her bed.

From the foregoing we believe the court was fully justified in finding that the plaintiff was necessarily, totally, and continuously confined to her bed by reason of her illness and disease.

In the case of Home Protective Association v. Williams, 151 Ky. 146, 151 S. W. 361, Ann. Cas. 1915A, 260, the court there said:

"Under a policy which provides that the insurer shall not be liable to a member for disability while convalescing from any disease, and that it shall accept liability only for the actual time the member is necessarily and continuously 'confined to bed,' the insured can collect benefits if his sickness is such as would reasonably confine a person continuously to bed or substantially so confine him, though he may have been up at times to get fresh air or for other purposes."

So, also, in the case of Hays v. General Assembly American Benevolent Association, 127 Mo. App. 195, 104 S. W. 1141, 1143: "The words employed must be viewed in the light of common sense, and there must be some reasonable construction placed upon the words

'entirely and continuously' when used in connection with requiring a sick person to keep his bed; otherwise, one who is in fact so enfeebled by sickness as to be unable to bear the fatigue of being dressed by an attendant would forfeit his insurance by sitting propped up in a chair * * * as a change from a reclining position upon the bed."

[2] It has long been an established rule that insurance policies are to be given that construction, if at all reasonable, which is most favorable to the insured rather than which is favorable to the insurer. In other words, policies of insurance are to be construed liberally in favor of the insured. Wells, Fargo & Co. v. Pacific Insurance Co., 44 Cal. 397; Granger v. New Jersey Insurance Co., 108 Cal. App. 290, 291 P. 698.

[3] The provisions of all policies are always to be construed as to prevent a forfeiture if the language will reasonably permit of such a construction. O'Neill v. Caledonian Insurance Co., 166 Cal. 310, 135 P. 1121.

Certainly this plaintiff who had a policy upon which she had regularly paid her premiums for protection against the misfortune that she suffered cannot be deprived of her rights now upon the ground that she was from time to time bodily removed from her bed. To hold otherwise would be not only unreasonable but far beyond the purpose and intent of the contract between the parties, and a very strained construction to place thereon.

[4] Defendant also contends the court had no jurisdiction of the cause of action in that no final proof of loss was furnished by the insured to the company. Inasmuch as no evidence was introduced upon this point by defendant we rely upon the testimony as produced by plaintiff.

During the course of the trial the following took place:

"The Court: Mr. Riley, might I ask, do you question the sufficiency of the preliminary report?

"Mr. Riley: No, we are not questioning the sufficiency of the preliminary report.

"The Court: In other words you admit the reports and notices were all given according to the policy.

"Mr. Riley: We don't admit that; we admit they were given as alleged in the complaint, however.

"The Court: Is there any issue that the reports were not given in accordance with the terms of the policy?

"Mr. Riley: Well, I have never looked into that; I have simply taken the complaint as stating the facts and have not examined anything further than that; the proof was furnished, whatever the date was there, all the reports have come in regularly ever since."

A representative of the company, after receiving notice of the disability, wrote to the insured inclosing the final proof blank for use in presenting a claim.

Quoting from a letter by the claim's examiner for the defendant, we find: "Immediately upon recovery the statements of yourself, attending physician or your employer if any, are to be completed and forwarded to this office. In order that your claim may receive prompt attention all blank places should be properly filled in. If you should be disabled for more than one month please send us every thirty days a report from your attending physician stating your condition and the probable duration of your disability, as required by the policy."

It was established at the trial that plaintiff had not as yet recovered, but that each month her attending physician had reported to defendant as to her condition and the duration of disability.

It is the contention of defendant that under the terms of the policy no indemnity could be collected until after the furnishing of the proof of disability, which proof of disability could not be furnished until after recovery. The policy provides: "(4) Written notice of injury or of sickness on which claim may be based must be given to the Company within * * * ten (10) days after the commencement of disability from such sickness."

Dr. Cottrell, the attending physician, filed the preliminary report as soon as the blanks were obtained which was sent in some time prior to February 8, 1932.

Paragraph (L) of the policy provides: "If the insured is disabled by injury or sickness for more than thirty (30) days, he or his representative shall furnish to the Company every thirty (30) days, or as near thereto as may be reasonably possible, a report in writing from his attending physician or surgeon of his disability."

The record shows that the attending physician complied with this provision of the policy.

Paragraph (7) of the policy requires affirmative proof of loss be furnished the company within ninety days after the termination of the period for which the company was liable. Proof of loss was furnished on February 14th. On the date of trial an amendment to the complaint was allowed asking for additional indemnity from the date of the filing of the complaint until the date of the trial.

Under the facts of this case the liability of the company did not terminate until the insured had recovered from the illness alleged, sufficiently to leave her bed, and having filed claim of disability and monthly reports by the attending physician, no further action was required of the insured to entitle her to her

monthly indemnity, so long as she remained in that condition.

It was not the purpose or spirit of the policy that the payment should be withheld until the insured should recover. Moreover, the policy provided the payments for illness were payable monthly as the policy was undoubtedly taken by the insured in order that there might be some income to meet the expenses of any illness covered by the policy, she might suffer. It cannot be that the courts will assist defendant in maintaining a position that would defeat the very purpose for which the contract was procured. Respondent further maintains that no further forms of proof of loss were required; that the company by their policy agreed, upon receipt of notice of disability, they would furnish to plaintiff such forms as were usually furnished by it for filing proofs of loss, which they did.

[5] "Any conduct on the part of the insurer which tends to create a belief in the mind of the claimant under the policy that notice need not be given or that proofs of loss will be unnecessary, operates as a waiver of a policy provision requiring such notice or proofs." Estrada v. Queen Ins. Co., 107 Cal. App. 507, 290 P. 525, 526.

The contentions of appellant are without merit.

The judgment and order of the court are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

135 Cal.App. 746

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 1083.

District Court of Appeal, Fourth District, California.

Dec. 14, 1933.

Master and servant ⇐405(6).

Under evidence that experienced quarryman, during year preceding injury, was employed 82⅞ days at wages varying from $6.50 to $4 per day, and earned $442.60, and, when injured, was employed at $5.50 per day for 5½-day week, finding of average weekly earning capacity of $5.50 per day for 5½-day week, as determined by fourth statutory method, *held* not, as matter of law, excessive (Gen. Laws 1931, Act 4749, § 12 (a) (4).

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Fred McDonald, claimant, opposed by the McGilvray Raymond Corporation, employer, and the California Casualty Indemnity Exchange, an interinsurance exchange, insurer. To review an order of the Industrial Accident Commission awarding compensation, insurer brings certiorari.

Affirmed.

Richard L. Oliver, of Los Angeles, for petitioner.

Arthur I. Townsend and Everett A. Corten, both of San Francisco, for respondents.

JENNINGS, Justice.

Petitioner is the insurance carrier of the employer. Respondent Fred McDonald was employed by McGilvray Raymond Corporation as a quarryman in a rock quarry operated by said corporation at Lakeside, San Diego county. On September 23, 1932, the above-mentioned employee sustained an injury which was caused by a rock falling on his right foot resulting in a fracture of bones. There is no dispute that the injury arose out of and occurred in the course of employment. On November 9, 1932, the injured employee filed an application for adjustment of claim for compensation with the respondent Accident Commission. On December 6, 1932, the application was heard before a referee of the Accident Commission. The referee thereafter made his findings and award, which were approved and confirmed by the Industrial Accident Commission on December 16, 1932. It was found that the injury sustained by the said employee had caused temporary total disability continuing from the date of injury to and including December 6, 1932, and indefinitely, and that he was entitled to an award of $6.41 per week. It was stated that the weekly compensation, which it was found that the employee was entitled to receive, was based on an earning capacity at the time of injury of $45 per month from all sources. An award was accordingly made in his favor for compensation in the above-stated amount. On January 6, 1933, the insurance carrier filed with the Accident Commission a petition for rehearing. This petition was granted, and on March 23, 1933, the application came on for rehearing before a referee of the commission. On April 15, 1933, the Accident Commission filed its decision rescinding the findings and award of December 16, 1932. Findings of fact were made wherein it was found that the injured employee was entitled to compensation of $18.67 per week based upon earnings of $5.50 per day for five and one-half days per week. An award of compensation in the above-mentioned amount was accordingly made. On May 2, 1933, the insurance carrier

filed with the commission a petition to reopen the said decision on rehearing. The matter came on for further hearing before a referee of the commission on May 12, 1933. Additional evidence was submitted to the referee, and on May 23, 1933, the Accident Commission entered an order denying the petition to reopen its decision. On June 22, 1933, the insurance carrier filed with this court its petition for a writ of certiorari, whereby it seeks a review of the proceedings before the commission and in particular an annulment of the order of May 23, 1933, affirming the decision of April 15, 1933, which awarded to the employee compensation in the amount of $18.67 per week. The sole contention advanced by petitioner in support of its application for the writ is that the award of compensation made by the commission is arbitrary and unreasonable and that the findings of fact upon which the award is based are not supported by the evidence submitted to the referee.

It is conceded that the injury suffered by the employee caused temporary total disability. It is also conceded that, from the facts and circumstances developed by the evidence, section 12 (a) (4) of the Workmen's Compensation Act of California (Stats. 1917, p. 831, and amendments; 2 Deering's Gen. Laws, 1931, pp. 2272, 2286, Act 4749) affords the proper method for determining the average weekly earning capacity of the employee. This section is in the following language: "Where the employment is for less than five days per week or is seasonal or where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent of such sum as shall reasonably represent the *average weekly earning capacity* of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments during the year preceding his injury; provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury." (Italics ours.)

The record herein discloses that the evidence submitted to the referee showed that the respondent McDonald had been employed by the McGilvray Raymond Corporation for a period of approximately 20 years; that during the year preceding the injury such employment had been irregular; that during said preceding year he had worked for said corporation approximately 44 and a fraction days and had received therefor wages which aggregated $281.60; that during said year the rate of pay in such employment varied from $6.50 to $5 per day; that during the month of September, 1932, prior to the occurrence of the accident which resulted in the injury to his foot, he had worked a total of 6 days for which he was paid at the rate of $5.-50 per day; that he had worked for other employers during the year which preceded the date of injury a total of approximately 38 days at rates of pay varying from $4 to $5 per day; that the actual earnings of respondent McDonald from all sources and employments during the year preceding the date of injury amounted to approximately $442.60.

On the basis of the above-mentioned facts it is urged by petitioner that the compensation awarded to respondent McDonald is manifestly far in excess of that to which he is entitled in accordance with the provisions of the above-quoted section 12 (a) (4) of the Workmen's Compensation Act, and it is said that it is evident that the respondent Accident Commission improperly applied the provisions of subsections (1) and (2) of section 12 (a) rather than the provisions of subsection (4). It must be conceded that applicant's contention that subsections (1) and (2) are not here applicable is correct. Subsection (1) is by its precise terms applicable only when "the injured employee has worked in the same employment, whether for the same employer or not, during at least two hundred sixty days of the year preceding his injury." The evidence presented by the record herein establishes that respondent McDonald had not worked a total of one-half of 260 days during the year preceding his injury. Subsection (2) might have been applicable if any evidence showing "the daily earnings * * * of an employee of the same class working at least two hundred sixty days of such preceding year in the same or a similar kind of employment in the same or a neighboring place" had been presented. No such evidence was submitted, hence subsection (2) was not available.

It is particularly urged that the award is excessive because no proper account was taken of the actual earnings of the injured employee during the year preceding the injury. It is petitioner's view that the employee is entitled to an award based solely on such earnings and that to determine "average weekly earning capacity" necessitates a calculation whereby the total amount actually earned during the entire year is divided by 52. It is immediately apparent that this method of computation places upon an injured employee the entire risk of inability to secure employment without regard to his health, training, experience, or willingness to work.

It is our opinion that this argument is answered by the reasoning of two recent decisions of different District Courts of Appeal of this state in each of which a hearing was refused by the Supreme Court of California. These decisions are Department of Water and Power of the City of Los Angeles v. Industrial Accident Commission, 130 Cal. App. 231, 19 P.(2d) 832, and Ætna Life Insurance Co. v. Industrial Accident Commission, 130 Cal. App. 488, 20 P.(2d) 372, 373. In the former

case the employee was engaged for a stated period of 30 days at the rate of $4 per day. He was injured on the 20th day of his employment. The evidence showed that the injured employee had earned approximately $150 elsewhere during the year preceding the injury, for services at intervals within something less than one month, at a rate in excess of $4.83 per day. He was granted an award which was based upon wages of $28 per week. The employer petitioned for a writ of certiorari to review the award. The award was affirmed by Division 2 of the Second Appellate District. This court, speaking through Justice Craig, says: "We are unable to say as a matter of law that the respondent commission erred in adopting $4 per day as reasonably representing the average weekly earning capacity of the injured at the time, taking into consideration for such purpose prior actual earnings. Had he been employed for the full 260 days, the rate of compensation to be applied, though mandatory, would not appear to have been less." In the latter of the above-cited cases the employee was a laborer engaged in the work of wrecking buildings at a rate of $4 per day. His employment was not regular and he was paid a daily wage while the work lasted. On the first day of his employment he was injured. At the hearing of his claim for compensation it was shown that he had worked for the same employer during the year preceding his injury for a period of 16 weeks with an aggregate employment of 86 days and that he had received a total compensation of $408 therefor. It was also shown that during the preceding year he had worked for another employer for a period of time which is not stated and that he had received as wages therefor the sum of $273. It appeared further that during the year preceding the injury he was engaged for 25 days in digging a cellar and building a house for himself except for which work he might have been otherwise employed. The claimant himself testified that he had previously worked for another employer and that during the year preceding his injury he could have worked for such employer from September to January at a compensation of from $5 to $7.50 per day except that he had received a sum of $400 from other sources and voluntarily took a vacation to spend this money. The claimant received an award of $12.35 per week based upon wages of $4 per day for a 5-day week. The insurance carrier of the employer applied for a writ of certiorari. It was contended by the petitioner that the average weekly earning capacity of the injured employee should be determined by ascertaining the average weekly wages which he actually received during the entire year previous to the time of his injury. It will be observed that this is precisely the same contention advanced by petitioner in the present proceeding. The contention did not prevail. The District Court of Appeal for the Third Appellate District affirmed the award. The following language which appears in the opinion of the court written by Justice Thompson is apropos to the problem here presented: "The rule contended for by the petitioner would be unreasonable under some circumstances. It might result in grave injustice to a claimant. A workman may possess excellent earning ability and yet on account of temporary illness or other cause he may be prevented from working throughout a great portion of the year previous to his injury. Under such circumstances, an amount based only upon the average sum which he actually received during that year, regardless of the unusual conditions affecting his employment, would not fairly represent his earning capacity. We are of the opinion the language employed in paragraph (4) of subdivision (a) of section 12 of the Workmen's Compensation Act, which authorizes the acceptance of 'such sum as shall reasonably represent the *average weekly earning capacity* of the injured employee at the time of his injury' should be construed to mean that the wages of the employee which were actually earned during the year, together with all the surrounding circumstances affecting his earning ability, shou'd be considered in ascertaining a figure which will reasonably represent his weekly earning capacity. Capacity to earn money necessarily contemplates all the surrounding circumstances and conditions disclosed by the evidence which may indicate one's usual and ordinary ability to earn wages, including his physical ability, his natural talents, his training, his opportunity to secure employment and the condition of his health."

In fairness to the petitioner in the present proceeding it must be conceded that the appellate court, in affirming the award in the Ætna Case, took particular note of the fact that the testimony of the claimant that he could have been employed for several additional months at an average wage in excess of the sum awarded to him if he had so desired was not contradicted. No such evidence is contained in the record in the present proceeding. We consider, however, that the Ætna Case is direct authority for the proposition that, in determining the average weekly earning capacity of an injured employee, the entire risk of inability to secure employment shall not be cast upon the employee and that the actual earnings received by him during the year preceding his injury shall not furnish the sole test for determining his earning capacity. It must be conceded that neither the Ætna Case nor any other decision to which our attention has been directed holds that inability to secure employment shall not be considered as one of the factors in determining earning capacity. It does not, however, affirmatively appear in the present proceeding that the respondent McDonald was unable to secure employment during the year preceding his injury in addition to the em-

ployment which the evidence showed he actually obtained. If this was the fact, it was incumbent upon the petitioner to produce evidence of such fact upon the hearing of the application for an award. We find nothing in the record to indicate that respondent McDonald did not possess the physical ability, health, training, and natural talents to enable him to earn at least the wage which he was receiving at the time of injury. It does appear that he was an experienced quarryman, trained in the work which he was employed to perform. That his services were satisfactory to his employer is indicated by the undenied fact that he had been employed by the same employer in the same character of work for a period of approximately 20 years. In the absence of any evidence that his opportunity for employment during the year preceding the injury was limited and in view of the evidence tending to show that his average earnings during the time of actual employment amounted to approximately $5.50 per day and that he was employed at this rate 5½ days per week at the time of injury, we are unable to say that the commission did not take into consideration actual earnings from all employments during the preceding year or that the commission abused its discretion in finding that the earning capacity of the injured man was $30.35 per week.

Petitioner places much reliance upon the decision in Mahaffey v. Industrial Accident Commission, 176 Cal. 711, 171 P. 298. This decision received attention in the opinion in the Ætna Case and it was pointed out that it affirmatively appeared from the evidence in the Mahaffey Case that the claimant was irregularly employed in the work in which he was engaged at the time of injury for not more than 15 or 20 days during any year and that there was no showing that he was ever engaged in any other remunerative work. No evidence was produced which tended to show that he was capable of earning more than $60 per year, yet his average annual earning capacity was found to be $900. This is a very different situation from that which appears in the present proceeding. Respondent McDonald was employed for 82⅞ days during the year preceding his injury at wages which varied from $6.50 to $4 per day. His total actual earnings amounted to $442.60. At the time of injury he was employed at the rate of $5.50 per day working 5½ days per week. We are therefore impelled to the conclusion that, upon the facts presented, wages of $5.50 per day for a 5½ day week amounted to a fair estimate of the "average weekly earning capacity" of the injured employee and formed a proper basis for the award which was made.

Our conclusion that the award should be affirmed has been reached without regard to the contention of respondent Accident Commission that the application for a writ being an application filed by one who was twice aggrieved by a decision of the commission was filed too late, since it appears that it was filed more than 30 days after the decision on rehearing, although filed on the 30th day after the making of the order refusing to reopen such decision on rehearing. A determination that the award of the commission was proper on the evidence submitted renders it unnecessary for us to express an opinion in regard to the procedural question raised by respondent Accident Commission.

The award is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

135 Cal.App. 646

HOLLANDER v. WILSON ESTATE CO.

Civ. 9076.

District Court of Appeal, First District, Division 2, California.

Dec. 8, 1933.

Rehearing Denied Jan. 6, 1934.

Hearing Denied by Supreme Court Feb. 5, 1934.

1. Damages ⇐216(8).

Instruction respecting recovery for loss of time *held* not erroneous as authorizing award of damages for alien element.

Damages for loss of time was not for alien element in that plaintiff in his proof had attempted to show that after-effects of injury were such as to cause him to become greatly weakened, to become very irritable, and at times to cause him to leave his place of business and go home, and symptoms so intermingled that at times plaintiff suffered from loss of time while in his place of business and again suffered from loss of time by being compelled to quit and go home.

2. Damages ⇐216(8).

Instruction on damages recoverable *held* not erroneous as declaring that loss of time was equivalent of loss of ability to earn money.

Instruction authorized jury in determining amount of damages to be awarded, to take into account, in addition to loss of profits or earnings during period when plaintiff was unable to work and attend to his business by reason of injury, such additional sums as would compensate plaintiff for his loss of time, that is, his inability, if any, to earn money, which has resulted from injury, during period since he had been able to work and attend to his business to present time and whatever

loss of time or loss of ability to earn money would result in the future, if any.

3. Damages ⇐216(8).

Instruction on measure of damages *held* not erroneous as in effect telling jury that loss of time was equivalent to loss of profits.

4. Trial ⇐255(14).

Defendant seeking instruction to effect that jury should not duplicate award on any single element of damage was required to enter request therefor.

5. Damages ⇐216(1).

Instruction on damages authorizing recovery for mental and physical impairment *held* not erroneous.

6. Damages ⇐132(3).

$25,000 for injuries consisting of fracture of third lumbar vertebræ, crushing of fourth cervical, fracture of tip of sacrum, with fracture running up right side thereof with separation, fracture of coccyx, and fracture on upper right acetabulum, with deep lacerated wound near rectum, *held* not excessive.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Arthur Hollander against the Wilson Estate Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Lovell & Lovell, Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellant.

Albert A. Rosenshine, of San Francisco, for respondent.

STURTEVANT, Justice.

This is the second appeal in the above-entitled action. On the first appeal the action was remanded for a retrial on the issue of damages. Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.(2d) 177. After the remittitur went down a trial was had on that issue. The jury again returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has again appealed. It attacks numerous instructions. Before taking up those attacks it should be noted that in its decision the Supreme Court was called upon to determine the scope of the pleadings. Commencing on page 586 of 214 Cal., 7 P.(2d) 177, 179, the court said: "The complaint was in two counts. The first declared upon the injury, its nature and permanency, with added allegations respecting the items of expense for medical care and attention, with a prayer for damages covering these elements. The second count repeated the first, and added the following allegations: 'II. That prior to the aforesaid injuries * * * the said plaintiff was the owner of and engaged in the business of dealing in and with rugs, carpets and furniture, from which business plaintiff derived * * * $1,000.00 per month. III. That by reason of the premises plaintiff was unable, for * * * approximately * * * 8 months, to carry on and conduct said business. IV. That by reason thereof plaintiff has been further damaged in the sum of * * * $25,000.00.'" Then after adverting to the proof that was introduced the court said: "Under the above proof, the jury would have been justified in finding and doubtless did find that plaintiff, in addition to other damages suffered under the first count, suffered also a loss of profits to the extent of about $600 per month for a period of about six months."

The defendant makes numerous objections to some of the instructions given at the request of the plaintiff. The instructions so attacked are as follows:

"XI. Plaintiff seeks judgment in the sum of eighty-five thousand nine hundred and sixty dollars and thirty-five cents, as follows: $2960.35 for hospital and medical expenses—also $8000 for loss of time and profits during the eight months' period he was compelled to remain away from his business, and also the sum of $75,000 general damages for pain, suffering and injuries sustained, making a total sum of $85,960.35."

"XVI. In determining the amount of damages you will award to the plaintiff, you must take into consideration not only the loss and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any, arising from any disability resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received."

"XVIII. I instruct you that in fixing the amount of damages to be awarded to the plaintiff, Arthur Hollander, you must take into account any loss of profits or earnings from the business of plaintiff, Arthur Hollander, sustained by him during the period when he was unable to work and attend to his business as a result of the injury to him, not, however, to exceed the sum of $8,000.00 claimed in the second count of plaintiff's complaint.

"XIX. I instruct you that in determining the amount of damages to be awarded to plaintiff, Arthur Hollander, you must take into account, in addition to the loss of profits or earnings during the period when plaintiff was unable to work and attend to his business by reason of the injury to him, such additional sums as will compensate plaintiff for

his loss of time, that is, his inability, if any, to earn money, which has resulted from the injury, during the period since he has become able to work and attend to his business up to the present time, and whatever loss of time or loss of ability to earn money will result in the future, if any, and which can be traced by you to the result of said injury; the whole of said sum, however, not to exceed the amount prayed for in the first count of plaintiff's complaint, to-wit, $75,000.00."

On the trial evidence was introduced which showed that immediately after the accident the plaintiff was unable to attend at his place of business. The length of that period of time rested on conflicting evidence. The plaintiff contended that it continued eight months. On the other hand, the defendant contended that it continued four months. In addition to these matters, the plaintiff introduced proof to the effect that the injuries sustained in the accident had affected him physically in such a manner that he was becoming emaciated. He further contended his nervous system was so affected that he had become very weak, irritable, and easily tired. In this connection he introduced proof to the effect that down to the date of the second trial he was unable to transact his business throughout the day, but had to lay off at times and on some occasions was compelled to leave his place of business and go home. In other words, that at the date of the second trial he was able to work only intermittently.

Before proceeding it should be stated that at the time of the accident the plaintiff was the sole owner and operator of a rug business in the Wilson building and that he attended to nearly all branches of the business. In January, after the accident, he gave up that business, organized a corporation, and commenced a wholesale carpet business which he conducted with the assistance of certain employees. It is not claimed there was any evidence to the effect that the new organization was a one-man corporation or that the plaintiff was entitled to all of the profits in any one year nor how the balance sheets compared one year with another.

[1-4] The first attack made by the defendant is that the jury was permitted to award damages for the alien element of plaintiff's "loss of time" after he was able to work, but as shown by the statement of facts that element was not alien. In his proof the plaintiff had attempted to show that the after-effects of the injury were such as to cause him to become greatly weakened, to become very irritable, and at times to cause him to leave his place of business and go home. Those symptoms so intermingled that at times the plaintiff suffered from loss of time while in his place of business, and again suffered from loss of time by being compelled to quit and go home. The defendant asserts instruction XIX "declares that 'loss of time' is the equivalent of 'loss of ability to earn money.'" It does not expressly do so. Furthermore, when plaintiff was too irritable or too weak to transact business with customers, it will be conceded he suffered an inability. And, when on certain occasions the plaintiff was compelled to go home leaving his place of business by reason of sickness, he also suffered an inability The instruction went no further. Again, it is asserted the instruction was to the effect that every impairment of earning capacity results in loss of time. We think it is clear the instruction does not support the contention. Continuing the defendant asserts instruction number XI, read in connection with instruction XIX, in effect told the jury that loss of time was equivalent to loss of profits. To uphold that assertion is to place a strained meaning on the words used. Again, it asserts the instructions authorized the jury to make a double award for the same injury. It is not claimed that any instruction contained any express language to that effect. However, by a system of reasoning the defendant draws that conclusion. Picking up all of the instructions and reading them together, we think there is nothing that supports that conclusion. Finally, the defendant complains because the jury was not directly instructed that it should not duplicate its award on any single element of damage. To that complaint there are two answers. If the defendant had wanted an instruction on the subject, it should have asked for one; but it did not do so. The second answer is the instructions that were given were so drawn the jury must necessarily have understood it was not authorized to duplicate damages.

The second point made by the defendant is that the jury was permitted to award damages for the element of plaintiff's loss which rendered him less capable of attending to his business and to thereby duplicate and enhance the awards for loss of time and loss of ability to earn money. What has been said above regarding duplication we think is a sufficient answer to this point.

In its third point the defendant asserts that the jury was permitted to award damages for the alien elements of loss of business profits and loss of business earnings which were not attributable to the injuries. The point is without merit. No instruction referred to such elements, and the jury was not told to consider them, whether attributable to the injuries or otherwise. If the defendant means by "business profits" the "plaintiff's profits," that subject was not alien. While in business in the Wilson building the profits of that business were the earnings of this plaintiff, and, for the same reasons, the earnings of this plaintiff were the profits. Defendant refers to instructions XVIII, XI, XIX, and XVI in the order stated. Thereupon it asserts that the Supreme Court in

its decision [214 Cal. 582, 7 P.(2d) 177] excludes any recovery for loss of time or loss of earnings under the second cause of action. An examination of that decision does not support the contention.

[5] In its fourth point the defendant asserts that the court erred to the prejudice of the defendant in giving instructions to the jury at the request of plaintiff which submitted issues to the jury where evidence to justify such submission was lacking, and which directed the jury to disregard the evidence. Under this point many contentions are made. We shall try to state each. It is asserted instruction XVIII is broader than XI and that it is broader than the allegations of the second cause of action. For all of the purposes of this decision both contentions may be granted, but it does not follow that error was committed. It is next asserted that instructions XVIII, XVI, XIX, and XXII were not warranted by the evidence. We think they were. If in any respect any part of any one of them contained matter foreign to the case, the defendant has not pointed to that special matter and shown wherein the defendant was prejudiced thereby. More specifically presenting this point the defendant asserts that: "The measure of damages for impairment of earning capacity is the difference between the amount which plaintiff was capable of earning before the injury and that which he is capable of earning thereafter." 17 C. J. p. 897. It then asserts that while there was evidence of the plaintiff's earning capacity before the accident, there was "no evidence indicating his earnings from the business in which he later engaged." Hence defendant argues it was error to give instruction XI. Turning to that instruction, it will be noted it is addressed to the period immediately following the accident. As we have shown, the proof was full and complete as to that period and the instruction complained of was not addressed to alien matters. The same attack is made on instruction XIX, but that instruction was addressed to mental and physical impairment. It was not error to give it. Treadwell v. Whittier, 80 Cal. 574, 578, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Shaw v. Southern Pacific R. R. Co., 157 Cal. 240, 107 P. 108; Worden v. Central Fireproof Bldg. Co., 172 Cal. 94, 155 P. 839; 17 C. J. 1015.

[6] The last point presented is that the verdict was excessive. The verdict was for the sum of $25,000. The plaintiff in his brief states that the following injuries were received by him: The first, second, and third lumbar vertebræ were fractured; the fourth cervical was crushed; the tip of the sacrum was fractured and there was also a fracture running up the right side of the sacrum, with separation. The coccyx was fractured and there was a fracture on the upper right acetabulum. In addition to this, there was a deep lacerated wound about one and a half inches from the rectum, running inwards about two and a half inches. He was injured by shock and there were bruises over his whole body. He lay at the point of death for many days; he was immobilized with sandbags, indeed, he could not be placed in a cast for ten days because he could not be moved. The cast was finally placed on him and he remained motionless and helpless in this cast for over two months, his neck held by a Thomas collar. He remained in the hospital unable to feed himself or attend to his bodily wants for nearly three months. He earned nothing and had no income until at least January 1, 1928. But more important and more horrible are the resulting changes to his life and character; and as to these changes there is not one word of contradiction in the record. In its reply the defendant does not question any of those statements. An examination of the record discloses these additional facts: At the time of the accident, April 23, 1927, the plaintiff was 51 years of age. He weighed at that time from 172 to 180 pounds. The last trial commenced November 16, 1932. At that time he weighed 145 pounds. Before the accident he was strong physically and of such a jovial nature that he was nicknamed "Happy." At that time he transacted nearly all of his own business. In view of the foregoing facts it may not be said as a matter of law that the verdict was excessive. Swendsen v. Pacific Electric Ry. Co., 175 Cal. 502, 503, 166 P. 21.

We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

135 Cal.App. 699

KOUTS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9262.

District Court of Appeal, Second District, Division 1, California.

Dec. 12, 1933.

Exceptions, bill of ⇐51.

Trial court cannot refuse to settle proposed bill of exceptions because incomplete, but may require that bill be amended before settling it.

Application by Martha A. Kouts for writ of mandate prayed to be directed to the Superior Court of the State of California in and for the County of Los Angeles and the Honorable Lester William Roth, one of the Judges

thereof, to require respondents to settle a bill of exceptions.

Writ granted.

W. C. Dalzell, of Los Angeles, for petitioner.

Everett A. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, Justice.

Following a ruling made by the trial court on each of three motions which were presented to said court, each at a time different from that of either of the others, the petitioner herein, who was the "aggrieved" party in the trial court, presented to said court for its settlement thereof her proposed bill of exceptions.

For the purpose of considering the point here at issue, it is unnecessary to set forth more than an excerpt or example of the contents of the proposed bill of exceptions. After the title of the court and cause, the following appeared:

"Be it remembered that on February 10, 1933, the following motion came on to be heard in Department 43 of this court, * * * (here print notice of motion for February 7, 1933, and affidavits of William F. McLaughlin and Thomas B. Kouts and supplementary affidavit of William F. McLaughlin dated February 4, 1933).

"That defendant appeared by his counsel George I. Devor and plaintiff appeared in person and by her counsel W. C. Dalzell. That thereupon the following proceedings took place: (Setting forth what appears to be a transcript of what was said by the court and respective counsel at that time.)

"Thereupon the following minute order was made: (here print the minute order of February 10, 1933); and was entered at the margin of the entry of the original interlocutory decree on the 20th day of February, 1933, as follows: (here print the marginal stamped entry.)

"Thereafter on February 17, 1933, counsel for the defendant presented to the court for signature and in the absence of plaintiff and her counsel and the court signed the following order: (here print the order of February 17, 1933); which was entered on February 24th, 1933, in Book 842, page 242, of judgments."

The course pursued as to the other rulings of which complaint was made are practically identical in form with that hereinbefore outlined as to the first of such rulings. Then followed the several "specifications of error," together with a form of order of settlement of the proposed bill of exceptions.

The respondent to the proposed bill of exceptions interposed several objections thereto, as follows:

"(1) That the proposed bill of exceptions was not such as was required by law.

"(2) That it purported to cover several appeals, and that there should be a bill of exceptions for each appeal."

The remaining objections of the respondent to the proposed bill of exceptions related to different motions to strike from said bill specified portions thereof.

According to the allegations contained in the petition herein, which statement is admitted to be true by the respondents, when the matter of settlement of the proposed bill of exceptions came on for hearing before the trial court, the following occurred:

"Mr. Devor: If the Court please, I am willing to submit the settlement to the court upon the proposed bill of exceptions and our objections.

"Mr. Dalzell: I too, am willing to submit the matter but with one or two provisos. First, may I ask if the court has any different recollection of its own as to what took place at these proceedings?

"The Court: Yes, when I look over the papers it will come back to me.

"Mr. Dalzell: Then we have to prepare our engrossed Bill within ten days after the settlement. The engrossed bill will be rather long. May I request that I be notified immediately when the bill is settled?

"The Court: Yes, you will be notified.

"Mr. Dalzell: Very well, submitted.

"That on the same day, to-wit, May 19, 1933, the court entered its order refusing to settle the bill of exceptions on the ground that the proposed bill was incomplete."

Thereafter, on application by the petitioner, this court issued its alternative writ of mandate by which, in effect, the respondents were directed to show cause why the proposed bill of exceptions should not be settled. The respondents having appeared and filed a demurrer to the petition and an answer thereto, the question for determination is whether, in the form presented, the trial court was lawfully required to settle the proposed bill of exceptions.

In the case of Sansome v. Myers, 80 Cal. 483, 22 P. 212, a ruling was made which, on the facts there present, appears to be conclusive of the point here at issue, to wit, that although a proposed bill of exceptions, apparently prepared in good faith, may be but "skeleton" in form, and even inaccurate in many respects, meager and partial, nevertheless the trial judge is unauthorized to refuse to settle it because of such various imperfections. However, as therein was also decided, before doing so, he may require a correction of the several defects appearing in the proposed bill, together with a corresponding restatement of it. See, also, Cohen v. Wallace, 107 Cal. 133, 40 P. 101; Winters v. Buck, 121

Cal. 279, 53 P. 799; Hertter v. Addis, 89 Cal. App. 160, 265 P. 298.

Accordingly, it is ordered that the demurrer to the petition be, and it is, overruled; and that subject to the right in the respondent court to direct the petitioner, in particulars which may be specified by said court, to make and present a proper bill of exceptions as to each of the several orders from which the appeal is proposed to be taken, the said respondent court proceed in due course to the settlement of the bill of exceptions, either as already presented, or as hereafter to be presented, pursuant to amendments which may be made thereto in accord with the order of the trial court as aforesaid.

We concur: CONREY, P. J.; YORK, J.

135 Cal.App. 584

SOMO et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 9332.

District Court of Appeal, Second District, Division 1, California.

Dec. 6, 1933.

Injunction ⇐70.

Where dispute exists between claimants of offices and de facto officers of corporation over right to hold office in corporation, de facto officers will not be enjoined from acting as officers of corporation, in absence of judicial determination of disputed facts (Code Civ. Proc. § 526, subd. 6; Civ. Code, § 3423, subd. 6).

Application by Joseph Somo and Milton Strauss for a writ of prohibition against the Superior Court of Los Angeles County, and Emmett H. Wilson, as Judge thereof.

Writ granted.

Willcox & Judson, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, and Victor A. Berry, of Bell, for respondents.

HOUSER, Justice.

As they affect the application herein for a writ of prohibition, the facts are not in dispute; but that situation is not true with reference to the basic facts upon which it is alleged that the lower court is about to act on a petition presented to it for a writ of mandate, and, as incidental thereto, the issuance of a temporary restraining order, or an injunction pendente lite. More particularly, from the petition for a writ of prohibition and the answer thereto presented to this court, it appears that, as the proposed result of a petition for a writ of mandate, the lower court summarily, and without a trial of the involved issues of fact, is about to issue its order by which the petitioners herein, Somo and Strauss, who are not only assuming to act, but in fact acting, as the president and secretary respectively of Maywood Mutual Water Company No. 1, a corporation, and as such in possession of the office, office equipment, records, files, etc., of such corporation, will be required to surrender the same to Goodway and Butler, who likewise assert their right to act in the capacities of president and secretary respectively of the same corporation; and that the said Somo and Strauss desist from the collection by them, or by either of them, of bills of account owing to said corporation.

The record in the lower court shows that Goodway and Butler claim the right to said offices respectively by virtue of the result, not only of a referendum election instituted against Somo and Strauss, in their said respective capacities, but as well that Goodway and Butler also assert their alleged rights founded upon the result of an election by the stockholders of the said corporation at a meeting thereof claimed to have been regularly and legally called and conducted. On the other hand, by their answer to the petition for such writ of mandate and injunction, Somo and Strauss, both generally and specifically, denied practically each and every issuable fact essential to the establishment of the asserted right of Goodway and Butler. In addition thereto, by their affirmative answer to said petition for a writ of mandate, Somo and Strauss alleged that, at another recently called and conducted meeting of the stockholders of the corporation, certain directors thereof were elected, who thereupon proceeded to and did regularly and legally re-elect Somo the president, and Strauss the secretary, of said corporation; and that thereupon they accepted such respective offices, and are now acting as such officers. It thus appears that Somo and Strauss are in office, at least as hold-overs, and that they claim that in due and legal form they have been re-elected to their respective offices; while neither Goodway nor Butler ever has occupied either of said offices, but claims the right thereto by virtue of other elections.

From time immemorial, as popularly expressed, "possession is nine points of the law." Although not in identical language, but as far as affects the instant litigation, that policy has been enacted into statutory law, as substantially set forth both in subdivision 6 of section 526 of the Code of Civil Procedure,

and in subdivision 6 of section 3423 of the Civil Code, wherein it is provided that "an injunction cannot be granted * * * to prevent the exercise of a public or private office, in a lawful manner, by the person in possession."

In 32 Corpus Juris, at page 239, the rule, with appropriate citations affecting each of the different propositions there laid down, is stated as follows: "In the absence of special legislation, officers of a corporation will not be enjoined from acting as such within their chartered powers and in the exercise of discretion, for malfeasance in office or other reasons, even though they are only de facto officers, for the reason that there is an adequate remedy at law by quo warranto. It is not the province of equity to decide the right to an office, although it may do so as an incident to matters otherwise within its jurisdiction; and while there is some authority to the contrary, it has very generally been held that, where an injunction to prevent an officer from acting as such is really to test the validity of his election, it will be refused."

It is true that a decision contrary to the inhibitions contained in the statutes to which reference has been had may appear to have been made in the case of Consumers Salt Co. v. Riggins, 208 Cal. 537, 282 P. 954. But, on examination of the foundation for such ruling, it will be observed that the facts therein were "not in dispute"; which situation does not obtain in the instant case. To the contrary, as hereinbefore has been indicated, practically every material fact upon which a decision of the rights of the respective parties to the instant litigation could be founded actually are in dispute.

It is apparent that in the proceedings in the lower court a correct determination of the rights of the respective parties necessarily involves, not only a decision of several important and essential questions of law, but as precedent thereto, and as a foundation therefor, likewise requires a conclusion as to each of many different issues of fact. In view of the fact that Somo and Strauss, petitioners herein, are now in possession of the respective offices which are the subject of the controversy, together with the situation that practically every material fact upon which a final conclusion regarding the respective rights of the parties to the action is in dispute, it is thought that the statutory provisions to which attention has been directed are so clearly applicable and mandatory as to indicate a lack of jurisdiction in the lower court, in the absence of a trial or judicial hearing as to the issues involved, to enter its summary order by which the persons in de facto possession of the offices of the corporation effectually will be dispossessed thereof and their powers and emoluments, as such, if any, transferred to others.

It is ordered that the demurrer interposed by the respondents to the petition herein be, and it is, overruled. It is further ordered that, preceding a hearing and determination by it of the issues of law and of fact presented by the proceedings in the lower court, the respondents superior court of the county of Los Angeles and the judge thereof be, and each of them is, prohibited from making or issuing or entering any order in the proceeding referred to herein by which Somo and Strauss, or either of them, will be restrained or prevented from exercising the duties of the respective offices of president and secretary of the said corporation.

We concur: CONREY, P. J.; YORK, J.

135 Cal.App. 249

SILVA et al. v. MacAULEY et al.

Civ. 4964.

District Court of Appeal, Third District, California.

Dec. 8, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

Fish ⇐16.

Liability of deputy fish and game commissioners acting alone in illegal seizure of truckload of crabs, *held* individual and personal.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

On petition for rehearing.

Petition denied.

Hearing denied by Supreme Court; SHENK and CURTIS, JJ., dissenting.

Prior opinion, 26 P.(2d) 887.

U. S. Webb, Atty. Gen., Jess Hession and Emmett J. Peterson, Deputy Attys. Gen., and Eugene D. Bennett, of San Francisco, for appellants.

Charles Kasch, of Ukiah, for respondents.

PER CURIAM.

The record shows that judgment was entered in this case only against the persons who individually participated in the conversion of the property belonging to the plaintiffs. No question of respondeat superior is involved. From which it follows that the cases cited in appellants' petition for a rehearing have no bearing upon this case. Nor

is there any question raised as to the liability of officers for illegal arrests. The plaintiffs in this case were not arrested. The only issue presented concerned the property belonging to the plaintiffs and converted by the defendants against whom judgment was entered.

The cases cited in the opinion heretofore rendered were in some instances cases where the liability of a superior officer was involved, but those cases were cited simply to show the responsibility of an officer wrongfully converting property, not for the purpose of intimating that the liability of any principal was concerned. Such cases are pertinent because, if the circumstances are such as to show that a superior officer was involved, a deputy who acts for the superior officer would likewise be liable. In the instant case, it appears that deputies alone acted. Hence their liability is individual and personal.

The appellants' petition for rehearing apparently has overlooked the line of demarcation in the cases, and we are led to the conclusion that the court was laying down a rule as to the liability of principals.

The petition for rehearing is denied.

135 Cal.App. 666

FLIPPEN v. ABBEY.

Civ. 1447.

District Court of Appeal, Fourth District, California.

Dec. 8, 1933.

Hearing Denied by Supreme Court Feb. 5, 1934.

1. Bills and notes ⇐525.

Evidence as respects status of plaintiff suing on note *held* to establish that note was transferred back to original payee and by him transferred to plaintiff after maturity.

2. Bills and notes ⇐131.

Payee of note so long as he was owner thereof was bound by agreement with maker that it was not to be paid by maker but was to be paid by him from proceeds of certain stock which he was to buy and sell and then return to maker.

3. Bills and notes ⇐350.

Purchaser of note from payee after maturity and in fact with notice was in no better position to recover against maker than original payee.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Wade H. Flippen against Earl R. Abbey, as administrator of the estate of E. J. H. Primus, also known as E. J. Primus, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for appellant.

W. F. Menton and Charles D. Swanner, both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action on a promissory note for $10,000 dated June 16, 1931, payable on or before six months from date with interest at 8 per cent. per annum. The note was executed by E. J. H. Primus, was payable to "myself", and was indorsed by Primus and delivered to one E. M. Hilton on the day it was made. On the same day a written agreement was executed by both Primus and Hilton providing that Hilton was to purchase 100,000 shares of stock of the Mammoth Mines Corporation from A. G. Mahan at 25 cents per share, which stock he was to resell and trade at $1 per share, and that Hilton was to sell the note and use the proceeds in furthering a campaign for the sale of the stock to be so purchased. Hilton agreed to pay the note from the first proceeds received from the sale of this stock and to return the paid note to Primus, it being further agreed that all profits arising from the sale of the stock should be divided between the two.

On July 1, 1931, Hilton indorsed and sold the note to one J. M. Horton, receiving $5,000 in cash with an agreement to pay Hilton an additional $2,500 if and when the note was collected. No part of this $2,500 was ever paid. Primus having died and an administrator having been appointed for his estate, Horton filed a claim against the estate on December 22, 1931, and filed an amended claim on March 29, 1932. The claim was not allowed or approved by the administrator and, on May 25, 1932, Horton indorsed the note without recourse, and delivered it together with an assignment of his claim against the estate to Hilton, receiving from Hilton twelve shares of "Kettleman Hills Royalty No. 1." Hilton delivered the note and an assignment of the claim against the estate to the plaintiff and received $3,000 in cash, which he retained. This action followed and the plaintiff has appealed from a judgment in favor of the defendant.

In addition to the facts above given, the court found that the agreement referred to was executed contemporaneously with the execution and delivery of the note; that no consideration was paid by Hilton; that Horton did not assign or transfer the note to the plaintiff; that Horton indorsed without recourse and assigned and delivered the note

back to Hilton in consideration of certain oil stock; that Hilton thereafter and after maturity of the note, for a consideration of $3,000, transferred and delivered the note to the plaintiff, together with an assignment of the claim against the estate; that there was no privity of contract between Horton and the plaintiff but that the note and claim against the estate were on May 25, 1932, transferred from Horton to Hilton and, thereafter and after maturity of the note, transferred by Hilton to the plaintiff; that neither Primus nor his estate had received any consideration for the execution and delivery of the note and that Hilton retained all the consideration received from the sale of the note to Horton; and that the plaintiff, at the time he acquired the note and claim against the estate, took the same with full knowledge and notice that there was no consideration for its execution and that it had been obtained through fraud and misrepresentation.

Most of the points raised by the appellant are based upon the theory that he holds the note free from any defenses since he purchased the same directly from Horton, who was an innocent purchaser for value before maturity and without notice, and that the findings to the effect that the note and claim were assigned by Horton back to Hilton and then from Hilton to the appellant are not sustained by the evidence.

It may first be observed that even the position of Horton was not too secure since he purchased the note shortly after it was executed for much less than its face value after investigating the financial standing of the maker but without looking into the consideration given, when an investigation would have disclosed an agreement that the maker was not to pay the note. Jordan v. Grover, 99 Cal. 194, 33 P. 889; Witty v. Clinch, 207 Cal. 779, 279 P. 797.

The appellant relies on his own testimony that he purchased the note from Horton through Hilton acting as the agent of Horton, and Horton's testimony that he sold the note to the appellant and that Hilton made the sale as his agent. However, the record contains other evidence which, we think, supports the findings made. While Horton testified that Hilton told him he would try to sell the note for him and acted as his agent in selling the note to Flippen, he also testified that he made a written assignment of his claim against the estate and delivered it to Hilton; that he indorsed the note without recourse and delivered it to Hilton at the same time; that Hilton told him he had a purchaser for the note and asked him if he would accept from the proceeds of the sale ten shares of Kettleman Hills Royalty No. 1; that he told Hilton he would accept twelve shares of the oil stock as payment for the note and that Hilton could sell the same; that he delivered the note and assignment of his claim back to Hilton; that at the time he delivered these all he had was Hilton's word that he would receive twelve shares of oil stock; that about that time he received ten shares of the stock from Hilton and two months later he received the other two shares from Hilton; that he did not "remember" who had been the previous owner of this stock; that it was a "three-cornered deal"; that Hilton was to sell the note and he was to receive the shares of Kettleman Hills Royalty No. 1; and that Hilton asked him in Flippen's presence if he would be satisfied to receive twelve shares of oil stock "from the proceeds of the sale." The appellant testified that he received the note and assignment from his attorneys but did not know who delivered the same to them; that Hilton tried to sell him the note; that later on Hilton told him Horton wanted to sell it; that he never owned any stock in the Kettleman Hills Royalty No. 1; that he paid $3,000 for the note; that the check was made payable to Hilton and was cashed; that Hilton at first told him it would take $3,800 to put through this three-cornered deal; and that he knew Hilton was to get the money he paid, he was to get the note and Horton was to get something but what it was he never knew. He also admitted that before purchasing the note he talked with the administrator of the estate and the attorney for the administrator and was told that the administrator was objecting to paying the note.

[1] No explanation is offered as to how this could have been a simple sale from Horton to Flippen through the agency of Hilton and, at the same time, a three-cornered deal. There was no meeting of the minds between Horton and Flippen as neither ever knew what the other received or paid. Horton delivered the papers to Hilton, receiving something which Flippen had never owned and a part of which was not received until two months later. It is significant that the assignment of the claim against the estate which was executed by Horton was not introduced in evidence, and the only inference reasonably to be drawn from the whole evidence is that this assignment was made out to Hilton. Horton's testimony shows, at best, that he knew he was to receive only a part of the proceeds which Hilton was receiving for the note and that he neither knew nor cared what Flippen paid. It fully appears that Hilton was free to reduce the price of the note from $3,800 to $3,000 without consulting Horton. Hilton received the papers from Horton, obtained time for delivering the stock and then, after conducting his own negotiations with Flippen, delivered the note with an assignment of the claim, receiving and retaining the cash paid. A further consideration is that during all of the time Horton held the

note an interest in the same to the extent of $2,500, if the same should be paid, was retained by Hilton, and Horton was hardly in a position to transfer the note to anyone other than Hilton without making proper provision for this phase of the matter, and, so far as the evidence shows, nothing was said to Flippen concerning the same. We think the evidence justified the court in finding, as testified to by both Flippen and Horton, that this was a "three-cornered" deal and not one between Flippen and Horton alone and that, with the reasonable inferences therefrom, it fully supports the findings to the effect that the note was transferred back to Hilton and by him later transferred to Flippen.

[2, 3] The appellant contends that the record contains no evidence of any breach of Hilton's agreement with the maker of the note and, therefore, the respondent has failed to establish any defense even as against Hilton. It is argued that the court removed the only evidence of a breach of this agreement when it struck out certain testimony given by Mahan, from whom Hilton agreed to purchase the stock for the promotion of the sale of which the note was given. Mahan had testified that Hilton never bought any stock from him. While the record shows that the court erroneously struck out this testimony and also erred in shutting out considerable other evidence offered by the respondent, we think it sufficiently discloses a defense to the note as against Hilton. So long as he was the owner of the note he was bound by his agreement that it was not to be paid by the maker but was to be paid by him from the proceeds of certain stock which he was to buy and sell, and was by him to be returned to the maker. It appears that this was not done and that Hilton himself could not recover as against the maker and the appellant is in no better position since he bought the note from him after maturity and in fact with notice. While not material, it is not without significance that the appellant bought the note after maturity for about one-fourth of its face value, after being told that payment would be contested and after making inquiry of his lawyers as to whether "it was legal."

Questionable circumstances appear in connection with every phase of these transactions and indications of collusion are not absent, all of which may have had its influence on the trial court in reaching a conclusion as to the truth of various portions of the evidence.

The views already expressed make it unnecessary to consider the other points raised.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 724

Ex parte ROSENTHAL.

Cr. 1771.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1933.

Trade-marks and trade-names and unfair competition ⇐51.

Complaint alleging violation of temporary code of fair competition by charging less for cleaning suit than price fixed by vote of trade association *held* not to charge offense (St. 1933, c. 1037).

Since St. 1933, c. 1037, contemplates that commissioner of corporations shall approve all the provisions of the code, which approval is to be concurred in by the director of the department of industrial relations, and in view of fact that there was no schedule of prices included in code approved by the commissioner or director, there was no violation of any of the provisions involved.

Original application by David H. Rosenthal for writ of habeas corpus prayed to be directed to the Sheriff of Alameda County.

Petitioner discharged.

Bohnett, Hill & Cottrell, of San Jose, for petitioner.

A. S. Newburgh, of San Francisco, amicus curiæ, for petitioner.

Earl Warren, Dist. Atty., and R. Robert Hunter and T. A. Westphal, Deputy Dist. Attys., all of Oakland, for respondent.

Decoto & St. Sure, of Oakland, for Cleaners and Dyers Trade Ass'n of Alameda County.

PER CURIAM.

Habeas Corpus. Petitioner is accused of a violation of the State Recovery Act of the State of California, approved August 4, 1933 (chapter 1037, Laws of 1933) and the provisions of the acts amendatory and supplemental thereto, and the provisions of the temporary code of fair competition for the cleaning and dyeing industry of the state of California.

It is claimed that the facts recited in the complaint do not constitute a violation of the provisions above referred to, nor do they constitute a violation of the provisions of the temporary code of fair competition for the cleaning and dyeing industry. The alleged criminal violation of the temporary code consists of charging seventy-five cents for cleaning a man's three-piece suit when the price for that work had been fixed at $1 by a vote of the trade associations of Alameda county.

The statute in question contemplates that the commissioner of corporations shall approve all the provisions of the code, which approval is to be concurred in by the director of the department of industrial relations. There was no schedule of prices included in the code approved by the commissioner or director. There was, therefore, no violation of any of the provisions involved. Since the arrest of petitioner a code of fair competition which fixes the schedule has been approved under the act of Congress. From what we have said it follows that petitioner should be, and he is, discharged from custody and his bail exonerated.

135 Cal.App. 544

THOMSON v. LEAK.

Civ. 4898.

District Court of Appeal, Third District, California.

Dec. 2, 1933.

1. Trial ⇐397(4).

No finding is required on allegations of pleadings, where there is no evidence adduced thereon.

2. Trial ⇐396(1).

Finding may be made outside framed issues if case is tried upon theory supporting finding.

3. Contracts ⇐193.

Amount received by vendor from sale of land constitutes measure of vendor's liability under contract requiring payment to third person from funds received from sale.

4. Vendor and purchaser ⇐82.

Execution of substituted sales contract which constituted merely redraft of original contract, without affecting third person's right under original contract to receive portion of payments, did not warrant third person's recovery from vendor on ground of rescission, where no payments had been made under substituted contract.

5. Appeal and error ⇐1071(1).

Insufficiency of findings *held* not to require reversal of judgment for defendant, where inspection of contract on which plaintiff relied disclosed no right of recovery.

6. Vendor and purchaser ⇐82.

Meaning of sales contract under which third person would receive portion of payments to vendor, and whether substituted contract amounted to rescission as to third person, *held* questions of fact.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Herman L. Thomson against L. W. Leak. Judgment for defendant, and plaintiff appeals.

Affirmed.

K. D. Robinson, of Auburn, for appellant.

Fred P. Tuttle, Jr., of Auburn, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

By this action plaintiff seeks to recover from defendant certain moneys alleged to be due plaintiff from defendant under the terms of a written contract. The case was tried in the court below without a jury, and judgment was ordered and entered in favor of defendant and against plaintiff.

From such judgment the plaintiff appeals, and the appeal is presented on the judgment roll alone, consisting of the complaint, answer, findings of fact and conclusions of law, and the judgment.

A great deal of comment concerning the facts has crept into the briefs, but we have no record of the evidence taken, so therefore the allusions to what the testimony was does not at all aid us; on the contrary, they but tend to befog the question.

The complaint alleges, and the answer admits, that on September 21, 1928, plaintiff and defendant entered into a written agreement substantially as follows: Defendant agreed to pay plaintiff on and after September 1, 1930, the sum of $500, and on and after September 1, 1931, the sum of $500, and on and after September 1, 1932, the sum of $500, provided that defendant should receive from Manuel Silva, Julia Silva, and Manuel Dutra the sum of $1,500 for each of said years under a contract made between defendant and the Silvas and Dutra, which latter contract was dated September 21, 1928, and by the terms of which the parties last named agreed to buy from defendant certain lands in Nevada county.

It was further alleged that by a contract made February 16, 1929, between defendant Leak and the said Silvas and Dutra, it was agreed that the former contract of purchase and sale between the parties, namely, the contract of September 21, 1928, under which plaintiff was to receive a portion of the payments, was rescinded and supplanted by said later agreement. It is further alleged that by reason of said rescission defendant has prevented performance by the Silvas and Dutra, and has thereby prevented himself from receiving the payments referred to in the contract between plaintiff and defendant, and has thus put it out of his power to perform.

The further allegations of the complaint

allege demand and nonpayment and ask for judgment in the sum of $1,500. This complaint was filed October 14, 1931.

It seems unnecessary to set forth the details of the defendant's answer, inasmuch as the trial court made no findings thereon. It will suffice here to say that issue was joined, and the defendant pleaded the contracts between himself and the Silvas and Dutra. The genuineness of these instruments was admitted. We may refer to the answer later herein.

In the first agreement of September 21, 1928, the Silvas and Dutra agreed to buy the lands described for a total purchase price of $25,000. There was a federal land loan against the premises of $5,214.07, and the buyers assumed this, leaving a balance of $19,785.93. Two thousand dollars was paid upon the execution of the instrument, which was paid by a chattel mortgage on certain live stock. The balance of $17,785.93 was to be paid as follows: $1,000 on September 1, 1929; $1,500 on the 1st day of September of each of the following years, to wit: 1930, 1931, 1932, 1933, and the balance to be paid at the rate of $1,000 on the 1st day of September of each year subsequent to 1933 until the total had been reached.

The contract of February 16, 1929, was between the same parties, namely, defendant Leak as seller and Silvas and Dutra as purchasers. The same lands were involved and the same total purchase price of $25,000.

The change in the contract affects the chattel mortgage and the first cash payment. There was no acknowledged cash payment, and the balance to be paid was $19,785.93. This sum was to be paid as follows: The sum of $1,000 on September 1, 1929, and the sum of $1,500 on the 1st day of September on each of the following years, 1930, 1931, 1932, and $1,000 per year on the 1st day of September of each and every year thereafter until the total of $19,785.93 had been paid.

It was provided in this second agreement that a chattel mortgage on certain cattle be given to secure the payment of $2,000 payable on September 1, 1929, and September 1, 1930. The last or second contract provides as follows: "This contract is made for the purpose of supplanting that certain contract by and between the same parties, dated the 21st of September, 1928, and it is hereby agreed by and between the parties hereby that said contract is hereby rescinded."

The trial court found, pursuant to appropriate issue presented by the answer, as follows:

"Finding No. 1. That plaintiff suffered no damages by reason of the execution of the contract of February 16, 1929.

"Finding No. 2. That the execution of the second contract did not preclude plaintiff from maintaining an action against defendant for money due him under his contract, provided defendant received the payment or payments under said contract in which plaintiff was to participate.

"Finding No. 3. That defendant did not receive the sum of $1500.00 nor any other sum from the Silvas and Dutra or any other sum whatsoever from the said parties.

"Finding No. 4. That it is not true that by reason of said agreement of February 16, 1929, and said rescission, defendant had prevented the performance by Silvas and Dutra of the contract of September 1st, 1928, and has acquiesced in said nonperformance and has thereby prevented the Silvas and Dutra from paying and defendant from receiving under said contract said sums of $1,500 or any part thereof.

"Finding No. 5. That the so-called second contract was made at the request of the Silvas and Dutra and was made in good faith by the defendant and it was not the intent of defendant in making said contract to defraud plaintiff of the payments due him under the contract between plaintiff and defendant."

[1, 2] Naturally, an attack is made upon the findings as not being sufficient to support the judgment and as not being responsive to the issues. We are not inclined to give much time to these contentions. No finding is required where there is no evidence adduced on the allegation. Further still, a finding may be made without the framed issues if the case was tried upon any theory which would support the finding. What transpired in the trial court and the theory of the case and the testimony offered does not appear. The main contention of appellant both here and in the court below, as far as it appears, is that the second contract irrevocably terminated the first contract under which plaintiff was to receive a portion of the payments, and thus defendant put it out of his power to comply. The findings do expressly negative this contention. With the contracts before it, the trial court found that the Silvas and Dutra were not prevented from performing the first contract, and as a conclusion of law found nothing due plaintiff.

Further, the court did expressly find that defendant had received nothing under the second contract. As the terms of payment, in as far as plaintiff was concerned, were identical in both contracts, in respect both to times and amounts of payment, this finding is equivalent to a finding that nothing was received under the first contract of sale.

[3-6] A mere reading of the two contracts of sale compels the conclusion that the second contract was merely a redraft of the first. It would surely be a ridiculous situation if the buyers under the second contract could retain the property without payment upon the ground that their liability to pay was based

upon the first contract, and that, being rescinded or supplanted, no liability remained.

The real obligation of defendant was to pay plaintiff from the funds received from the sale of the land to the Silvas, and, where no fraud is alleged or found, the measure of the defendant's liability to plaintiff is the amount received by defendant on the sale.

While it might be conceded that much criticism could be directed at the findings, yet, where the record discloses and the appellant admits his right of recovery depends entirely upon the construction of the instruments before the court, and an inspection and study of such instruments demonstrates plaintiff has no right to recover anything, it would seem a needless and useless act to send the case back for a retrial.

The intent and meaning of a contract and the association of contracts dealing with the same subject-matter between the same parties are really questions of fact to be determined by the trial court, and we think that the record sufficiently disclosed the theory of the judgment.

The language in the second contract to the effect that the first contract was supplanted thereby negatives the latter expression that the first contract was thereby rescinded. The intent was manifest in the writing that the second contract merely carried on the first with the one change in payments that did not affect the right of plaintiff.

The case, as a whole, has no merit, and seems to be a modern idea of the "pound of flesh." If plaintiff is so overanxious to lean upon the written word without the aid of permissible and lawful construction or interpretation, we might suggest that the language of his contract whereby defendant agrees to make payments on or after a certain date still leaves to the defendant an eternity within which to comply with the terms of the promise and that there is something premature in plaintiff's present demand.

The general rule, well supported by authority, is announced in Ruling Case Law, vol. 6, p. 923, § 307, as follows: "One contract is rescinded by another between the same parties, when the latter is inconsistent with, and renders impossible the performance of, the former; but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first and the two must be construed together. Where the new contract is inconsistent with the continuance of the former one, and only provides a new mode of discharging the former one, it has no effect unless and until it is performed. Moreover, where parties enter into a contract, which if valid would have the effect, by implication, of rescinding the former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction."

Going further, and by way of argument, let us assume that defendant herein did in the consummation of the sale to the Silvas and Dutra receive the full purchase price under the second contract of sale at the time and in the manner specified, or at any other time for that matter, it is not conceivable that any court would free him from his liability to plaintiff for the reason that the first contract was supplanted by the second.

It is too obvious to further discussion that, instead of being prevented by the second contract from fulfilling his contract with plaintiff, the defendant would be compelled to fulfill whenever the sale was completed.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

135 Cal.App. 550

EDWARDS v. MODOC COUNTY BANK et al.

Civ. 4949.

District Court of Appeal, Third District, California.

Dec. 2, 1933.

Rehearing Denied Dec. 30, 1933.

1. Partnership ⇐145.

Bank loans to individual partners *held* not individual loans because bank had already loaned partnership, as partnership, full statutory amount (Gen. Laws 1931, Act 652, § 80).

2. Banks and banking ⇐178.

Debtor is not absolved where bank loans exceed statutory limit, nor are any presumptions raised against truth of bank's testimony concerning loan transactions (Gen. Laws 1931, Act 652, § 80).

3. Appeal and error ⇐989.

In reviewing evidence, appellate court determines whether inferences drawn by trial court are permissible, and whether facts support judgment, regardless whether same facts would support different conclusion.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by H. R. Edwards against the Modoc County Bank and others, wherein named defendant and other defendants filed a cross-

complaint against plaintiff and defendant Gus Meckfessel. Judgment for defendants, and plaintiff appeals.

Affirmed.

See, also, 27 P.(2d) 800.

Thomas H. Breeze, of San Francisco, and C. S. Baldwin, of Alturas, for appellant.

Oscar Gibbons, of Alturas, and White, Miller, Needham, Harber & Mering, of Sacramento, for respondent Modoc County Bank.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent Rainey.

PARKER, Justice pro tem., delivered the opinion of the court.

Plaintiff, as a member of a partnership composed of himself and defendant Meckfessel, brought this action to recover moneys of the partnership which had been unlawfully and fraudulently appropriated by Meckfessel to his own use and benefit in the discharge of certain obligations due from Meckfessel individually to the Modoc County Bank, of which latter institution the defendants Bush and Baker were respectively president and vice president.

It is further alleged that this partnership money was rightfully due to plaintiff from his partner and from the partnership. The defendant bank and its officers admitted receipt of the money, but alleged that it was received in the due and regular course of business in payment of obligations due from the partnership to the bank; alleging further that there was still a balance due on certain notes for which plaintiff was liable, and for the payment of which plaintiff had deposited collateral. The cross-complaint of the bank was to recover a judgment for the balance so claimed, and to foreclose upon the security or collateral held by it.

The findings of the trial court were in favor of defendants on all of the issues.

Appellant has presented his contentions on appeal in a forceful and convincing manner, supported in the main by ample authority on the points of law involved. Indeed, both sides seem in harmony as to the law. The case was one of some difficulty for a trial court, and a decision either way would have found support in the testimony. However, as it is presented here, it resolves itself into a pure dispute of fact.

The partnership is admitted, and it is further admitted that there were certain partnership transactions involving the borrowing and lending of money for partnership use. The entire case presents a picture not new to the smaller counties of California. It is a picture of a small cattle ranch where one man owns the ranch and another joins him in a stock-raising venture, and neither of them has ample funds to conduct the business on a money-making basis. The nonowner starts with the idea of financing the partnership, and the owner of the lands is to furnish the feed and handle the actual running of the stock. On paper, the success of the enterprise is assured. All the increase will be female, and these will be of superior fecundity; the meadows and the hillsides will yield abundant forage; and the market will always be at a peak. The enterprise will clear itself within a year or two, and both of the partners will bask in the smile of fortune. One partner remains on the property and the other aids in the management by cable from London. Experience has not demonstrated such ventures to attain any great degree of success. The actual reality differs much from the early picture. Feed gets short, cattle die, and markets fall. The enterprise engulfs itself in the costs of operation, and these costs, usually sustained through borrowed money, eventually bring on the day of reckoning when the foreclosure decree and sale spell out the one word "failure."

In the instant case the trial court's findings may be summarized, and in effect will be adopted as the narrative of facts. The partnership between plaintiff and Meckfessel began some time in October, 1925, and up to January, 1926, was conducted without any written agreement of partnership. In January of 1926 the parties entered into written articles of partnership, the general nature of the business being the raising of cattle and ranching. On or about October 5, 1925, plaintiff gave to Meckfessel his power of attorney, by the terms of which Meckfessel was authorized, among other things, to sign, seal, execute, and deliver bills of sale, mortgages, and other instruments in writing as may be necessary in his judgment to properly carry on the business. This power of attorney remained unrevoked until April, 1931.

Before the time that plaintiff and Meckfessel first engaged in the said partnership, Meckfessel was indebted to the Modoc County Bank (which will hereinafter be designated as the "bank"), on a separate and personal indebtedness approximating $9,000. This indebtedness was secured, for the most part, by a valid chattel mortgage upon certain hay on the ranch of Meckfessel, and said hay had a value of about $12,000. In the fall of 1925 plaintiff informed the bank that he and Meckfessel had formed the partnership, and that they desired to use the hay on the ranch and make the said hay over into an asset of the partnership. It was then agreed between the bank and the partnership that, in consideration of the release of the hay to the partners, the partnership would assume the debt secured by the hay. Accordingly, the bank released the hay and discharged the separate debt of Meckfessel, taking the partnership as sole debtor.

In the year 1925 it was further agreed between plaintiff, Edwards, and the partnership

on one hand and the bank on the other that future loans would be made by the bank, and that any and all advances made by the bank for any purpose or in any way connected with the business of the partnership would be the liability of the partners, both individually and jointly, whether the loans were made through Edwards or Meckfessel, and whether the same should be evidenced by the note of Edwards or Meckfessel, or both. The business was carried on, and, as the years passed, the bank at times held the separate notes of the partners and the joint notes as well. There was thereafter no personal indebtedness of Meckfessel after the original secured debt had been discharged. In March of 1928 the partnership was indebted to the bank in the sum of $11,403.02, and such indebtedness arose out of loans made by the bank on the credit of the partnership, and evidenced by a note executed by Meckfessel. At this time a new note was taken for the sum of $13,000, which included a present advance of $1,596.98, and this new note was signed by Meckfessel in his own behalf and in the behalf of Edwards, by virtue of the existing power of attorney. At all times the bank understood, and it was the intent of the bank, that the loans were advanced to the partnership for partnership purposes. As security for the last-mentioned note of March, 1928, a chattel mortgage was given the bank, executed similar to the note referred to as of that date, which mortgage covered a herd of cattle belonging to the partnership.

The entire relationship of the bank with the parties to the partnership, or either or both of them, was free from fraud, conspiracy, or wrong dealing of any sort on the part of the bank or any of its officers or employees or agents.

The balance of $2,683.72, unpaid on the note of March, 1928, was the amount of the court's judgment; the said amount being decreed a lien upon the collateral deposited by Edwards with the bank.

Passing now from the narrative as disclosed in the findings, we may briefly consider some of the facts argued from the evidence. There was testimony that plaintiff, Edwards, told the officers of the bank that the partnership would require large sums of money; that is to say, large sums when considering the size of the bank and its loaning capacity under the banking laws. (Gen. Laws 1931, Act 652, § 80.) Edwards was told about these laws, and his reaction was that it could be arranged so that the loans would appear to be separate loans, and thus not on their face bear evidence of any violation of the law. It was his statement to the bank that, whatever form the loans, or the evidence thereof, might take, it would all be for the joint account, and so considered.

There was further testimony that separate notes were taken, in accord with this plan, and that, when the bank examiners gleaned the truth, it was necessary for the bank to call for reduction of loans. There is evidence showing that Edwards was, or became, aware of this situation and cleaned up his own note. The correspondence on this transaction indicates that at the time Edwards was familiar with his obligations on the notes signed by Meckfessel.

[1, 2] It is one of the arguments of appellant that the taking of the notes in the individual names clearly shows an individual liability was intended, for the reason that the banking laws make this conclusion imperative. In other words, that whatever the plan might be, as indicated, it was aborted by the law, and the fact that the bank knew it could not loan the partnership over a certain amount demonstrates that the loans, if made, were not in violation of the law, but were in accord therewith, and therefore individual loans. This is purely argumentative. The fact that a bank might loan beyond its statutory limit does not absolve the debtor or raise any presumptions against the truth of the testimony given. On this point attention is called to the case of Blochman v. Investment Company, 177 Cal. 762, 171 P. 943.

[3] The entire brief of appellant, while highly convincing and most impressive, does, in its last analysis, urge upon us that we practically retry the case; that we draw inferences from the testimony at variance with those drawn by the trial court. This we are not permitted to do under our scheme of appellate practice. In going over the evidence, our inquiry is not as to what conclusions the testimony or evidence might support, or what inferences may logically be drawn therefrom. We seek to learn whether or not the inferences drawn by the trial court are permissible and whether or not the facts will support the judgment, regardless of the fact that the same facts would support an entirely different conclusion. We are loathe that it should appear that we ignore the excellent argument of appellant, but, if we took up each phase of this argument, we would eventuate in a showing that, while the judgment contended for by appellant would find ample support, yet so also would the judgment of the trial court before us for review. In such a case our only course would be affirmance.

Much of the argument of appellant is to the effect that the testimony discloses that certain practices of the bank were irregular, and therefore subjected the entire testimony thereon to scrutiny and doubt. Passing, for the moment, the fact that the trial court entertained no such doubt, the regrettable situation throughout the entire nation is that banking practices in numerous instances were irregular and sometimes worse. We make no attempt to indict banks or bankers by this statement, for the reason that in a vast majority of the cases the unfortunate re-

sults followed from the fact that the general prosperity ceased without warning, and but for the fact of many of these irregularities, carried on with the idea of saving a disaster, the debacle would have occurred sooner.

We find ample in the evidence to support the judgment, giving, as we must, a construction upholding the findings of the trial court.

No point is made upon the appeal as to the judgment in favor of Meckfessel. The trial court found that there were unsettled accounts between the partners, and no accounting was had. In any event, the appeal, in so far as it may affect Meckfessel, is not urged.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

135 Cal.App. 556

EDWARDS v. MODOC COUNTY BANK et al.

Civ. 4950.

District Court of Appeal, Third District, California.

Dec. 2, 1933.

Rehearing Denied Dec. 30, 1933.

Chattel mortgages ⇐247.

Marginal entry on mortgage record that chattel mortgage was satisfied *held* not to preclude recovery on mortgage note, where there was no claim of payment, or settlement of mortgage debt.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by H. R. Edwards against the Modoc County Bank and another, wherein defendant Edward Rainey, as State Superintendent of Banks, filed a cross-complaint against plaintiff and Gus Meckfessel. From the judgment, plaintiff appeals.

Affirmed.

Thomas H. Breeze, of San Francisco, and C. S. Baldwin, of Alturas, for appellant.

Oscar Gibbons, of Alturas, and White, Miller, Needham, Harber & Mering, of Sacramento, for respondent Modoc County Bank.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent Rainey.

PARKER, Justice pro tem., delivered the opinion of the court.

This is a companion case to Edwards v. Modoc County Bank, 27 P.(2d) 797, this day decided. The two cases were tried together and submitted upon the same brief, with an exception to be hereinafter noted.

As was noted in the former action, there was a promissory note given by Meckfessel to the Modoc County Bank, which note was executed by Meckfessel for himself, and for and on behalf of the plaintiff, Edwards, under a power of attorney vesting such authority in Meckfessel. It has been determined that this note was for a consideration moving to the partnership, for the debts of which each partner was liable. The present action was to recover certain securities belonging to Edwards and held by the bank as collateral. The bank cross-complains, setting up a balance due on the note and asking judgment for the said balance, and a decree fastening such amount upon the securities so held, with an order for the sale of sufficient to discharge the debt.

All of these issues are determined in the previous suit, and the parties agree that a decision in the former suit would conclude the questions presented in the instant appeal, save as hereinafter.

The promissory note around which the litigation centers was secured by a chattel mortgage on certain cattle. In January of 1931 these cattle were sold and the proceeds applied upon the note. Such proceeds were insufficient to meet the face of the note. On January 29, 1931, there was a marginal entry made upon the page and book of the record of the mortgage, as follows: "This mortgage is fully paid, satisfied and discharged. Modoc County Bank, by Mitchell Tillotson, cashier." It is appellant's claim here that this entry completely discharged and wiped out the debt secured by the note.

It is possible, though we have no occasion to so decide, that, if this were an action to foreclose the mortgage, or if the rights of innocent third parties, misled by the marginal entry, were involved, the question might deserve serious consideration. But here, where there is no claim of payment, and no claim of compromise or acceptance of a lesser amount in discharge of the debt, we consider the point unworthy of further consideration. No authority is cited, save a Code section, which declares a rule of substantive law but remotely applicable to the fact.

It will be noted that the entry does not state that the debt secured by the mortgage was discharged, but simply that the mortgage on the specific property was satisfied and paid. See Caffaro v. Romani, 70 Cal. App. 448, 233 P. 412. In so far as the mortgage went, the sale and delivery participated in by the mortgagee, with or without foreclosure, would have the practical and legal effect of removing the lien from the chattel. Not a suggestion of fraud enters the case, and the

plaintiff does not urge that in any way he was injured. He stands solely upon the marginal entry and claims his debt discharged.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

219 Cal. 558

HOOD et al. v. VERDUGO LUMBER CO. et al.

L. A. 14363.

Supreme Court of California.

Dec. 26, 1933.

1. Appeal and error ⇐430(1).

Appeal, notice of which was filed over 60 days after entry of judgment, must be dismissed, in absence of new trial proceeding.

2. Appeal and error ⇐133.

Order granting motion for entry of corrected judgment is not appealable.

3. Appeal and error ⇐781(4).

Appeal from order refusing to vacate order for examination of debtors must be dismissed as involving moot questions, where examination has been had.

4. Appeal and error ⇐125.

Judgment against surety on bond staying judgment pending appeal, on which judgment was reversed, with directions to strike out interest allowed and enter judgment as before, less such interest, *held* consent judgment and not appealable; judgment stayed having been affirmed "in part" within stay bond.

Stay bond obligated surety to pay judgment "or any part thereof" in event of affirmance or dismissal of appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Hartley Shaw, and Douglas L. Edmonds, Judges.

Action by Van Lee Hood and others against the Verdugo Lumber Company and another, in which defendants cross-complained. From a corrected judgment for cross-complainants and orders granting their motion therefor and refusing to vacate an order for examination of debtors, plaintiffs appeal, and from a judgment against the Ætna Casualty & Surety Company on a bond, given to stay the original judgment pending appeal therefrom, and an order granting defendant's motion for entry of judgment against such company, it appeals. On motion to dismiss the appeals.

Appeals dismissed.

Van Lee Hood, Tudor Gairdner, Robert E. Austin, and John N. Helmick, all of Los Angeles, for appellants.

Edgar C. Smith, of Los Angeles, for respondent Emil F. Swanson.

Glen Behymer, of Los Angeles, for respondent Verdugo Lumber Co.

G. L. Boltinhouse, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

WASTE, Chief Justice.

Motion to dismiss appeals from certain orders and judgments.

[1] This is an action for an accounting. The defendants Swanson and Verdugo Lumber Company answered and cross-complained. A money judgment was entered in their favor. Upon appeal therefrom the plaintiffs Hood filed a stay bond by the terms of which the Ætna Casualty & Surety Company undertook to pay the judgment or any part thereof in the event of an affirmance or a dismissal of the appeal. The District Court of Appeal, Fourth Appellate District, concluded that the trial court had improperly allowed interest prior to judgment. 127 Cal. App. 133, 15 P.(2d) 542. It thereupon reversed the judgment, with directions to the court below "to strike out the interest allowed, prior to judgment and to enter judgment as before less this interest." After the remittitur had gone down, the cross-complainants moved for a new and corrected judgment in accordance with the directions of the District Court of Appeal. The motion was granted, and judgment was accordingly entered January 19, 1933. New trial proceedings were not instituted. Notice of appeal was filed May 31, 1933, more than sixty days after the entry of the corrected judgment. The purported appeal from the judgment must therefore be dismissed as having been taken after the expiration of the time provided therefor by law.

[2] The attempted appeal from the order granting the motion for the entry of a corrected judgment must also be dismissed. Such an order is nonappealable, the same being reviewable on appeal from the judgment.

[3] Subsequent to the entry of the corrected judgment and after an execution thereon had been returned unsatisfied, the cross-complainants filed an affidavit looking to an examination of the judgment debtors (the plaintiffs Hood) and the surety on the prior appeal bond (the Ætna Casualty & Surety Company) with a view to ascertaining the nature and extent of the property deposited by said debtors with the surety as security for the bond furnished by the latter. The trial court on May 18, 1933, made and filed an order for examination as prayed. On the following day an unsuccessful attempt was made to have the order for examination of debtors vacated and set aside. Hearing was had on the order for examination on May 24, 1933, at which time the parties appeared, were examined and discharged, no order apparently being made relative to the application of any money or property in discharge of the judgment. Inasmuch as the examination has been had and the matter is now moot, the appeal from the order refusing to vacate the order for examination of debtors must be dismissed. Estate of Blythe, 108 Cal. 124, 126, 41 P. 33.

[4] We are next confronted with the appeal of the surety company from a judgment entered against it on the bond theretofore filed by it to stay the original judgment pending the appeal therefrom. In response to the contention that the judgment against the surety was entered pursuant to the terms of the stay bond and was therefore a consent judgment and nonappealable, the appellants contend that the original judgment was not "affirmed" in whole or in part, as required by the bond, but was "reversed," with directions to the trial court to enter a proper judgment omitting therefrom all reference to and allowance of interest prior to judgment. The point is without merit. As indicated above, the District Court of Appeal approved and for present purposes must be held to have affirmed the judgment for principal entered in favor of the cross-complainants and respondents and merely rejected that portion of the judgment awarding interest prior to judgment. Under the directions of the Appellate Court there was no necessity for a retrial of any of the issues. The judgment as originally entered was, in the main, approved. The second judgment complied in all material respects with the directions of the appellate tribunal and, so far as material here, was identical with the original judgment except for the interest item which, pursuant to directions, was deleted. In view of this, we are satisfied that the judgment was affirmed "in part" within the meaning of the stay bond. The judgment against the surety must therefore be held to be a consent judgment and nonappealable.

In the main, the authorities cited by the appellants on this point are distinguishable and contain nothing in conflict with our holding herein. There is, however, language in Chase v. Ries, 10 Cal. 517, from which the appellants might derive some comfort. The opinion in that case is exceedingly brief, and, in the absence of any reference therein to the facts giving rise to the litigation, we are not prepared to say that the decision is contrary to our present holding. The complete decision in the cited case consists of two sentences and reads as follows: "This is an action on an appeal-bond, executed by defendants, conditioned to pay the judgment appealed from, if the same should be affirmed by the Appellate Court. It appears, from the record, that the judgment appealed from was reversed, with directions to the Court below to enter *a different judgment*, consequently no liability attached to defendants under the conditions of the bond."

In the absence of the facts, the italicized portion of the quote might reasonably be interpreted to mean that the judgment directed to be entered varied from and was "different" in material and substantial respects from the judgment originally entered in the trial court. Such is not the situation here confronting us. As pointed out above, the judgment entered in the present case pursuant to the direction of the appellate court was on the merits of the case the same judgment as had been originally entered with the omission of interest prior to judgment. This being so, it must be held that the judgment thereafter entered against the surety on the appeal bond was a consent judgment and nonappealable.

It is also significant to note, and the point is stressed in Heinlen v. Beans, 71 Cal. 295, 298, 299, 12 P. 167, that the bond sued on in Chase v. Ries, supra, was conditioned upon an *affirmance* of the judgment. In the present case the bond was conditioned upon an affirmance of the judgment, "or any part thereof." The facts are therefore dissimilar. As stated above, the original judgment herein was approved and, in effect, affirmed on the merits, the interest item alone being rejected by the Appellate Court.

What has been said necessarily disposes of the purported appeal from the order granting respondents' motion for the entry of judgment against such surety. That order is likewise nonappealable.

The appeals from the several judgments and orders are, and each is, hereby dismissed.

We concur: PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

219 Cal. 548

GOODFELLOW et ux. v. GOODFELLOW et al.

L. A. 12702.

Supreme Court of California.

Dec. 26, 1933.

1. Mortgages ⇐39.

Whether deed to grantee was outright deed of conveyance with verbal option in another to purchase land from grantee for original purchase price *held* for trial court.

2. Mortgages ⇐38(2).

To warrant determination from oral evidence that purported absolute deed was something essentially different, testimony must be clear and conclusive.

3. Mortgages ⇐1.

Mortgage presupposes existence of debt for which conveyance was security.

4. Mortgages ⇐32(5).

Agreement that grantee paying purchase price on behalf of alleged purchaser take deed, and that purchaser could pay grantee purchase price when he was able, *held* insufficient to create indebtedness from purchaser to grantee, so as to constitute deed a mortgage as security for indebtedness.

5. Mortgages ⇐38(1).

Evidence in quiet title action sustained finding that grantee taking deed gave plaintiff, claiming deed was mortgage, option to purchase land at original purchase price, and that option was terminated.

6. Contracts ⇐235.

Where sales contract required payment in money, buyer's obligation to pay may only be satisfied by payment in money unless parties agreed to substitute other medium.

7. Contracts ⇐248.

Whether party to agreement calling for payment in cash agreed to accept payment in different medium *held* for trial court.

8. Appeal and error ⇐1010(1).

Trial court's findings supported by evidence must be upheld by reviewing court.

9. Quieting title ⇐44(3).

Evidence in quiet title action failed to establish acceptance of option to purchase land involved.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by George W. Goodfellow and wife against A. W. Goodfellow and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

For prior opinion, see 21 P.(2d) 634.

Head, Wellington, Jacobs & Scovel and Head, Wellington & Jacobs, all of Santa Ana (Hugh Goodfellow and Thomas Ashby, both of San Francisco, of counsel), for appellants.

B. H. Cory, of Fresno, and Simpson & Simpson and W. E. Simpson, all of Los Angeles, for respondents.

PER CURIAM.

Hearing was granted in this court, after decision by the District Court of Appeal, Fourth Appellate District, for the purpose of giving further consideration to the question of whether or not the finding of the trial court to the effect that the deed was not intended as a mortgage had evidentiary support in the record.

Our examination convinces us that the cause was properly disposed of by the District Court of Appeal in an opinion by Justice Jennings, and we, therefore, adopt that opinion as the decision of this court, as follows:

This action was instituted by plaintiffs to quiet their title to certain real property located in Kings county. The complaint recites that on October 22, 1920, negotiations for the purchase of the land were entered into between plaintiff George W. Goodfellow, and certain parties by the name of Barritt, who then owned the property and that it was agreed that the defendant A. W. Goodfellow would pay to B. F. Barritt the purchase price of the property, being the sum of $1,600 in cash, and that the deed to the property should be made to A. W. Goodfellow as security for the repayment to him of said sum by the plaintiff George W. Goodfellow. It is further alleged that the defendant A. W. Goodfellow specifically agreed with plaintiff George W. Goodfellow that when the sum of $1,600 should be repaid to said defendant the property would be conveyed to the plaintiff George W. Goodfellow and that in reliance upon this promise the said plaintiff permitted the deed to the property to be executed in the name of A. W. Goodfellow as grantee. The pleading alleges that the aforementioned plaintiff and defendant at all times material to the controversy between them were permitted to draw certain moneys from the estate of their father, which estate was in charge of their mother, and that pursuant to this arrangement defendant A. W. Goodfellow caused the account of plaintiff George W. Goodfellow with the estate to be charged with the sum of $1,600 for the purchase of the land and his own account with the estate to be credited with said sum. It is then alleged that from November 6, 1920, until March 26, 1926, defendant A. W. Goodfellow held the property thus conveyed to him in trust for the plaintiff George W. Goodfellow, and that on March 26, 1926, said defendant and his wife conveyed the property to the defendant L. L. Cory; that the conveyance to Cory was without consideration and for the purpose of defrauding plaintiff. The prayer of the complaint is that it be decreed that the deed to the defendant A. W. Goodfellow be declared void and canceled and the deed to Cory likewise ordered canceled and that it be adjudged that the plaintiff George W. Goodfellow is the owner in fee of the land free and clear from any claim of said defendants.

The answer of the defendants A. W. Goodfellow and L. L. Cory admits that negotiations were entered into for the purchase of the land between plaintiff and the Barritts, as alleged in the complaint, but that the plaintiff was unable to comply with the terms agreed upon for the purchase and that by

the mutual agreement of the vendors and the plaintiff and the defendant A. W. Goodfellow the land was actually purchased by A. W. Goodfellow and that with the acquiescence and consent of the plaintiff the deed conveying the land was executed to defendant A. W. Goodfellow as grantee; that the land was purchased by defendant A. W. Goodfellow, who paid the purchase price therefor for his sole use and benefit and not upon the understanding or agreement that the deed to the land was to be made to said defendant as security for the repayment to him by the plaintiff of the purchase price; that at the time the land was so purchased by said defendant A. W. Goodfellow he gave to the plaintiff a verbal option to purchase the land, which option was without consideration and revocable by said defendant and was thereafter and prior to the commencement of the action revoked by defendant A. W. Goodfellow and by mutual consent of plaintiff and said defendant was terminated; that the defendant A. W. Goodfellow did not charge the sum of $1,600, being the purchase price of the land, to the account of plaintiff with the estate of the father of plaintiff and said defendant nor did he credit his account with said estate with such amount; that on March 26, 1926, the defendants A. W. Goodfellow and Katherine C. Goodfellow, in good faith and for a valuable consideration, executed and delivered to defendant L. L. Cory a deed to the said land, which deed was executed without knowledge or notice on the part of the grantors or grantee that plaintiff George W. Goodfellow had any right, title, interest, or claim in the said property.

Upon the issues framed by the aforementioned pleadings the action proceeded to trial. Upon the conclusion of the trial the court found that the land was purchased by the defendant A. W. Goodfellow for his sole use and benefit and that the deed conveying the land to said defendant was not delivered to him as security for the repayment of the purchase price of $1,600 by the plaintiff George W. Goodfellow or that said plaintiff agreed to pay to said defendant the sum of $1,600 or that defendant A. W. Goodfellow agreed to pay the purchase price of $1,600 upon the understanding or agreement that the deed to defendant A. W. Goodfellow was to be made as security for the repayment to said defendant of said sum by the plaintiff George W. Goodfellow. The court further found that at the time the deed was executed and delivered to the defendant A. W. Goodfellow said defendant granted to the plaintiff George W. Goodfellow a verbal option to purchase the land from him, which option was without any consideration and was revocable at the pleasure of said defendant and that thereafter and prior to the commencement of the action the option was repudiated by the plaintiff George W. Goodfellow and by mutual consent of the said parties was canceled and annulled. The court further found that on March 26, 1926, the defendants A. W. Goodfellow and Katherine C. Goodfellow, in good faith and for a valuable consideration, executed a deed conveying the property to the defendant L. L. Cory, which deed was made with knowledge on the part of plaintiff George W. Goodfellow that it was executed for a valuable consideration and without knowledge or notice on the part of the defendants that said plaintiff had or claimed to have any right, title, claim, or interest in or to said property. It is also found that the plaintiffs have not nor has either of them any right, title, or interest in or to said property. From the findings thus made the court drew the conclusion that the plaintiffs were not entitled to succeed and rendered judgment accordingly in favor of the defendants. From this judgment plaintiffs have prosecuted the present appeal.

The principal contention presented by appellants which they claim warrants a reversal of the judgment is the familiar contention that the findings which form the basis for the judgment are not sufficiently supported by the evidence. To be more explicit, it is particularly urged that the court's finding that the respondent A. W. Goodfellow purchased the property for his own use and benefit and that the deed conveying the land to him was not delivered to him as security for the payment by appellant George W. Goodfellow of the amount paid by A. W. Goodfellow as the purchase price of the land is lacking in evidentiary support.

In the final analysis the evidence respecting the sale of the land and the circumstances under which the deed was made and delivered to A. W. Goodfellow rests entirely upon the testimony of appellant George W. Goodfellow and respondent A. W. Goodfellow. The testimony of these witnesses with respect to what was agreed upon between them is irreconcilably conflicting. Appellant George W. Goodfellow testified that at the time he made the oral agreement with the owner of the land to purchase it the vendor insisted that he be paid for it in cash, that appellant replied he could not pay all cash, and that respondent A. W. Goodfellow, who was present, stated that the deed to the land could be made to him as grantee and that appellant could pay him "when he gets it." It is undisputed that the purchase price of $1,600 was paid by respondent A. W. Goodfellow. Appellant George W. Goodfellow further testified that in the year 1926, after he had been advised that A. W. Goodfellow had conveyed the land to L. L. Cory, he demanded of A. W. Goodfellow that he execute a deed to the land to appellant. Respondent A. W. Goodfellow testified that at the time the oral agreement for the purchase of the land was made between B. F. Barritt, the owner, and appellant George W. Goodfellow, the latter did not have the money to pay for the

land and that the witness stated to the vendor, "Well I will purchase this one hundred sixty acres of land from you and you give me a deed to the land in my name," and that he stated to appellant George W. Goodfellow, "I will buy this one hundred sixty acres of land and I will give you an option to buy it from me at what I have paid for it." This witness further testified that he thereupon permitted the appellant to have the use of the land and that appellant in return therefor agreed to pay the taxes, that in the year 1925 it was brought to his attention that certain taxes assessed upon the land had not been paid by appellant, and that he then stated to appellant that he would pay the taxes that had become delinquent and that he then and there terminated the verbal option he had given appellant to purchase the land from him. It is undisputed that appellant George W. Goodfellow did have the use of the land from the time the deed conveying it to A. W. Goodfellow was executed until the year 1925 and that he agreed to pay the taxes assessed against the land and that he did pay the taxes with the exception of one instalment for the year 1925 which was allowed to become delinquent and that A. W. Goodfellow paid the delinquent taxes and redeemed the land.

[1] From the aforesaid evidence it was incumbent upon the trial court to determine whether the deed conveying the land to respondent A. W. Goodfellow was intended to operate as a mortgage securing the payment of the purchase price of the land or whether it was what it showed on its face, a deed outright vesting title in the grantee, and that the parties interested, to wit, respondent A. W. Goodfellow and appellant George W. Goodfellow, intended that the latter should have merely a verbal option to purchase the land at some future time upon payment by appellant to respondent of the sum paid by the latter as the purchase price. Certainly so far as the latter theory is concerned there was evidence produced which justified the court in adopting it and in arriving at the conclusion that the deed was what it purported to be, an outright deed of conveyance, and that respondent and appellant so considered it and further intended that appellant should have a verbal option to purchase the land from respondent at the price originally paid therefor.

[2] That the court's determination of the question of fact thus presented was justified upon the conflicting testimony above mentioned is rendered the more certain when it is borne in mind that it is well settled that to warrant a trial court in determining from oral testimony that a deed purporting to convey land absolutely in fee simple is in reality something essentially different, viz., a mortgage or trust, such testimony must be clear, convincing, and conclusive. Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Stevens v. Fetterman, 76 Cal. App. 741, 246 P. 102.

[3-5] It may be observed that the trial court would have encountered further difficulty in sustaining the contention of appellants that the deed to A. W. Goodfellow, although in form a deed absolute, was in reality a mortgage, since a mortgage presupposes the existence of a debt for which the conveyance was security. Henley v. Hotaling, 41 Cal. 22; Holmes v. Warren, 145 Cal. 457, 78 P. 954. The testimony of appellant George W. Goodfellow was that A. W. Goodfellow said that the deed could be made to him and that appellant could pay him when "he gets it." Assuming that the trial court accepted this testimony as a true and correct statement of what was said by A. W. Goodfellow at the time the deed was executed to him, so vague, uncertain, and indefinite an agreement could hardly be held sufficient to create an indebtedness from George W. Goodfellow to A. W. Goodfellow. Had the latter instituted an action against the former to enforce collection of the amount paid as the purchase price and sought to foreclose the mortgage on the theory that the deed was a mortgage and the evidence showed that the agreement was in accordance with appellant's testimony the burden would have rested upon respondent to prove that appellant was in fact able to make payment. Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932; California Prune, etc., Growers v. Baker, 77 Cal. App. 393, 397, 246 P. 1081. It is also significant that appellant George W. Goodfellow did not testify that he expressed his assent to the statement attributed to A. W. Goodfellow that appellant could pay him when he should become able to do so. We think the court was amply warranted in accepting the testimony of the respondent A. W. Goodfellow that he gave appellant a verbal option to purchase the land conveyed to him and that the option was terminated by A. W. Goodfellow prior to the institution of this action.

Some consideration should be given to the contention of appellants that respondent A. W. Goodfellow had in fact received payment of the sum originally paid by him as the purchase price of the land prior to the institution of this action, and that therefore, accepting as correct his version of the agreement between the parties, viz., that he granted to appellant George W. Goodfellow an option to purchase the land at the original purchase price, appellants are nevertheless entitled to the relief demanded in their complaint.

The record shows that George W. Goodfellow and A. W. Goodfellow are brothers and that for some considerable period of time

prior to the commencement of this action loans of money were made to both brothers by their mother, Alice R. Goodfellow, and that in the books of the mother an account was carried in the name of each brother in which were entered the various amounts advanced from time to time to the debtor as well as such items of credit as he was entitled to receive. The record further shows that a short time subsequent to the purchase of the land the title to which is here in controversy, A. W. Goodfellow's bookkeeper charged George W. Goodfellow's account with the amount paid by A. W. Goodfellow as the purchase price of the land and forwarded to the office of Alice R. Goodfellow in San Francisco a schedule of items which were to be charged to the account of George W. Goodfellow, in which there was one item of $1,600 representing the price paid for the land and that as a consequence the indebtedness of George W. Goodfellow to Alice R. Goodfellow as shown by the latter's books was increased by this amount and the indebtedness of A. W. Goodfellow to Alice R. Goodfellow was decreased by the same amount. A. W. Goodfellow testified that he did not learn that George W. Goodfellow's account on his books was charged with the amount paid by him for the land or that this amount formed one of the items forwarded by his bookkeeper to the office of Alice R. Goodfellow in San Francisco until the year 1926. The record contains no evidence that Alice R. Goodfellow knew that such an entry was to be made or that she approved or consented to it after it was made. A. W. Goodfellow also testified that the transaction whereby he paid the purchase price of the land was a cash transaction "which he was supposed to pay me in cash."

[6-9] The principle is well established that where a contract for the sale of property is entered into and it appears that the terms of such contract require payment to be made in money the obligation of the purchaser to pay may only be satisfied by payment in money unless the parties to the contract agree that some other medium of payment shall be substituted therefor. Borland v. Nevada Bank, 99 Cal. 89, 33 P. 737, 37 Am. St. Rep. 32; First National Bank v. Corcoran, 105 Cal. App. 116, 286 P. 1105; Margolis v. Los Angeles-First Nat., etc., Bank, 122 Cal. App. 186, 9 P.(2d) 526. As above noted, there was evidence that the agreement between respondent A. W. Goodfellow and appellant George W. Goodfellow called for payment by the latter to the former in cash and it was for the trial court to determine whether the evidence showed that A. W. Goodfellow ever agreed or consented to accept a different medium of payment than cash. The court's findings make it clear that the trier of facts accepted the testimony of A. W. Goodfellow as the correct explanation of the transaction between the brothers, and under the circumstances disclosed by the record we cannot declare that the court erred in so doing. It must again be observed in this regard that the court specifically found that the deed from Barritt to A. W. Goodfellow was not executed pursuant to an agreement between the brothers that it should be held by the grantee as security for the payment to him by George W. Goodfellow of the amount of the original purchase price or that A. W. Goodfellow held title to the land in trust for George W. Goodfellow but that A. W. Goodfellow purchased the land for his own use and benefit and merely granted to his brother, George, a verbal option to buy the land from him at the price which he had paid for it which option was entirely unsupported by any consideration and revocable at the pleasure of said respondent. The court also found that the option thus given was terminated by A. W. Goodfellow prior to the institution of this action. As heretofore pointed out, there was evidence to support the findings thus made and we are therefore bound to uphold them. The contention of appellants that the entries in the books of Alice R. Goodfellow whereby the indebtedness of George W. Goodfellow to his mother was increased in the amount of $1,600 and the indebtedness of A. W. Goodfellow was decreased by a like amount amounted to payment of the sum of $1,600 without any additional evidence that George W. Goodfellow ever exercised the option to purchase the land was in conformity with the theory and contention consistently advanced by appellants throughout the trial that the two brothers agreed at the time the deed was executed that A. W. Goodfellow should take title to the land and hold the same as security for the payment to him of an indebtedness of $1,600 then created in his favor by George W. Goodfellow. There was evidence, however, which warranted the court in finding that there was no such agreement between the brothers and that no such indebtedness was created. The purported payment made in the manner above indicated standing alone could hardly be said to discharge an obligation which never existed.

Our conclusion that the court's findings with respect to the nature of the transaction between George W. Goodfellow and A. W. Goodfellow and that the deed to the latter was not given as security for the payment of the purchase price of the land are not lacking in evidentiary support eliminates the necessity for any consideration of those findings which relate to the position of the respondents Carolyn A. Cory as executrix and Benjamin H. Cory as executor of the last will and testament of L. L. Cory, deceased. Since there was evidence that A. W. Goodfellow purchased the property for himself and merely granted an option for its sale to George W. Goodfellow which was terminated prior to the time when A. W. Goodfellow ex-

ecuted the deed conveying the land to L. L. Cory, no question can arise as to the good faith or knowledge of L. L. Cory or the consideration paid by L. L. Cory to A. W. Goodfellow and Katherine C. Goodfellow.

Judgment affirmed.

219 Cal. 589

HOLVE v. MYERS, Controller.

S. F. 14943.

Supreme Court of California.

Dec. 29, 1933.

Municipal corporations ⇐244(1).

Purchase of materials payable out of water revenue fund of Los Angeles could be made without city purchasing agent's approval, though expenditure exceeded $1,000.

Purchases of materials and supplies payable out of water revenue fund could be made without approval of purchasing agent, since Los Angeles Charter, § 391, subd. 1, requiring purchasing agent's approval for purchase of materials and supplies involving expenditure of less than $1,000, makes certain exceptions including purchases payable out of water revenue fund, and the words "all such purchases," as used in subdivision 2, providing that all such purchases involving an expenditure in excess of $1,000 should be made only on approval of city purchasing agent, disclosed that the exceptions and exemptions contained in first subdivision should be read into and carried over to the second subdivision.

In Bank.

Mandamus proceeding by William Holve against John S. Myers, as Controller of the City of Los Angeles.

Writ granted.

Leslie R. Hewitt and Hewitt & Perkins, all of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., and Loren A. Butts, Asst. City Atty., both of Los Angeles, for respondent.

WASTE, Chief Justice.

This is a proceeding in mandamus to compel the respondent, as controller of the city of Los Angeles, to approve a demand, duly assigned to petitioner, drawn on the water revenue fund of said city in the sum of $1,092.70. The demand represents the purchase price of certain water meters furnished by petitioner's assignor to the bureau of waterworks and supply. Respondent has demurred generally to the petition, urging that under the provisions of the charter of the city of Los Angeles it is essential, where purchases of materials and supplies in excess of $1,000 are involved, that requisitions, specifications, and authorizations for such purchases be first submitted to and approved by the city purchasing agent. Petitioner contends that purchases made by the bureau of waterworks and supply or by the bureau of power and light, constituting, together, the department of water and power, are exempt from the charter provisions requiring the approval of the city purchasing agent. In support thereof petitioner urges that the department of water and power has been given authority to control expenditures from the water revenue fund and the power revenue fund, the funds from the former fund being available for "necessary expenses of operating and maintaining" the municipal waterworks and for "constructing, extending and improving such works." Charter, §§ 220, 221. The charter further provides that all moneys pertaining to the waterworks are to be kept in the city treasury separate and apart from other moneys of the city and in a fund to be known as the water revenue fund, to be drawn from said fund upon demands authenticated by the signature of the chief accounting employee of the department. From this, petitioner argues that the department of water and power is, in effect, autonomous within its sphere and may disperse its own funds for materials and supplies without first seeking and procuring the approval of the city purchasing agent.

The purchase here involved was duly authorized and approved by the department of water and power and the demand involved has been approved by the chief accounting employee of that department.

The parties concede that the disposition of this proceeding turns on the construction to be given to section 391 of the charter, which reads:

"(1) All purchases of materials or supplies involving an expenditure of one thousand dollars ($1000.00) or less, required for any board, officer or employee of the city, excepting purchases requiring payment from the harbor revenue fund, the library fund, the power revenue fund or the water revenue fund, or from any bond funds controlled by the harbor, library or water and power departments, shall be made from the lowest responsible bidder, by the Purchasing Agent of the city, upon requisition delivered to him and signed by the department, officer or employee for whom the purchase is to be made.

"(2) All such purchases involving an expenditure in excess of one thousand dollars ($1000.00) shall be made from the lowest responsible bidder by the Purchasing Agent

upon such said requisition, provided that in this case the specifications on which bids were asked must first have been approved by the Purchasing Agent and also by the department, officer or employee for whom the purchase is being made, or in lieu of the latter, by the director of the Bureau of Budget and Efficiency and provided further, that the acceptance of any bid in such case shall be approved by the Purchasing Agent and also by the department, officer or employee for whom the purchase is being made, or in lieu of the latter, by the Director of the Bureau of Budget and Efficiency."

Subdivision 1 of the section is clear. It requires, with certain exceptions, that all city purchases of materials and supplies involving an expenditure of $1,000 or less be made from the lowest responsible bidder by the purchasing agent of the city, upon requisition delivered to him, signed by the department officer or employee for whom the purchase is to be made. This subdivision definitely exempts from its provisions purchases of $1,000 or less requiring payment from the power revenue fund or the water revenue fund.

Subdivision 2 is less definite. We have considered the varying constructions contended for by the parties with respect thereto and have concluded that the equivocal language, "all such purchases," appearing at the beginning of subdivision 2, has reference to all purchases of materials and supplies, involving an expenditure in excess of $1,000, made by the several boards or departments of the city government *other than the departments excepted in subdivision 1 of the section*, thus excluding from the operation of subdivision 2 all purchases of materials and supplies payable out of the water revenue fund or the other special funds specifically designated in subdivision 1. In other words, we are of the opinion that section 391 undertakes to regulate and operate upon one class of purchases, common to both subdivisions, i. e., purchases for any board, officer, or employee of the city, exclusive of the departments designated in the "excepting" clause of subdivision 1 of the section, which excluded departments are elsewhere in the charter given control of their own special or specific funds.

This construction is borne out by the parallel structure of the opening clauses of the two subdivisions which, to briefly repeat, read as follows:

"(1) All purchases of materials or supplies involving an expenditure of one thousand dollars ($1000.00) or less, required for any board, * * * [with exceptions above mentioned], shall be made * * * by the Purchasing Agent * * * upon requisition. * * *"

"(2) All such purchases involving an expenditure in excess of one thousand dollars ($1000.00) shall be made * * * by the Purchasing Agent upon *such* said requisition, provided that in this case [where the amount exceeds $1000]" the specifications and bid must first have been approved by the city purchasing agent.

The introductory language of these two subdivisions is such as to immediately suggest that the exceptions and exemptions contained in the first must be read into and carried over to the second.

Respondent's demurrer is therefore overruled, and the alternative writ heretofore issued is made peremptory.

We concur: SHENK, J.; THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

219 Cal. 538

WEIL v. CALIFORNIA BANK.

L. A. 13204.

Supreme Court of California.

Dec. 21, 1933.

Rehearing Denied Jan. 18, 1934.

1. Trial ⇐136(3).

Whether writing is upon face complete expression of agreement is question of law for court in determining admissibility of parol evidence.

2. Evidence ⇐419(11).

Determination that writing did not constitute entire agreement of parties because of stipulation that certain expressed consideration was only part of consideration, and therefore that parol evidence was admissible to show further consideration, *held* not error.

3. Contracts ⇐155.

Uncertainty in contract is resolved and language construed most strongly against party whose officer prepared agreement and caused uncertainty to exist (Civ. Code, § 1654).

4. Evidence ⇐419(11).

When agreement does not express entire agreement of parties and proof by parol of additional consideration does not defeat legal operation thereof, such proof is admissible.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Malwina Z. Weil against California Bank. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 22 P.(2d) 732.

William B. Himrod, Swanwick, Donnelly & Proudfit, R. W. Proudfit, and Donald O. Welton, all of Los Angeles, for appellant.

Leo Freund and George Appell, both of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a judgment for the plaintiff in an action for an accounting.

The plaintiff was the owner, as her separate estate, of certain apartment house property in the Pellissier tract in the city of Los Angeles. Her title was subject to a first trust deed in the sum of $40,000 and a second trust deed of $16,100. The second trust deed was in the process of foreclosure. The defendant theretofore had recovered and was the owner of a judgment against the plaintiff's husband in the sum of $5,643.91, the payment of which was being demanded by the defendant at the time said foreclosure proceedings were pending. After negotiations between the parties hereto the plaintiff agreed to convey her equity in the apartment house property to the defendant subject to said deeds of trust. The defendant agreed to satisfy the judgment against Mr. Weil and, as "a part of the consideration" for the plaintiff's deed, to permit the plaintiff to occupy one of the apartments for about three months thereafter. The entire agreement of the parties is claimed by the defendant to be evidenced by a letter prepared by an officer of the defendant, addressed to the defendant, and signed by the plaintiff and her husband, setting forth certain terms of an offer to the defendant. This offer was accepted by the defendant by written indorsement appended to the letter. Pursuant to this agreement the plaintiff's deed was filed for record by the defendant and said judgment was satisfied of record. Thereafter the defendant disposed of said real property at a profit in the transaction, so the court found, of $4,076.

This action was based upon an alleged oral agreement entered into shortly before the signing of the aforementioned letter and said acceptance, under the terms of which oral agreement the defendant undertook to pay to the plaintiff whatever profit it might realize from the deal after deducting its investment therein.

The defendant objected to the introduction of any evidence of the alleged oral agreement on the ground that the entire agreement of the parties had been incorporated into the writing, and that the same superseded all negotiations or stipulations concerning the matter which preceded or accompanied the executing of the writing.

The plaintiff contended that the writing did not purport to be the entire agreement of the parties, in that the same on its face did not express the entire consideration for the execution of the deed, or at least that an uncertainty existed therein sufficient to permit proof of further consideration by parol.

The trial court approved the position of the plaintiff, overruled the objection, received evidence of the parol agreement, found in the plaintiff's favor thereon, and entered judgment accordingly. The alleged error of the court in permitting proof of said oral agreement is the principal ground of the appeal.

[1-4] The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court. Thoroman v. David, 199 Cal. 386, 249 P. 513; Harrison v. McCormick, 89 Cal. 327, 26 P. 830, 23 Am. St. Rep. 469. The trial court interpreted the writing as not constituting the entire agreement of the parties by reason of the stipulation that certain expressed consideration was only "a part of the consideration" for the deed. While the question is a close one, we are not prepared to say that the court's interpretation was not reasonably justified. At least the use of the language in the contract may be said to be uncertain as to what constituted the entire consideration. This uncertainty is to be resolved and the language is to be construed most strongly against the defendant, whose officer prepared the agreement and caused the uncertainty to exist. Payne v. Neuval, 155 Cal. 46, 99 P. 476; 13 C. J., p. 5451; section 1654, Civ. Code. It is unnecessary therefore to discuss the argument of counsel on the question as to whether the case falls within the exception to the general rule, which exception authorizes, under certain circumstances, the proof by parol of consideration for an agreement. This case is governed by the rule that when the agreement does not express the entire agreement of the parties, and proof by parol of the additional consideration does not in any way defeat the legal operation of the agreement, such proof is admissible. See Hendrick v. Crowley, 31 Cal. 472; Arnold v. Arnold, 137 Cal. 291, 70 P. 23.

The evidence bearing upon the existence of the parol agreement was sharply conflicting. There is ample in the record to support the finding of the trial court that the agreement was made as alleged and that the terms thereof were as found by the court.

The defendant also urges that the court erred in admitting evidence of certain witnesses as to the value of the real property, asserting in that behalf that said witnesses did not show the qualifications necessary to enable them to testify as experts. Their testimony on direct examination was sufficient, prima facie, to qualify them and the defendant did not seek on cross-examination, immediately, to test their qualifications. The ob-

jections urged go rather to the weight than to the admissibility of the evidence. It cannot be said that the court abused its discretion in admitting it.

Other points presented by the defendants do not require discussion.

The judgment is affirmed.

219 Cal. 522

PEOPLE v. CRAVEN.

Cr. 3660.

Supreme Court of California.

Dec. 15, 1933.

1. Licenses ⇐18½.

Certificates sold by defendant which represented fractional interest in oil and gas leases *held* "securities" within Corporate Securities Act, requiring permit from corporation commissioner to sell securities (St. 1917, p. 673, § 2 (a) (3, 6, 7), as amended by St. 1929, p. 1251; St. 1917, p. 673, § 2, par. 8 (a), as amended by St. 1925, p. 964).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

2. Licenses ⇐18½.

Purpose of act penalizing issuance of stock without permit from corporation commissioner is to protect public against purchase of spurious and worthless securities (St. 1917, p. 673, § 2, as amended by St. 1923, p. 87, § 1).

3. Licenses ⇐18½.

Issuance by defendant of certificates representing fractional interest in oil and gas leases, without permit from corporation commissioner, *held* to violate Corporate Securities Act (St. 1917, p. 673, § 2 (a) (3, 6, 7), as amended by St. 1929, p. 1251; St. 1917, p. 673, § 2, par. 8 (a), as amended by St. 1925, p. 964; St. 1917, p. 673, § 2, as amended by St. 1923, p. 87, § 1; St. 1917, p. 675, § 3).

4. Constitutional law ⇐70(1).

Courts cannot interfere with exercise of jurisdiction of Legislature so long as it keeps within its constitutional restraints.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

J. M. Craven was convicted of violating the Corporate Securities Act, and he appeals.

Affirmed.

Prior opinion, 21 P.(2d) 459.

Rex B. Goodcell, Manley C. Davidson, and Joseph H. Grossman, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., and Seibert L. Sefton and Ralph O. Marron, Deputy Attys. Gen., for the People.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., amici curiæ for Commissioner of Corporations.

CURTIS, Justice.

The defendant was indicted for the violation of the Corporate Securities Act in that he sold interests in oil and gas leases without a permit from the corporation commissioner. The indictment contains seven counts, and he was found guilty upon five of such counts, namely, counts I, II, V, VI, and VII. The defendant stipulated that he knowingly sold and issued the certificates of interest in the oil and gas leases in question and that he had not secured a permit therefor from the commissioner of corporations. The five certificates of interest in the oil and gas leases sold by the defendant were similar in form and substance. They all recited that the defendant is the owner of an oil and gas mining lease covering certain land described therein, and that for the consideration of $1 the defendant sold and conveyed to the purchaser a fractional interest in the oil and gas produced and saved from said land. Under each of the five counts it was shown that the defendant had secured a lease upon certain supposedly oil-bearing lands, under which he was entitled to receive seven-sixteenths of all oil and gas produced and saved on the leased property, and in each of said certificates issued and sold by defendant, the interest sold was described as a fractional interest in and to seven-sixteenths of all oil and gas saved and produced from said real property. It was stipulated that the interests sold under counts V, VI, and VII were in property yet undeveloped for oil and gas. The case was tried by the court without a jury, and resulted, as stated above, that defendant was found guilty on five of the counts of said indictment. Defendant has appealed.

The defense of the defendant as to all of said charges was and is that he was the owner of the leasehold in question in which he sold and issued certificates of fractional interests, and that said sales were made by him as an individual, and that the Corporate Securities Act either regulating or prohibiting sales of that character is unconstitutional, and for that reason said act is to that extent void.

It might be well to briefly refer to certain provisions of the Corporate Securities Act which the prosecution relies upon as applying to and governing the question presented herein.

The sales involved in count I and II were made in the year 1930, and were therefore subject to the provision of the act as amended in 1929 (Stats. 1929, p. 1251). Subdivision 7 of paragraph (a) of section 2 of said act, as amended in 1929, provided as follows: "The word 'security' shall include any * * * certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining lease * * * or beneficial interest in title to property, profits or earnings."

The sales involved in the three other counts were made in June, 1929, and were subject to the provisions of the Corporate Securities Act as amended in 1925 (Stats. 1925, pp. 962, 964). Paragraph 8 of section 2 of the act, as amended in 1925, provided as follows: "The word 'security,' in so far as it applies to 'individuals,' includes : (a) Any instrument offered to the public by an 'individual' evidencing or representing any right to participate or share in oil, gas or other hydrocarbon substances or other minerals of any sort, as yet undeveloped, or in the proceeds of sale thereof."

[1] Under either of these provisions of the statute, there can be no question but that the certificates of interest sold by the defendant were securities. We do not understand that the defendant contends otherwise. His defense is based upon the contention that the property sold by him, as represented by these certificates, was his individual property, and that the provisions of the Corporate Securities Act prohibiting an individual from disposing of his own property is unconstitutional and void. These provisions of the act are section 3 (Stats. 1917, pp. 673, 675) and subdivisions 3 and 6 of paragraph (a) of section 2 (Stats. 1929, p. 1251), and read as follows: "Sec. 3. No company shall sell * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner [of corporations] a permit authorizing it so to do." "Sec. 2. (a) * * * 3. The word 'company' includes all domestic and foreign private corporations * * * and partnerships of every kind, trustees as hereinafter defined, and also individuals as hereinafter defined." "Sec. 2. (a) * * * 6. The word 'individual' in so far as it is included in the definition of a 'company,' includes only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security of their own issue."

[2] Under these sections of the act it is clear that an individual, as well as a company or corporation, is prohibited from selling or negotiating for the sale of any security of his own issue. The evidence in the case clearly shows that the certificates of interest in the leases which were sold by defendant were of his own issue; he having executed and delivered said certificates as completely and effectively as a corporation would issue its shares of stock. There would have been no practical difference in so far as the transaction might affect the public had the defendant formed a corporation, sold to it his leases in exchange for its stock, and then sold this stock without securing a permit. This was the course followed by the defendant in People v. Smith, 111 Cal. App. 177, 295 P. 105, which was held to be a direct violation of the penal provisions of the Corporate Securities Act. The purpose of this act is to protect the public against the purchase of spurious and worthless securities, and, to make it more effective, the Legislature in 1923 extended the scope of its provisions to include individuals as well as organizations of individuals such as copartnerships, joint-stock companies, and corporations (Stats. 1923, p. 87, § 1). Defendant contends that in doing so the Legislature exceeded its powers and thereby infringed upon the constitutional rights of persons to freely enjoy, possess, and dispose of property acquired or owned by them. Defendant relies in support of this contention upon the following authorities: People v. Pace, 73 Cal. App. 548, 238 P. 1089, People v. Lesser, 123 Cal. App. 489, 11 P.(2d) 668, and Buttrick v. Seines, 209 Cal. 567, 289 P. 616. These cases are not controlling, as we will proceed to show. The first two cases relied upon by defendant involved the sale of stock in a corporation by the defendants who individually owned said stock, and who sold the same without securing a broker's license to make such sale. While the provisions of the Corporate Securities Act (Stats. 1923, p. 87; Stats. 1929, p. 1251) in effect at the date of said respective sales required an individual to secure such a license before selling his personally owned securities, the sections contained an express exception providing that any owner of any security who was not the issuer or underwriter thereof was excepted from the provisions of said section. In neither of these two cases was the defendant either the issuer or the underwriter of the shares of stock which he was charged with selling. He had simply purchased the stock in the usual and ordinary course of business, and was proceeding to sell the same in the same manner in which he had acquired it. The court in neither of those cases decided that an issuer of securities, even though he was the bona fide owner of the same, was not subject to the requirements of the Corporate Securities Act, requiring that such owner should secure a broker's license before making sale of such securities, as no such case was before the court on either occasion. It is true that the court in the opinion in each of those two cases had much to say regarding the constitutionality of an act which would require a bona fide owner of securities to secure a broker's license before he could legally sell the same, but, in our opinion, what was said by the court in that regard was not

necessary to the decision in either case, nor was it applicable to the facts then before the court.

[3] The decision in Buttrick v. Seines, supra, involved the sale of a security by an owner who was also an issuer without securing a permit so to do. But this sale was made under the 1917 Corporate Securities Act, and, as we have seen, it was not until 1923 that an individual issuer of securities was required to secure a permit from the corporation commissioner before he could make a legal sale of his securities. It is true that in the opinion in Buttrick v. Seines, supra, the case of People v. Pace, supra, was cited in support of the proposition of law that the defendant in that case was not guilty of any violation of the Corporate Securities Act by transferring a fractional interest therein without securing from the corporation commissioner a permit to make such a transfer. As the opinion points out, the transfer involved therein was made under the law then in effect which was passed in 1917, and which did not require an individual issuer of securities to secure a permit to make transfers thereof. All that Buttrick v. Seines holds is that, under the law in effect at the date of the sale involved therein, an individual issuer of a security was not required to secure a permit from the commissioner of corporations before he could legally sell such a security, for the reason that the law as then in force did not apply to individual issuers of security. These cases upon which the appellant relies, therefore, have no application, and are in no manner controlling the case now before us. On the other hand, there are decisions in this state directly in point which sustain the provisions of the Corporate Securities Act requiring an owner who is also an issuer of securities to secure a permit from the corporation commissioner before he can legally sell or negotiate the sale of such securities. We refer to the following decisions of the District Court of Appeal: People v. Smith, supra; Black v. Solano Co., 114 Cal. App. 170, 299 P. 843; People v. Shafer, 130 Cal. App. 74, 19 P.(2d) 861, and People v. Claggett, 130 Cal. App. 141, 19 P.(2d) 805. It is not necessary for us to analyze any of these last-mentioned cases, nor to quote any express language from any of them. A reading of them will convince the most casual that they are directly applicable to the facts before us. We are in perfect accord with the conclusion reached therein, and, in our opinion, the principles so announced should control the decision of the present case.

[4] The defendant has indulged in certain criticism of the Corporate Securities Act, and has endeavored to show that its general purpose is opposed to the free exercise of the property rights of the individual and that its provisions are oppressive and burdensome. With the policy of the law, the courts are not concerned. It is the exclusive jurisdiction of another department of government to determine the character and scope of the laws by which we are governed, and, so long as that department keeps within its constitutional restraints, the courts are without power or right to interfere with the exercise of that jurisdiction.

We might answer these criticisms of counsel and close the opinion with the following observation from the Supreme Court of the United States relative to the purposes of legislation of this character, and of the evils it is designed to correct: "It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed; that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of "blue sky;"' or, as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations.' Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government, and that the appreciation of the consequences of it is not open for our review." Hall v. Geiger-Jones Co., 242 U. S. 539, 550, 37 S. Ct. 217, 220, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; IRA F. THOMPSON, J.

219 Cal. 562

PEOPLE v. DAY.

Cr. 3654.

Supreme Court of California.

Dec. 26, 1933.

1. Criminal law ⇐539(1).

In prosecution for contributing to delinquency of minor, admitting deposition of prosecuting witness taken at preliminary examination *held* not error, where it appeared that she did not intend to testify at trial (Pen. Code, § 686).

2. Witnesses ⇐19.

Where prosecuting witness notified deputy district attorney that she did not intend to testify in prosecution for contributing to delinquency of minor, district attorney was not bound to proceed under statute providing for bond to insure appearance of witness (Pen. Code, § 879).

In Bank.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Olive Clark Day was convicted of contributing to the delinquency of a minor, and she appeals.

Affirmed.

Prior opinion, 20 P.(2d) 753.

Lorrin Andrews and Edward Moran, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary and Frank Richards, Deputy Attys. Gen., and Buron Fitts, Dist. Atty., and Jeu J. Sullivan and Tracy Chatfield Becker, Deputy Dist. Attys., all of Los Angeles, for the People.

SHENK, Justice.

This is an appeal from a judgment of conviction and from an order denying a motion for a new trial in an action charging the defendant with the offense of contributing to the delinquency of a minor.

[1] The principal point argued as a ground of reversal is the alleged error of the trial court in admitting in evidence, in the absence of the prosecuting witness, the testimony of said witness taken at the preliminary examination.

The action was twice tried. A judgment of conviction following the first trial was reversed for reasons not involved in the present appeal. See People v. Day, 125 Cal. App. 106, 13 P.(2d) 855. On September 8, 1932, the court made an order resetting the cause for trial on Friday, October 14, 1932. On September 12, 1932, the prosecuting witness was personally served with a subpœna to appear at the trial to be commenced on October 14. On the day last mentioned, after the jury had been sworn to try the cause, it appeared that the prosecuting witness was not present; whereupon the prosecution offered to read in evidence the testimony of the prosecuting witness taken at the preliminary examination of the defendant. To this offer the defendant objected on the ground that the statutory requirement of due diligence had not been shown. At the request of the prosecution, the court therefore issued a bench warrant for the absent witness and continued the trial to the following Monday. On Monday morning, in the absence of the jury, the prosecution proceeded to lay the foundation for the introduction of the deposition of the absent witness as required by section 686 of the Penal Code. In this behalf there was ample evidence on which the court could find and conclude that the witness had left the apartment with her husband on October 11, 1932, had started by automobile for Mount Vernon, Wash., where the mother of the husband resided, and that in all probability the witness was, at the time of the hearing, without the state of California. Such a finding is necessarily implied from the order made by the court, and was tantamount to a finding that the witness could not "with due diligence be found within this state."

The defendant grounds her claim of error mainly on the following facts: When the cause was called on September 8, 1932, to be set for trial, the attorney for the defendant stated to the court that he had been informed that the prosecuting witness was then within the jurisdiction of the court, but that he believed she would not testify in the case and would attempt to escape from the jurisdiction, and that in such case she should be restrained by the prosecution so that her presence at the trial might be assured. The court made no order with reference to the statements of counsel for the defendant other than to order the cause set down for trial on October 14th. At the hearing on October 17th, with reference to the question whether the deposition should be admitted, it developed that the witness had written a letter to a judge of said court (not the judge who set the cause for trial, nor the judge who presided at the trial), and a similar letter to the deputy district attorney in charge of the case to the effect that she (the witness) did not intend to testify at the trial. These letters were received by the addressees on October 11th, three days before the trial was to commence.

It appears to be the position of counsel for the defendant that the trial court should have insured the appearance of the witness at the trial pursuant to an order provided for in section 879 of the Penal Code; but it is conceded by counsel for the defendant that no "proof on oath" was made to the trial judge as required by that section in order to in-

voke its provisions. Furthermore, the fact that no proceedings were taken under that section would seem to have no material bearing on the question then under consideration on October 17th; namely, whether the witness was then within the jurisdiction of the court.

[2] The further fact that the district attorney, after the receipt of the letter on October 11th, failed immediately to have the witness put under bond to insure her appearance as provided by section 879, would likewise have no material bearing on the question before the court, except to fortify the conclusion that the witness was not at that time within the jurisdiction of the court. The district attorney was not bound to proceed under that section. Under the facts as presented, he was entitled to rely on the personal service of the subpœna upon the witness. If the subpœna was not effectual, the burden was cast upon him to prove at the trial that the witness was without the jurisdiction or could not with due diligence be found within the state. He established the former to the satisfaction of the trial judge, and on the record we find no basis for a charge against the district attorney that he was not diligent in attempting to obtain the attendance of the witness at the trial or that he connived in the least in the purpose and effort of the witness to absent herself from the trial.

We conclude that the trial judge did not abuse his discretion in admitting in evidence the deposition of the witness taken at the preliminary examination. See People v. Ramos, 52 Cal. App. 492, 199 P. 544. No other points require discussion.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; LANGDON, J.; PRESTON, J.

135 Cal.App. 527

THUET v. SOUTHERN PAC. CO. et al.

Civ. 4849.

District Court of Appeal, Third District, California.

Dec. 1, 1933.

1. Railroads ⇐348(4).

In action for injuries sustained by passenger in automobile in collision between train and automobile at dangerous crossing, evidence sustained finding that no warning of approach of train was given (Civ. Code, § 486).

2. Appeal and error ⇐994(3).

Where witnesses were young at time of accident and five years passed before trial, credibility of witnesses *held* question for trial court.

3. Evidence ⇐147.

Negative testimony of witnesses in a position to hear, as to sounding of bell and whistle of train, *held* admissible to establish railroad's negligence.

4. Railroads ⇐348(6).

In action for injuries sustained by passenger in automobile in collision between train and automobile at dangerous crossing, evidence sustained finding that plaintiff was not contributorily negligent.

5. Railroads ⇐301.

Where railroad crossing is dangerous because of obstructed view and depressed tracks, both motorist and railroad had duty of taking extra precautions upon approaching crossing (Civ. Code, § 486).

6. Damages ⇐132(6).

$6,000 to minor for injury to hip, incapacitating plaintiff for a year and causing permanent lameness and atrophy of leg, *held* not excessive.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Theodore Thuet, a minor, by his guardian ad litem, Owen J. Mauel, against the Southern Pacific Company and others. Judgment for plaintiff, and defendant Southern Pacific Company appeals.

Affirmed.

W. D. Tillotson, of Redding, and George R. Freeman, of Willows, for appellant.

L. C. Smith, of Redding, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action, a minor, had judgment against the appellant in the sum of $6,000, for and on account of injuries sustained when an automobile in which he was riding as a guest was struck by a train belonging to and operated by the appellant.

The record shows that on or about the 27th day of June, 1928, the plaintiff, a minor, was a passenger and guest in a model T Ford automobile driven by his father. The automobile was being driven southerly along the state highway south from the city of Redding, until it reached a point known as the "Olney Creek" railroad crossing. At this place the automobile was stopped until other automobiles traveling on the same highway had passed by, when the automobile in which the plaintiff was riding was turned to

the left for the purpose of crossing the tracks belonging to the appellant. The record shows that the automobile was stopped at a point about 90 feet from the crossing. From this point the automobile was driven in an easterly direction, and upon reaching the crossing was struck and demolished by a passenger train running northerly, and the plaintiff severely injured.

The complaint alleges, and there is testimony in the record to the effect, that the automobile was stopped as we have just stated, and that the driver of the car looked and listened to ascertain the approach of any on-coming train; that from the point where the automobile was stopped until it reached practically the rails on which the train of the company was being operated, it is impossible to see the approach of the train by reason of trees, underbrush, and weeds growing upon the right of way of the appellant, and which were permitted and allowed to grow upon said right of way to such an extent as to prevent persons using the crossing from seeing the approach of trains.

It is further alleged that the train approached the crossing without any bell being rung or any whistle blown, as provided by section 486 of the Civil Code. There is nothing in the record indicating that the driver of the Ford car stopped, looked, or listened after starting from the point which we have stated as being some 90 feet distant from the railroad crossing.

The record shows that neither the driver of the automobile nor the plaintiff saw the approaching train, both testifying that their view was obstructed as herein stated. The record further shows that neither the engineer nor the fireman of the approaching train saw the Ford automobile until after the collision, the fireman testifying that he was sitting on the west side of the cab in the engine, not talking to the engineer, but was facing northward in the direction in which the train was moving, yet he did not see the automobile until after it had been struck by the engine. The record further shows that the railroad, at the crossing in question, runs through a cut which partially obstructs the view of an approaching train.

The trial was had before the court sitting without a jury, and findings filed sustaining the contention of the plaintiff that no bell was rung and no whistle sounded, as required by section 486, supra. Also, that the appellant had allowed weeds, underbrush, and trees to grow upon its right of way to such an extent as to obstruct the view of trains approaching from the south, and that the crossing in question was a dangerous crossing. That as a result of the collision the plaintiff was severely injured, and that at the time of the trial, which occurred some five years after the injury, the plaintiff was still suffering therefrom. That the injury was caused by reason of the failure of the train crew to ring any bell or blow any whistle. And also the court further found that no warning was otherwise given of the approach of the train.

The photographs introduced in evidence show only the usual crossbars. The court further found that the appellant had permitted brush, vegetation, etc., to grow upon the west side of its railroad tracks on its right of way to such an extent as to prevent one approaching the Olney Creek crossing from the west to observe the approach of trains running northward. The findings are further to the effect that the injury to plaintiff was caused solely by the negligence of the appellant in failing to ring any bell, blow any whistle, or otherwise give notice of the approach of the train in question.

[1, 2] The contention of the appellant is to the effect that the findings to which we have referred are not supported by the testimony; that the testimony as to the ringing of the bell and blowing of the whistle on the part of the plaintiff is negative in character, while on the part of the appellant the testimony is direct that the whistle was blown at the whistling post a quarter of a mile distant from, and south of the crossing; and that the fireman testified that the bell was ringing from the whistling post until after the crossing had been passed.

The contention is also made that the witnesses on the part of the plaintiff were young in years, and that as five years had elapsed between the date of the accident and the time of the trial, their memory was wholly unreliable. This objection, however, would go to the testimony introduced on behalf of the appellant, three or four of whom were interested persons. The reliability of the witnesses and the accuracy of their memories, however, were questions to be decided by the trial court. An examination of the record discloses that at least two of the witnesses on the part of the plaintiff were direct that no bell was rung and also that no whistle was blown. The testimony of the appellant's witnesses is that the whistle was blown at a point, as we have stated, a quarter of a mile south of the crossing. No contention is made that the whistle was thereafter sounded, which would leave the provisions of section 486, supra, uncomplied with so far as giving warning of the approach of the train by the blowing of the whistle. So far as applicable here that section reads: "A bell, of at least twenty pounds weight, must be placed on each locomotive-engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or a steam-whistle must be attached, and be sounded, except in cities, at the like dis-

tance, and be kept sounding at intervals until it has crossed the same."

The testimony in the record and the photographs introduced in evidence amply justified the court in concluding that Olney Creek crossing was a dangerous crossing. The trees and shrubbery shown by the photographs indicate that the approach of a train from the south was materially obstructed, and four witnesses testified that the view of an automobile driver from the west approaching the crossing was so obstructed. The photographs also show that the track on which the train was being operated is laid through a cut at the Olney Creek crossing.

The contention is also made by the appellant that the injuries suffered by the plaintiff were due solely to the negligence of the driver of the automobile. As we have stated, the record does not show that the driver of the automobile stopped, looked, or listened after starting from the point on the state highway where he had paused to allow traffic thereon to pass by before turning eastward. This fact, and the fact that his view was obstructed, calling for the exercise of additional precaution on his part, might very well have led the court to conclude that the driver of the automobile was negligent. This, however, does not relieve the appellant from responsibility, and a holding on our part that the driver of the automobile was negligent as a matter of law would not obviate the finding of the trial court as to the appellant's liability.

[3] In so far as the testimony introduced on behalf of the plaintiff, that no bell was rung and no whistle sounded, the rule of law is clear that such testimony is admissible and may be accepted by the court as evidence of such facts.

In the case of Jones v. Southern Pacific Company, 74 Cal. App. 10, 239 P. 429, this court had occasion to examine this question thoroughly, and in that case cited a number of authorities supporting the rule just stated. It is there held that negative testimony of witnesses who are in a position to hear and to observe who declare they heard no signals and saw none, even as opposed to positive testimony that signals were given, presents a question to be submitted to the jury, and it has been held such negative evidence is sufficient to sustain a verdict. It would only be useless repetition to again review the decisions upholding the admissibility of negative testimony and the right of the jury to act thereon, considered in the Jones Case.

The circumstances involved in the case of Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788, are readily distinguishable from those surrounding the case at bar by reason of the fact that the plaintiff is not chargeable with the negligence of the automobile driver. If the driver of the Ford car were the plaintiff in this case, then the fact of insufficient view would have imposed upon him, just as in the Koster Case, the obligation to stop, look, and listen in order that he might determine whether there was an on-coming train, and his failure to exercise such precautions would justify a holding as to his negligence.

Likewise, the facts shown by the record in the case of Friddle v. Southern Pacific Co., 126 Cal. App. 388, 14 P.(2d) 568, are distinguishable from those we are considering. In the Friddle Case the negative testimony consisted of the testimony of a truck driver who was not less than 400 yards from the scene of the accident; there was a loud explosion following the accident involved in that case; and the driver of the truck who gave the negative testimony neither heard the whistle of the train nor the explosion just referred to. The witness, testifying as to not hearing, did not know that anything unusual had happened until he drove his truck to the agreed meeting place. Such testimony, of course, did not have any evidentiary value.

[4] We find no merit in the contention of the appellant that the plaintiff was guilty of contributory negligence. In the case of Wagner v. A., T. & S. F. R. Co., a corporation, 210 Cal. 526, 292 P. 645, 646, the court answers this contention made as against the passenger of plaintiff, as follows: "This point is without support, either in the law or the facts. The law does not demand of a passenger the same high degree of observation as it requires of the driver, for the passenger has not, in the ordinary case, any actual control over the driver. He is normally bound to protest against actual negligence or recklessness of the driver, but the extent of his duty depends upon the particular circumstances of each case, and is a question for the jury. Marchetti v. Southern Pac. Co., 204 Cal. 679, 269 P. 529; Curran v. Earle C. Anthony, Inc., 77 Cal. App. 462, 247 P. 236."

In Switzler v. A., T. & S. F. R. Co., 104 Cal. App. 138, 285 P. 918, 922, this court had occasion to set forth the law relative to the contention that a passenger riding in an automobile struck by a moving train was guilty of contributory negligence. It is there said: "That the negligence of an automobile driver, even in approaching railway crossings, is not imputable, as a matter of law, to a guest or passenger having no control or direction over the operation of the machine, clearly appears by the text found in 3 California Jurisprudence, pp. 853, 854, and 855, and the authorities in the footnotes supporting the text." The cases there cited supporting this rule are so numerous that reference thereto is all that is necessary.

[5] The court found, and there is ample testimony in the record to sustain the finding of the court, that Olney Creek crossing,

at the time of the accident, was a dangerous crossing, and while it is not necessary to hold, as many cases do hold, that the permitting of the growth of weeds, underbrush, and trees on the right of way belonging to the railroad company constitutes negligence per se, yet if it adds to the dangerous condition of the crossing it places an obligation upon the company, as well as upon one attempting to use such crossing, the taking of additional precautions to avoid accidents. We find the rule as to this question clearly stated in the case of Young v. Pacific Electric R. Co., 208 Cal. 568, 283 P. 61, 64, as follows: "Marchetti v. Southern Pac. Co., supra, was an action for damages for death caused by a collision. The court granted defendants' motion for a nonsuit based on the contributory negligence of the deceased. There, as here, the evidence showed the crossing to be dangerous because of existing obstructions, and there was a conflict as to the sounding of proper warnings. On appeal the respondents contended that, even though it should be held there was error on the part of the trial court in granting their motion on the ground of contributory negligence, the order should be sustained, because there was no evidence of negligence on their part in the operation of their train at the time of the collision. In passing upon this contention, the court said: 'It was held in Green v. Southern Pac. Co., 53 Cal. App. 194, 202, 199 P. 1059, 1062: That the law imposed "upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a question for a jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing."'"

In view of the dangerous condition of the crossing involved in this action, we think the trial court had the right to take into consideration the failure of the appellant to have the whistle of its engine blown intermittently from the whistling post until after it passed the crossing, even though the whistle was actually blown at the whistling post. The dangerous condition of the crossing, the obstructions to which we have referred, the fact that the track was laid through a cut, called not only upon the automobile driver to take extra precautions, but also placed the same obligations upon the appellant. In the absence of a flagman or a mechanical signal, the lack of an intermittent sounding of the whistle presented a question for the trial court in determining whether the appellant did or did not use the necessary precautions in approaching the crossing.

The court found that the whistle was not blown at intervals as it approached the crossing, and we find no testimony opposing this finding. The court likewise found that the bell was not rung, and the testimony upon the ringing of the bell is conflicting.

While the complaint alleges excessive speed, the court did not make any finding that the injury resulted therefrom. A number of cases are cited by the respondent to the effect that the permitting of the growth of weeds, underbrush, and trees on the railroad right of way, so as to obstruct the view of one approaching the railroad crossing, is negligence in and of itself. However, as the trial court did not go so far as to hold that the plaintiff is entitled to judgment from this fact, but only held that the appellant failed to give the warning signals as required by section 486, supra, we do not need to determine whether the permitting of such growth and such obstructions constitutes per se actionable negligence.

[6] The contention is further made that the judgment is excessive. The finding of the court in this particular is as follows: "That the plaintiff was badly bruised, injured and damaged and received a severe shock, and suffered a dislocation of his right hip, from which he has not recovered, and the ligaments thereof were so badly bruised, torn and strained that he was totally incapacitated for a long time, and has been made permanently lame, and has lost the strength and full use of his right leg, and that said leg has atrophied to some extent."

The testimony shows that the plaintiff was in a hospital for a week, but that as his parents were unable to stand the expense of hospitalization, he was taken home, where he was sick and incapacitated for practically a year. The fact that the injuries found by the court were still apparent after the lapse of five years precludes, we think, any disturbance of the verdict on the ground that it is excessive.

We have not quoted the testimony of the witnesses for the respective parties, on the question of whether the bell was rung or the whistle sounded, for the simple reason that such testimony is conflicting, and the weight and credibility thereof being solely for the trial court.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

133 Cal.App. 105

PICKENS v. COFFEY.

Civ. 5029.

District Court of Appeal, Third District, California.

Dec. 28, 1933.

Appeal and error ⇐161.

Judgment debtor accepting from marshal amount adjudged as homestead exemption *held* estopped to appeal from judgment ordering sale of homestead and payment of debt, since acceptance of amount of exemption constituted election to abide by judgment.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Douglas L. Edmonds, and Lester W. Roth, Judges.

Action by Wesley S. Pickens against S. J. Coffey, also known as Stephen J. Coffey. From an adverse judgment, defendant appeals. On plaintiff's motion to dismiss appeal.

Appeal dismissed.

Catherine A. McKenna, of Los Angeles, for appellant.

Roy A. Linn and Roy C. Kaiser, both of Los Angeles, for respondent.

LEMMON, Justice pro tem., delivered the opinion of the court.

In this proceeding a judgment creditor sought successfully to subject the homestead of the judgment debtor to execution under the provisions of sections 1245, et seq., of the Civil Code. The trial court adjudged the homestead exemption to be the sum of $1,000 and ordered a sale of the real property by the marshal of the municipal court of the city of Los Angeles and decreed that out of the proceeds of the sale there be paid to the judgment debtor the amount of the homestead exemption of $1,000, the expenses of the sale and the costs of the proceeding be then deducted, the amount of the judgment be next paid to the judgment creditor and the balance paid to the judgment debtor.

Respondent herein, the judgment creditor in the proceeding moves to dismiss the appeals taken from several orders of the trial court. The homestead property was sold by the marshal in pursuance to the court's decree and the sale brought the sum of $1,521.40. This sum is just sufficient to discharge the homestead exemption of $1,000, the expenses of sale and the costs of the proceeding and the claim of the judgment creditor. Appellant has accepted from the marshal the said sum of $1,000.

The acceptance from the marshal of this sum constituted an election to abide by the judgment and the doctrine of estoppel by election is applicable. The case of Turner v. Markham, 152 Cal. 246, 92 P. 485, is directly in point and determinative upon the motion.

The motion is granted, and the appeals dismissed.

We concur: PLUMMER, J.; PULLEN, P. J.

LOS ANGELES COUNTY v. METROPOLITAN CASUALTY INS. CO. OF NEW YORK.

Civ. 8115.

District Court of Appeal, Second District, Division 2, California.

Nov. 3, 1933.

As Amended On Denial of Rehearing Dec. 1, 1933.

1. Action ⇐61.

A cause of action does not "accrue" until the party owning it is entitled to begin and prosecute action thereon.

Applied to a cause of action, the term to "accrue" means to arrive, to commence, to come into existence, to become a present enforceable demand.

[Ed. Note.—For other definitions of "Accrue; Accrued," see Words & Phrases.]

2. Limitation of actions ⇐47(3).

Forfeiture is prerequisite to action on bail bond, hence limitation on time for instituting action runs from time of forfeiture, and not from time principal in bond fails to appear for trial (Pen. Code, §§ 1305, 1306).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Suit by Los Angeles County against the Metropolitan Casualty Insurance Company of New York. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 26 P.(2d) 699.

Henry L. Knoop, of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and Robert A. Cushman, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, Justice.

A suit upon an undertaking furnished on behalf of a person charged with felony hav-

ing been decided by the superior court in favor of the plaintiff, the defendant appealed.

The appellant states that the question presented is as to whether upon the record the period of limitation began to run upon accruing of the cause of action or of the right to the remedy. The facts are not disputed. A complaint was filed on June 24, 1925, against one Eli Stanton, who, on July 1st, was held to answer to the superior court, posted said undertaking on July 3d, was informed against on July 24th, and was arraigned on July 27th, at which time the date of trial was set for the 14th day of September, following. On August 22, 1930, owners of securities hypothecated moved to exonerate the said bond, which motion was denied, and the same was forfeited. He having failed to appear, and his undertaking remaining unpaid, suit was commenced by the county December 1, 1930, thereon.

It is insisted by the appellant that the cause of action arose, and the limitation upon the time within which an action could be instituted thereon, commenced to run when Stanton failed to appear for trial. The undertaking provided that the defendant would "appear and answer the charge * * * mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof, or if he fails to perform either of these conditions, then we will pay," etc. By section 1305 of the Penal Code, it was then provided: "If, without sufficient excuse, the defendant neglects to appear for arraignment or for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered upon its minutes, and the undertaking of bail, or the money deposited instead of bail, as the case may be, must thereupon be declared forfeited. But if at any time within twenty days after such entry in the minutes, the defendant or his bail appear and satisfactorily excuse his neglect, the court may direct the forfeiture of the undertaking or the deposit to be discharged upon such terms as may be just." Section 1306 provided: "If the forfeiture is not discharged, as provided in the last section, the district attorney may *at any time after twenty days from the entry upon the minutes*, as provided in the last section, *proceed by action against the bail upon their undertaking.*" From the foregoing, it seems apparent the surety was obligated to pay the amount agreed upon failure of the defendant without satisfactory excuse to appear and answer the charge, or to comply with conditions requiring that he be amenable to orders and process of the court; but the law allowed him a period of twenty days within which to offer such excuse. By its complaint the respondent alleged that on August 22, 1930, "said court ordered the said bail forfeited, and said forfeiture was then duly entered upon the minutes of said court and said order of forfeiture has not been set aside."

[1] Applied to a cause of action, the term to "accrue" means to arrive, to commence, to come into existence, to become a present enforceable demand. Eising v. Andrews, 66 Conn. 58, 33 A. 585, 50 Am. St. Rep. 75. "A cause of action accrues from the time the right to sue for the breach attaches." Walker v. Bowman, 27 Okl. 172, 111 P. 319, 320, 30 L. R. A. (N. S.) 642, Ann. Cas. 1912B, 839. A cause of action does not "accrue" until the party owning it is entitled to begin and prosecute an action thereon. It accrues at the moment when he has a legal right to sue on it, and not earlier. Jocque v. McRae, 142 Mich. 370, 105 N. W. 874. Many other cases might be cited to the same effect. Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; McGuigan v. Rolfe, 80 Ill. App. 256; Port Arthur Rice M. Co. v. Beaumont Rice Mills, 105 Tex. 514, 143 S. W. 926, 148 S. W. 283, 150 S. W. 884, 152 S. W. 629; In re Hanlin's Estate, 133 Wis. 140, 113 N. W. 411, 17 L. R. A. (N. S.) 1189, 126 Am. St. Rep. 938.

[2] The statute directs that if the principal shall neglect to appear for arraignment, trial, or judgment, or upon any other occasion when his presence in court is lawfully required, his bail must be forfeited. It places no limitation upon the time within which such forfeiture shall be entered. Until then he may appear with or without his surety, or he may appear within twenty days thereafter and with satisfactory excuse have his surety exonerated. Any attempt at enforcement of the undertaking prior to forfeiture would be futile. As was stated in an early case: " 'The law requires no man to do a vain thing,' is a familiar maxim, and certainly it would be vain to require a party to surrender to an officer having no power to detain him." Allen v. Breslauer, 8 Cal. 552. It has, on numerous occasions, been held in other jurisdictions that forfeiture is a prerequisite to an action upon such undertakings. Peacock v. People, 83 Ill. 331; People v. Race, 2 Ill. App. 563; Baldwin v. State, 126 Ind. 24, 25 N. E. 820; State v. Gorley, 2 Iowa, 52; State v. Smith, 83 Kan. 240, 111 P. 184. It cannot be said from the language of the foregoing sections that such obligation became actionable until established by the procedure therein prescribed. What has been said herein must be held to apply to other undertakings included in the action and presented upon the same facts.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

135 Cal.App. 763

NIEVES et al. v. VIGOLINO et al.

Civ. 8852.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1933.

1. New trial ⊜10.

Trial court *held* not precluded from granting new trial in automobile accident case for errors in instruction concerning negligent speed, by fact that defendant proposed similar instruction relative to contributory negligence (St. 1923, p. 553, § 113(d), as amended by St. 1931, p. 2120, § 34).

2. New trial ⊜39.

Trial court has wide discretion in granting new trial for error in instructions.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Raymond Nieves, Jr., and another, by their guardian ad litem, Nelsa Nieves, and by Nelsa Nieves, individually, against Americo Vigolino and others. From an order granting a new trial, plaintiffs appeal.

Affirmed.

M. Mitchell Bourquin and James R. Loofbourow, both of San Francisco, for appellants.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by plaintiffs from an order granting a new trial in an action for damages for death brought by plaintiffs as the heirs of the deceased. The main ground urged in the trial court in support of the motion for new trial was that the jury had been erroneously instructed.

This action involved a collision at a street intersection between an automobile driven by the deceased and an automobile driven by respondent. The accident occurred after the effective date of the amendment of 1931 to section 113 of the California Vehicle Act (Stats. 1931, p. 2120, § 34). The evidence regarding the speed of the two cars, the manner in which they entered the intersection, and the manner in which they collided, was all conflicting. The effect of the trial court's instructions was to tell the jury that respondent was guilty of negligence as a matter of law if he traversed the intersection at a speed in excess of fifteen miles per hour. Section 113 of the California Vehicle Act, as amended in 1931, provides in subdivision (d) thereof: "In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." It will thus be seen that the jury was erroneously instructed on the important element of speed with relation to respondent's alleged negligence.

[1, 2] Appellants do not seriously question the existence of error in the instructions, but they do contend that respondent is estopped to complain of said error by reason of the fact that respondent proposed a somewhat similar instruction on speed with relation to the alleged contributory negligence of the deceased. In our opinion this contention is without merit. In support thereof, appellants cite and rely upon Noble v. Miles, 129 Cal. App. 724, 19 P.(2d) 265, but the authority cited is not in point. There the appeal was from the judgment, while here the appeal is from the order granting the new trial. The sole question before us on this appeal from the order granting the new trial is whether the trial court abused its discretion. Weaver v. Shell Oil Company, 129 Cal. App. 232, 18 P.(2d) 736. Appellants might have urged the considerations of waiver and estoppel before the trial court upon the hearing of the motion for new trial, and such considerations might have justified a denial of said motion. Furthermore, in the event that the motion for new trial had been denied, these same considerations might have been urged in support of the action of the trial court on an appeal from the judgment. But where the jury has been erroneously instructed and the trial court has determined that the error was prejudicial, we do not believe that it is precluded from granting a new trial merely because there may be said to be a waiver or an estoppel on the part of one of the parties. Weaver v. Shell Oil Company, supra. To hold otherwise would mean that the trial court, by reason of the action of the parties, would be powerless to correct what might be an obvious miscarriage of justice. The trial court is allowed a wide discretion in granting a new trial on the ground that the jury has been erroneously instructed (Pope v. Wenisch, 109 Cal. App. 608, 293 P. 622), and we find no abuse of discretion in the present case.

The order granting the new trial is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

⊜For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

136 Cal.App. 58

MARDUENO et al. v. JUSTICE COURT OF BRAWLEY TOWNSHIP et al.

Civ. 1078.

District Court of Appeal, Fourth District, California.

Dec. 22, 1933.

Justices of the peace ⇐205(3).

Order vacating and discharging writ of review to review proceedings in justice's court was affirmed where nothing in record or brief showed in what manner it was claimed justice's court exceeded jurisdiction.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Julia Mardueno and others against the Justice Court of Brawley Township and another. From an order vacating and discharging a writ of review, plaintiff J. Edgar Ross appeals.

Affirmed.

J. Edgar Ross, in pro per.

W. E. Abraham, of Brawley, for respondents.

BARNARD, Presiding Justice.

This is an appeal by one of the parties from an order vacating and discharging a writ of review issued for the purpose of reviewing certain proceedings had in a justice's court. After the filing of appellant's opening brief, the respondent moved to affirm the judgment on the ground that the questions raised are so unsubstantial as not to need further argument.

The only record before us consists of copies of certain papers purporting to have been originally filed in the justice's court in another action, with a copy of a writ of review issued by the superior court, a copy of a minute order taking under submission a motion to discharge the writ, and a copy of the order discharging the writ of review. The papers apparently filed in the justice's court, although not so certified, are the complaint, amended complaint, alias summons, amended affidavit for attachment, amended undertaking on attachment, amended writ of attachment, and second amended complaint.

The petition for a writ of review which must have initiated this proceeding is not before us and nothing appears in the record to show in what manner it is claimed the justice's court exceeded its jurisdiction. Nor are we further enlightened by the appellant. While the opening brief states that the petition for a writ of review alleged that "certain proceedings" in the justice's court were "in excess of that court's jurisdiction," the brief fails entirely to inform us as to what proceedings are referred to. The only authorities cited are directed to the point that the acts of a justice's court in excess of its jurisdiction may be reviewed in a superior court, and the only argument made is that the return before the superior court clearly shows that the justice's court had exceeded its jurisdiction and, therefore, the order dismissing the writ was erroneous. We can neither tell from the record here what return was before the superior court when the matter came on at the time set for hearing nor how any jurisdiction was exceeded. If the copies of the papers filed in the justice's court, which are included in this record, constituted the return before the superior court, it was entirely insufficient to show anything done by the justice's court in excess of its jurisdiction.

We may add that, if we are correct in our surmise that the real claim is that an attachment was issued in the original action which was in excess of the court's jurisdiction, the contention is not sustained by the record before us.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

DIETHELM v. RAINEY. *

Civ. 8854.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1933.

Hearing Granted by Supreme Court Feb. 1, 1934.

1. Corporations ⇐217.

Repeal of constitutional provision making stockholder personally liable for such proportion of debts of corporation during time he was stockholder as amount of stock owned by him bore to whole of subscribed capital stock, *held* not to affect outstanding contracts prior to repeal (Const. art. 12, § 3).

2. Banks and banking ⇐63½.

Bank superintendent liquidating insolvent bank could withhold from stockholder's deposit only so much as represented stockholder's liability on his shares notwithstanding nonstockholding depositors had not been paid (Gen. Laws 1931, Act 652, § 21; Const. art. 12, § 3).

3. Banks and banking ⇐63½.

In stockholder's action to recover deposit against superintendent of banks liquidating insolvent bank judgment for stockholder *held* not erroneous because stockholder's liability

was not mentioned, since prima facie stockholder was entitled to deposit, and, if his liability was a material sum, superintendent should have alleged facts (Gen. Laws 1931, Act 652, § 21; Const. art. 12, § 3).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Ulrich Diethelm against Edward Rainey, as Superintendent of Banks of the State of California, and as trustee in charge of the liquidation of the Bank of Oakley. Judgment for plaintiff, and defendant appeals.

Affirmed.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, for respondent.

STURTEVANT, Justice.

On the 20th day of August, 1920, the Bank of Oakley was organized, having a capital stock of 250 shares of the par value of $100 per share. Thereafter it commenced the transaction of business. This plaintiff became the owner and holder of 1 share of stock, but the record does not show when. In the year 1925 he opened a savings account, received a passbook, and commenced to make deposits, which amounted to $3,718.77. Thereafter, on the 19th day of December, 1930, the bank became insolvent. The superintendent of banks in the manner provided by law took possession of said bank and commenced to administer its affairs as an insolvent bank. Thereafter the plaintiff in due time filed his claim against said bank for the sum of his deposits. The superintendent of banks rejected the claim and thereupon the plaintiff commenced this action. An answer was filed by the superintendent of banks and a trial was had on an agreed statement of facts. The trial court rendered its judgment in favor of the plaintiff, and from that judgment the defendant has appealed.

The defendant calls to our attention the fact that the plaintiff is both a depositor and a stockholder and contends that he is not entitled to receive any payment until nonstockholding depositors have first been paid. He cites and relies on the last paragraph of section 21 of the Bank Act (1 Deering's Gen. Laws, p. 237). That paragraph reads as follows: "The capital and assets of such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders." Candidly conceding that the construction is harsh, nevertheless the defendant contends that he is bound by certain decisions. Murphy v. Pacific Bank, 119 Cal. 334, 51 P. 317; Murphy v. Pacific Bank, 130 Cal. 542, 62 P. 1059; Taidlaw v. Pacific Bank, 137 Cal. 392, 70 P. 277. We think the defendant misconceives the facts and the doctrine stated in the cases cited. All of the facts do not appear on the face of the cases as reported. We have examined the records of the cases and the following facts are material to an exact understanding of the rulings. The first two cases are two different appeals involving one controversy. They involved the claim of Captain James M. McDonald. The Pacific Bank at the time it failed had outstanding $1,000,000 in capital stock; its total liabilities at said time were $1,855,000, of which $1,000,000 was due depositors who were not stockholders, and the value of the assets did not exceed $900,000. Captain McDonald held 1,738 shares in the Pacific Bank. His potential stockholder's liability was nearly $173,800. The amount of the claim for which his assignee sued was $73,928.10. If the claim of Captain McDonald had, under the foregoing facts, been paid, the proceeds could have been so sequestered as to prevent, in whole or in part, the collection of any judgment on his stockholder's liability. The representatives of the insolvent bank had no authority to sue the stockholders in behalf of the depositors, but they were bound not to impair the security which under the statute (St. 1862, p. 201, § 10) was to be held for the depositors who were not stockholders. Applying to the claim of Captain McDonald the provisions of said statute, his liability as a stockholder was not impaired in the least degree nor was it increased. The principle involved in Laidlaw v. Pacific Bank, supra, was the same as in Murphy v. Pacific Bank. However, that case involved the claim of R. H. McDonald, which amounted to $90,003, and his potential stockholder's liability was nearly $478,000. In other words, in each of said cases the potential stockholder's liability of each of the claimants greatly exceeded the amount of his claim as a depositor.

[1, 2] At the time the Bank of Oakley was organized, it was the law of California that its capital stock, reserve funds, and other assets would stand as a security to repay depositors. It was also the law that "each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." (Const. art. 12, § 3.) That section of the Constitution was repealed November 4, 1930. However, as to outstanding contracts the repeal had no effect. Coombes v. Getz, 285 U. S. 434, 52 St. Ct. 435, 76 L. Ed. 866. Out of the plaintiff's deposit there could have been legally withheld the amount of his stockholder's liability, but not a greater sum. If more had been withheld, this plaintiff might have

been held for debts that were incurred when he was not a stockholder and, furthermore, he might have been held for all of the debts of the Bank of Oakley up to the amount of his deposit. Neither of such propositions was ever the law of California. Moreover, when the Legislature attempted to enact a statute purporting to impose such additional liability it was held that the Legislature has exceeded its authority and that the statute was void. Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861. In this connection we understand the defendant to claim that in the Pacific Bank Cases, supra, all constitutional questions were decided against the claim now made by this plaintiff. That claim is too broad. Some constitutional questions were there decided, but not the one we have discussed. As we have shown above, the facts in those cases did not present the question, nor did the court express an opinion thereon. We think the statute should be construed as though it read, "The capital and assets of such bank are a security to depositors and stockholders, depositors having priority of security over stockholders *up to the amount of the latter's stockholders' liability.*" The words italicized are readily implied. Furthermore, they are necessary to confine the statute within constitutional limits. As it is presumed the statute is constitutional, the construction indicated necessarily follows. In applying that meaning to the facts of this case, there should have been deducted from the amount of the deposit the amount of plaintiff's stockholder's liability, and the balance should be taken as the proper amount of the plaintiff's present claim. Any remaining claim of the plaintiff must abide the event of the liquidation. As so construed the statute is given force and effect in all its parts and its operation is confined within the provisions of article 12, section 3, of the Constitution. If the total amount of his stockholder's liability is not required to pay off the depositors and other creditors, the plaintiff, at some time in the future, may assert a further claim. If it is all required to pay off the depositors and other creditors, the plaintiff will have discharged merely his constitutional liability as a stockholder and may not complain. Neither may the depositors nor creditors complain because they will have collected from the plaintiff all they were entitled under the Constitution to collect from him. Moreover, they will be given the benefit fixed in the statute in so far as any valid statute could extend it.

The conclusion to which we have come squares with the contract of the parties in the instant case. Paragraph 14 of "Terms and Conditions," printed in each passbook, was as follows: "14. The Capital Stock and the Surplus of the Bank are the property of its stockholders, but all the depositors of the Bank have for their security not only said Capital Stock and Reserve Fund, and all other assets of the Bank, but also the individual liability of each Stockholder in the proportion which the amount of stock held by him at the time deposits are made bears to the whole amount of the stock in the Bank." That language shows that each stockholder, among other things, would be liable to each depositor to the amount of his stockholder's liability, but not to the amount of his deposits without regard to the amount of his stockholder's liability.

[3] The amount of the plaintiff's stockholder's liability is not set forth in the agreed statement of facts. Considering all of the facts that were before the trial court, we think it did not err in rendering a judgment that does not mention this plaintiff's stockholder's liability. Prima facie the plaintiff was entitled to receive his deposit. If his stockholder's liability was of a material sum, the defendant should have set forth the facts.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

135 Cal.App. 661

DUCKWORTH v. SCHUMACHER.

Civ. 1424.

District Court of Appeal, Fourth District, California.

Dec. 8, 1933.

Brokers ⇐43(2).

Plaintiff could not recover under oral contract for services in assisting in subdividing lands for sale and promoting sales, since statute requiring contract where one is "employed to sell or purchase" land to be in writing applied (Civ. Code, § 1624, subd. 5).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by W. E. Duckworth against J. E. Schumacher. Judgment for plaintiff, and defendant appeals.

Reversed.

Forgy, Reinhaus & Forgy, of Santa Ana (A. M. Bradley, of Santa Ana, of counsel), for appellant.

Leonard Evans, of Anaheim, for respondent.

WARMER, Justice pro tem.

Plaintiff brought this action to recover $1,168 for services performed under an oral con-

tract. According to the complaint, the plaintiff was to assist and aid the defendant in laying out for subdivision and subdividing for sale certain lands of the defendant and to act as defendant's general sales manager in charge of the advertising of said subdivision, and devising ways and means of promoting the sale of said tract and superintending the sale thereof at a stated salary per week until the employment should be terminated, and alleging certain payments made thereon. The defendant's answer denied the allegations of the complaint except the receipt by plaintiff of certain sums of money alleged as payments by the defendant, and as a separate defense pleaded a contract alleging the employment of the plaintiff by the defendant as a sales manager for the purpose of offering for sale and making sales of certain real property; that said agreement herein referred to by said defendant was oral and as a separate defense that the cause of action is barred by the provisions of section 1624 of the Civil Code and by cross-complaint sought to recover a judgment for certain sums of money advanced to the plaintiff. The finding is in accordance with the plaintiff's claim except that the court finds that the plaintiff was employed by a contract in writing and by an oral contract. This appeal is taken upon a bill of exceptions.

The record before us discloses that the plaintiff's testimony was in strict accord with the allegations of the complaint above mentioned. There is no evidence in the record to support the finding so far as the contract being in writing is concerned. However, that is immaterial if the contract here, being oral, is not within the inhibitions provided in Civil Code, § 1624. Appellant contends that by the very terms of the contract here found to exist it is one falling squarely within subdivision 5 of section 1624 of the Civil Code, which provides that any agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless in writing, or some note or memorandum thereof is in writing and subscribed by the party to be charged. The employment had to do with the sale of real estate.

Shanklin v. Hall, 100 Cal. 26, 34 P. 636, 637, was an action to recover for services rendered in the exchange of certain real estate. Plaintiff was to use his knowledge and influence on behalf of and render his services to defendant to enable him to sell or exchange the lands mentioned, for which plaintiff was to be paid by defendant a certain sum of money. The trial court gave judgment for the plaintiff. The Supreme Court said: "We think the conclusion of law arrived at by the court erroneous. * * * It is not necessary, in the sense of the statute, that he should have been authorized to execute a conveyance of defendant's real property. * * * 'The duty assumed by a broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made.' [Citing cases.] And this is what plaintiff was employed to do, and precisely what he avers he did in performance of the agreement on his part." Again in Shanklin v. Hall, supra, in discussing the case of Wilson v. Morton, 85 Cal. 598, 24 P. 784, the court said: "In that case the plaintiff was not employed to purchase or sell, or to assist in the purchase or sale of real estate."

Dolan v. O'Toole, 129 Cal. 488, 62 P. 92, 93, was a case in which the defendant was the owner of a mine and had contracted with a third party to sell said mine for him upon certain terms, that the purchaser should be put in possession for a specified time for examination and development of the mine; and the sale was to be consummated if the mine proved satisfactory and was to be paid for at a specified price. Plaintiff was an experienced miner and expert, and was well acquainted with the mine and had worked in it. While the conditional purchasers were in possession under their contract and prospecting for ore, the defendant made a contract with the plaintiff for his services, to be rendered in *aiding* him (defendant) to consummate the sale under the contract and for which, if the sale were made, he was to receive ten per cent. The contract was oral. Objection was made to the admission of any testimony thereon and the objection sustained. The plaintiff then offered to show that at the request of the purchasers plaintiff gave them directions where to work or where to develop ore, that his directions were followed successfully and resulted in such development of ore as induced the purchase under said contract. The court said: "I see no ground upon which this case can be distinguished from Shanklin v. Hall, supra, and upon the authority of that case the judgment appealed from should be affirmed."

Plaintiff relies entirely upon the case of Arbuckle v. Clifford F. Reid, Inc., 118 Cal. App. 272, 4 P.(2d) 978, 981. In that case, so far as pertinent here, the complaint alleged that the plaintiff and defendant had entered into a contract; that pursuant to said contract plaintiff entered the employ of the defendant as director of sales and manager of real estate salesmen, and as director and manager fully and fairly performed his duties as such. The decision shows that in the carrying out of said contract the duties of the plaintiff were to employ salesmen and saleswomen and to aid and assist them in closing their deals in selling defendant's property, and to act as lecturer each day to the groups of prospective purchasers that the salesmen brought to the property; and that the number of salesmen and saleswomen under his management would average two hundred. The court, in discussing the point as to whether or not the contract fell within the terms of section 1624, subdivision 5, said: "This contract, as we view it, is not the kind of contract or agree-

ment to which reference is made by said section 1624. It contains no authorization to respondent to either purchase or sell the property of appellant, but, on the contrary, simply makes him the business manager of appellant for the purpose of aiding and assisting its salesmen in disposing of its lands." It will be noted that the plaintiff, pursuant to said contract, entered the employ of the defendant as director of sales and manager of real estate salesmen. The evidence introduced shows what the plaintiff actually did was to employ salesmen, both men and women, and to aid and assist them in closing their deals in selling appellant's property, and to act as lecturer to a group of prospective purchasers brought to the property by the salesmen; and that the number of salesmen under his management was about two hundred. We think the decision must be construed to go no further than indicated by the services shown to have been intended by the contract.

The services intended by the parties to the said contract were personal services of the plaintiff to effectuate a smoothly functioning organization for the benefit of the defendant and not directly for the sale of any certain real property by the plaintiff. If construed otherwise, it is in conflict with the established rule of law of this state as declared in the case of Shanklin v. Hall, supra, and from such established rule we feel we are not at liberty to depart. In the case at bar, the plain intendments of the parties to the contract were that the plaintiff was to aid and assist in preparing a certain tract of land belonging to the defendant for sale by laying the same out for subdivision and subdividing it; to act as sales manager; to promote the sales by a plan of campaign of advertising; and to superintend the sale thereof. Stating the proposition otherwise, the plaintiff was to aid and assist the defendant in the preliminary work of laying out a subdivision and subdividing a certain tract of land owned by the defendant; to plan and carry out an advertising promotional scheme looking to the sale of the land; to act as sales manager; superintend the sale of said tract. The contract in its entirety looked to the sale of said tract through the agency of said plaintiff and by the means conceived and devised by the plaintiff, all to the end that defendant might sell his said tract through the medium of and by the activities of the plaintiff. Such employment, therefore, had for its sole object and purpose the sale of the real property, and such an employment is within the inhibition of section 1624 of the Civil Code. To hold otherwise would give rise to a practice of ingenious forms, without substance in fact, and thus avoid the very salutary rule of law as declared in section 1624 of the Civil Code, and open the door to fraud, long closed by said statute, and would in effect abrogate such statute of frauds (Civ. Code, § 1624).

The decision in Arbuckle v. Clifford F. Reid, Inc., supra, as we understand it, is not in conflict with the decision in Shanklin v. Hall, supra; hence the sole question remaining for determination is: Is the contract of employment herein one that is required by the statute to be in writing? We think it is. If one assists either in the purchase or sale of real estate on a contract for compensation either by commission or salary, he falls within the inhibitions provided in said section to the same extent and in the same manner as though he had been the sole and exclusive medium through which the purchase or sale was made. We think that the terms "employed to sell or purchase" should and does include to aid and assist in the purchase or sale, and it seems to us that to state otherwise would be equivalent to saying that the whole does not include all of its parts. Shanklin v. Hall, supra; Dolan v. O'Toole, supra. Measured by this standard, all the testimony in the record shows that plaintiff was to aid and assist defendant in the sale of real estate, and such was the purpose of his employment. The evidence, therefore, was insufficient to support the findings of the court and the judgment, there being no evidence that the contract was in writing, that the contract was of such a nature as to require it to be in writing or some note or memorandum thereof in writing and signed by the party to be charged.

The judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

135 Cal.App. 761

PEOPLE v. PARKER.

Cr. 2446.

District Court of Appeal, Second District, Division 1, California.

Dec. 15, 1933.

1. Criminal law ⇐775(2).

Error in not giving instruction as to weighing alibi evidence *held* reversible, in view of uncertainty in evidence identifying defendant (Const. art. 6, § 4½).

2. Criminal law ⇐739(2).

In robbery prosecution, alibi evidence, though weak, was question for jury to weigh and consider.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

James Fred Parker was convicted of robbery in the first degree, and he appeals.

Reversed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen.

YORK, Justice.

Defendant was charged in an information filed by the district attorney with the crime of robbery and the crime of attempted robbery, together with a prior conviction of a felony. The defendant pleaded not guilty and admitted the prior conviction. Defendant was tried before a jury which found him guilty of robbery in the first degree, and not guilty of attempted robbery, the court having directed a verdict for defendant as to that count. This appeal is from the judgment and from the order denying his motion for a new trial.

The only direct evidence tending to connect the defendant with the robbery was the evidence of the complaining witness, who testified that the light in the store where the robbery occurred was not very good; who gave a description of the way in which the man who robbed him was dressed; and stated that he "couldn't see very well his face," and was not sure that the defendant was the man who held him up, but that the defendant resembled the man who committed the robbery, and that he thought the defendant was the person, and that the man was in the store for a period of about five minutes.

There was some circumstantial evidence in regard to a small yellow roadster with two red lights in the rear, in which the man who committed the robbery drove away from the scene thereof, and it was shown that for several days, including the time of the robbery, the defendant was in possession of a yellow De Soto roadster which had two red rear lights. There was testimony about a black overcoat with a velvet collar, which kind of overcoat the defendant admitted he owned; the complaining witness stating that the man who robbed him wore a grey felt hat which was pulled down and a black overcoat with a velvet collar which was turned up. The witness stated that he thought the barrel of the gun was round instead of "square" like the one shown to the witness, and that the collar of the coat came down further than the one introduced in evidence. Evidently the gun introduced in evidence (which defendant admitted was his property) had a hexagon barrel.

It thus appears that the evidence to identify the defendant as the person who committed the crime was not strong, direct, or certain. The best that can be said of it is that it may be legally sufficient to support the verdict.

[1] The main objection of appellant, that the court erred in not giving the instruction requested as to weighing alibi evidence, is well taken. The instruction was substantially correct, and should have been given. It has been suggested by the Supreme Court (People v. Visconti, 31 Cal. App. 169, at page 172, 160 P. 410, 411) that refusal to give such an instruction may not "in all cases" be deemed sufficient cause for reversal. But in this case such refusal, when coupled with the uncertainty of the identification of the defendant, and the failure of the so-called corroborating evidence to definitely connect the defendant with the crime charged, made such refusal to give such alibi instruction more prejudicial than in the average case which comes before the court.

From an examination of the entire record in the case and of all of the evidence before the trial court, this court must say "that the error complained of has resulted in a miscarriage of justice." Section 4½, art. 6, Constitution of California.

[2] It is true that the evidence as to the alibi was very weak; nevertheless, that was a question for the jury to weigh and to consider.

The judgment and the order denying motion for a new trial are, and each of them is, reversed.

We concur: CONREY, P. J.; HOUSER, J.

135 Cal.App. 726

OLSON v. GAY.

Civ. 4956.

District Court of Appeal, Third District, California.

Dec. 14, 1933.

Hearing Denied by Supreme Court Feb. 9, 1934.

Automobiles ⇐244(20).

Evidence that automobile host, notwithstanding guest's warning, continued at speed of 55 to 60 miles per hour and suddenly swerved to left in passing fleet of trucks and collided with on-coming automobile sustained implied finding that host was guilty of "willful misconduct" (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

"Willful misconduct" means something different from and more than negligence, however gross. The mere failure to perform a statutory duty is not, alone, "willful misconduct." To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed

to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Ann Olson against J. C. Gay. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Wakefield & Hansen, of Fresno, and C. A. Pinkham, of Los Angeles, for appellant.

Edmond A. Chevalier and Frank Curran, both of Fresno, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal by defendant from a judgment in an action brought by plaintiff against him as the driver of an automobile. The injuries sustained were the result of a collision, and defendant is charged by plaintiff with willful misconduct in the operation of his car.

At the time of the collision plaintiff was a guest of defendant, and the single issue here presented is whether the accident and injuries sustained by plaintiff were the direct and proximate result of willful misconduct on the part of defendant, as that term is defined in section 141¾ of the California Vehicle Act (as amended by St. 1931, p. 1693). Defendant, appellant herein, contends that the evidence adduced is insufficient to support the implied finding of the jury that he was guilty of willful misconduct, and it will therefore be necessary to consider in some detail the evidence adduced.

As plaintiff and defendant were proceeding along the Golden State highway north of Madera in the county of Merced, about 9 or 9:30 o'clock on an evening of May, 1932, they approached a fleet of three trucks, each drawing a trailer, the truck and trailer being about 40 feet in length over all, and traveling at intervals of 200 to 300 feet at a rate of approximately 28 miles an hour.

As defendant, who was driving the automobile, approached the trucks he was proceeding along a long straight portion of the highway at a rate of speed estimated at from 55 to 60 miles an hour. Plaintiff had remonstrated with defendant as to the speed, but defendant replied that he was anxious to reach San Francisco before midnight and that she should not worry as nothing would happen. As he drove up behind the rear truck and trailer, he suddenly and at a high rate of speed, swerved to his left, passed the truck, and swung in behind the second truck in the line. Again he suddenly swerved to the left, narrowly missing a head-on collision with a south-bound car, and again plaintiff remonstrated at the speed and the manner of his driving but he made no reply and swung in between the first and second trucks. Just as defendant was preparing to cut out and pass the first truck plaintiff told defendant that to attempt to pass the truck under the circumstances would be suicide. To this he again paid no heed but swung out in the line of the south-bound traffic, and almost immediately a collision occurred between the car of defendant and a south-bound car on the right side of the highway, traveling about forty miles an hour, causing the injuries complained of.

Plaintiff testified that she was seated on the right of the automobile, yet she clearly saw the lights of several cars approaching them from the north as they cut in and out between the trucks. Defendant was seated on the left and in a much better position to see the on-coming traffic, yet he continued at a speed of 55 to 60 miles an hour, and, in spite of the warning of plaintiff and the lights of the cars he must have seen, he persisted in swinging into the line of these cars.

The driver of the rear truck testified defendant passed him at a speed in excess of 55 miles an hour in a reckless manner and cut in so sharply that if the car had skidded it would have been struck by the truck. A driver of another of the trucks testified that the lights of the on-coming cars were plainly visible.

Defendant attempted to establish the fact that the driver of the Chrysler with which he collided was zigzagging and on the left of the highway and therefore the car was hidden by the leading truck and he did not see it (a rather inconsistent statement), but a witness who was proceeding south immediately behind the Chrysler testified that the car was in its proper place on the highway, traveling about 40 miles an hour.

The jury was amply sustained in their implied finding that defendant was proceeding in a negligent manner at the time of the collision.

Section 141¾ of the California Vehicle Act provides in effect that any person who as a guest accepts a ride in any vehicle moving upon a public highway, and, while so driving as such guest, is injured, shall have no right of recovery against the driver of such vehicle, provided, however, that the driver shall not be relieved for injury or death of such guest proximately resulting from the intoxication or willful misconduct of such driver.

The courts have on numerous occasions been called upon to define "willful misconduct" as the term is used in the California Vehicle Act and in the Workmen's Compensation Act (St. 1917, p. 831, as amended). A definition frequently quoted is found in Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512. "'Willful misconduct' means something different from and more than negligence, however gross. * * * The mere failure to perform a statutory duty is not, alone, willful misconduct. * * * To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

In Nelson v. Westergaard, 130 Cal. App. 79, 19 P.(2d) 867, 873, the following instruction was given: "'Willful misconduct' would imply a purposeful disregard of the care and diligence which the said defendant owed the said plaintiff," which instruction was approved by the reviewing court as a proper definition of the term.

Walker v. Bacon (Cal. App.) 23 P.(2d) 520, 521, is a recent case defining willful misconduct. There the operator of an automobile drove his car at a rate of 60 miles an hour on a rough and high-crowned road against the protests of his guest, he also knowing that the steering knuckle of his car was badly worn. In the concurring opinion in that case Mr. Justice Marks said:

"Numerous attempts have been made to define 'willful misconduct' without any definitely satisfactory result. In Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512, it was said: '"Willful misconduct" means something different from and more than negligence, however gross.' See, also, Howard v. Howard (Cal. App.) 22 P.(2d) 279, 281. It invites difficulties to conclude that 'willful misconduct' is 'something different' from negligence. If there is no negligence, there can be no willful misconduct, for, if there be no negligence, the driver of an automobile must be operating it in accordance with all the rules of the road and the dictates of prudence and caution. It is obvious that under such circumstances there could be no willful misconduct. It should be true that willful misconduct is 'more than negligence, however gross.'

"Gross negligence has been defined as '"the want of slight diligence," as "an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others," and as "that want of care which would raise a presumption of the conscious indifference to consequences."' Howard v. Howard, supra; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; 19 Cal. Jur. 554, and cases cited. When the Legislature in 1931 (St. 1931, p. 1693) omitted gross negligence from the grounds upon which a guest could recover damages against the owner, driver or person responsible for the operation of the motor vehicle, it restricted the right of recovery to intoxication or willful misconduct. While negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is 'willful' on the part of the responsible person.

"While it is difficult to define that degree of carelessness which the Legislature must have had in mind, it is my opinion that it must be held that willful misconduct is willfully, that is, intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable. Of course, willful misconduct may be inferred from the circumstances surrounding the accident."

In the case of Howard v. Howard (Cal. App.) 22 P.(2d) 279, 281, in which case a petition for a hearing in the Supreme Court was denied, the court said:

"While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wan-

ton and reckless disregard of its possible result."

Therefore, having in mind the facts in this case and analyzing these facts in the light of the definitions of willful misconduct, we are of the opinion that such willful misconduct was clearly shown to exist in the acts and conduct of defendant.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

135 Cal.App. 580

McCALLUM v. MAXWELL.

Civ. 1450.

District Court of Appeal, Fourth District, California.

Dec. 5, 1933.

1. Appeal and error ⇐731(5).

Where bill of exceptions brings up all evidence introduced at trial, and specification points to particular finding, it is sufficient (Code Civ. Proc. § 648).

2. Fraud ⇐50.

Fraud is affirmative defense, and burden of proving it rests on defendant.

3. Brokers ⇐19.

Broker acting as agent for party to exchange of realty was bound to highest degree of good faith to principal.

4. Appeal and error ⇐931(1), 1010(1).

Intendments are in favor of judgment, and, if evidence supporting findings is substantial, with or without conflict, findings are sufficiently supported.

5. Appeal and error ⇐931(1).

Appellate court must accept as true all evidence tending to establish correctness of findings, taking into account all inferences which might reasonably have been thought by trial court to lead to same conclusion.

6. Fraud ⇐13(2).

Actual fraud is committed where one with intent to induce another to enter into contract makes positive assertion in manner not warranted by information possessed of that which is not true, even though he believes it to be true.

7. Brokers ⇐85(9).

In broker's action for commission on exchange of realty involving defense of broker's fraudulent representation that there were only two vacancies in apartment house received by defendant in the exchange, evidence that, after signing agreement, defendant, according to method used by broker, counted mail boxes in hallway and discovered nine bearing no names, indicating nine vacancies, *held* admissible.

8. Brokers ⇐86(7).

In broker's action for commission on exchange of defendant's realty for apartment house, evidence warranted finding for defendant on his defense of fraudulent representation as to number of vacancies in apartment house (Civ. Code, § 1572).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Peter McCallum against M. A. Maxwell. Judgment for defendant, and plaintiff appeals.

Affirmed.

Roscoe R. Hess, of Los Angeles, and James L. Davis, of San Francisco, for appellant.

Roger C. Dutton, of Anaheim, for respondent.

WARMER, Justice pro tem.

The complaint in this action was for the recovery of a specified commission on the exchange of certain real property of the defendant for an apartment house belonging to a Mr. Cooper. The answer denies the allegations of the complaint, and by way of a separate defense alleges that the broker, plaintiff herein, represented to defendant that there were only two vacant apartments in the apartment house, and that the defendant was induced thereby to execute the offer of exchange of his property for the said apartment house. Judgment was for defendant, from which plaintiff appeals.

[1] Appellant urges that there is no evidence in the record to support the judgment. Respondent maintains that the record before us is insufficient to challenge the sufficiency of the findings on account of the failure of appellant to comply with the provisions of section 648 of the Code of Civil Procedure. Where a bill of exceptions brings up all of the evidence introduced at the trial and the specification points to a particular finding, it is sufficient. Tannahill v. Greening, 85 Cal. App. 714, 259 P. 1017, and cases there cited.

[2] Appellant then asserts that the burden of proof is upon the respondent to establish the issue of fraud. This is admitted by respondent and of course must be, as fraud is an affirmative defense, and the burden of proving such defense rests upon the defendant. 12 Cal. Jur. 816, 826.

[3-5] Appellant next contends that there is no evidence that there were any vacancies in the apartment house. That plaintiff was the agent of the defendant is conceded. Hence plaintiff is bound to the highest degree of good faith to his principal, the defendant. Gammon v. Ealey & Thompson, 97 Cal. App. 452, 275 P. 1005. The intendments are in favor of the judgment, and, if the evidence in support of the findings be substantial, either with or without conflict, the findings are sufficiently supported. Hind v. Oriental Products Co., 195 Cal. 655, 235 P. 438; Shannon v. Tooker et al., 167 Cal. 484, 140 P. 10. In examining the sufficiency of a questioned finding, the appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account as well all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Delannoy v. Quetu, 73 Cal. App. 627, 239 P. 71, and Menotti v. Marchesi, 63 Cal. App. 49, 218 P. 439.

[6] Actual fraud is committed where one, with intent to induce another to enter into a contract, makes a positive assertion, in a manner not warranted by the information of such person, of that which is not true, even though he believes it to be true. A party will always be held to make good his statement in the form in which he makes it. Muller v. Palmer, 144 Cal. 305, 77 P. 954; McMahon v. Grimes, 206 Cal. 526, 275 P. 440.

[7, 8] It appears from the record that respondent signed the exchange agreement after Mr. McCallum, appellant herein, had brought it to him with the statement that there were but two vacancies in the apartment house; that respondent had said to him, "Now, are you sure that is so? I don't want to sign until I am sure"; that appellant took respondent over to the apartment house some time prior to the date of signing the exchange agreement, and explained to him that the manner of determining the vacancies was by ascertaining the number of mail boxes in the lobby or hallway of the apartment house that had no names on them. If there was no name on a mail box, it meant that the apartment served by that particular mail box was vacant. On that occasion such method of determination of vacancies showed four vacancies, and appellant told respondent such was a fact. Almost immediately after signing the agreement or offer of exchange, respondent, accompanied by his father-in-law, went to the apartment house, and, applying the same method as hereinbefore described for determining vacancies, discovered that there were nine vacancies, according to the number of mail boxes having no names thereon. If, a short time before, such method of determining vacancies was sufficient for appellant to represent to respondent that it correctly revealed the actual vacancies, appellant cannot later complain if respondent uses the same method suggested by appellant for determining the desired facts. Appellant objected to all of the above evidence. We see no error in the admission of this testimony. There is no evidence that the method or yardstick of measurement was not used, or that the facts so determined were not true. Appellant ought not to be heard to say, in effect: "You (respondent) go to said apartment house. There you will find mail boxes in the hall, and each mail box without a name thereon indicates a vacant apartment in the apartment house." Then, when such direction is followed by respondent, his principal, appellant cannot say that evidence regarding the same is inadmissible, or, in effect: "I chose the yardstick or method for determining a fact. It was used by you and the fact so determined is against me. Therefore, such a manner of determining the fact, not being the most scientific possible, I repudiate it as incompetent, without value, and cannot be bound thereby. It is not even evidence of the fact."

The record shows that, following the date of the signing of the offer of exchange, respondent went to Los Angeles and met appellant; that respondent said he was ready to go into escrow, but wanted to check up on what appellant had theretofore said to him, suggesting that the checking be done at once. Whereupon appellant told him that could not be done (giving some very questionable purported reasons). Then the declaration was made by appellant: "You have to take it as it is."

We think the circumstances, conduct of the parties, and the testimony, without further quotation therefrom, are sufficient to support the finding of the trial court that there were more than two vacancies. It is only necessary to quote enough of the evidence to show that the finding is supported. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157. The evidence is uncontradicted that appellant made the representation that there were only two vacancies in the apartment house before respondent signed the exchange agreement. Construing the evidence in the light most favorable to the defendant herein brings the statements clearly within the provisions of section 1572 of the Civil Code. McMahon v. Grimes, supra. The evidence is sufficient to support the finding of the trial court.

The conclusion that we have arrived at makes it unnecessary to discuss the other points raised on appeal.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

KERRISON et al. v. UNGER et al.

Civ. 9045.

District Court of Appeal, First District, Division 2, California.

Dec. 7, 1933.

Rehearing Denied Jan. 6, 1934.

Hearing Denied by Supreme Court Feb. 5, 1934.

1. Death ⇐31(1).

Action for wrongful death exists only in favor of such persons as Legislature has declared (Code Civ. Proc. § 377).

2. Death ⇐31(8).

Children *held* entitled to maintain action for their mother's death caused by motorist who borrowed automobile from another, both parties being jointly and severally liable for motorist's negligence (Code Civ. Proc. § 377; Civ. Code, § 1714¼).

3. Trial ⇐335.

Where jury returned verdict of $3,000 against driver and $2,000 against automobile owner, trial court's refusal to accept verdict and sending jury back, after which jury returned verdict of $5,000 against driver and $5,000 against owner, *held* not error (Civ. Code, § 1714¼).

4. Death ⇐99(4).

$5,000 for death of 68 year old woman who contributed spending money to two of her daughters and paid board and worked for another daughter *held* not excessive.

5. Evidence ⇐20(1).

Court will take judicial notice that many servants are compensated in part by being furnished board and room and balance at so much money per month, in determining reasonableness of damages for death of mother who worked for her daughter.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Stephen M. Kerrison and others against William Unger and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellants.

Edwin V. McKenzie and Frank J. Mahoney, both of San Francisco, for respondents.

STURTEVANT, Justice.

In the forenoon on August 29, 1931, the defendant William Unger was driving an automobile southerly from San Francisco toward San Mateo, for the purpose of locating employment. The automobile was owned by his sister and her husband, Ann U. Daniels and Benjamin F. Daniels, who had loaned to their codefendant the automobile for the purpose of making the trip. When approaching Mount Olivet Cemetery the defendant Unger struck Clara E. Kerrison, knocking her down and causing such injuries that she died shortly thereafter. For damages suffered by them the plaintiffs, one son and four daughters, commenced this action. All of the plaintiffs are adults, the youngest one being thirty-four years of age. All of the defendants answered, and from a verdict in favor of the plaintiffs they have appealed.

The defendants present four points. The first and third are but different methods of presenting the contention that there is no statutory authority authorizing the plaintiffs to maintain this action. Section 377 of the Code of Civil Procedure is as follows: "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case, may be just." Section 1714¼ of the Civil Code, among other things, provides:

"Every owner of a motor vehicle shall be liable and responsible for *the death of or injury to* person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner provided that the liability of an owner for imputed negligence imposed by this section * * * shall be limited to the amount of five thousand dollars for *the death of or injury to* one person in any one accident * * * and provided that in any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant provided personal service of process can be had upon said operator within this state, and upon recovery of judgment, recourse shall first be had against the property of said operator so served;

"*Subrogation.* And provided, further, that in the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner shall be subrogated to all the rights of the person injured or whose property has been

injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. * * *"

[1, 2] The plaintiffs filed a complaint which contained two counts. In the first count it was charged that William Unger was the servant, agent, and employee of his codefendants. In the second count it was charged that Mr. and Mrs. Daniels were the owners of the automobile, and that Mr. Unger was driving it with their knowledge, permission, and consent. On the trial it transpired that Mr. Unger was not the servant, agent or employee of his codefendants, and the contention made at this time presents the question as to whether the owners of the automobile are, under the statutes of California and evidence that was introduced, liable for an action as for wrongful death. In presenting the point the defendants cite section 377, Code of Civil Procedure, and thereupon they assert that that section is not addressed to imputed negligence. They then cite section 1714¼, Civil Code, and they contend that the latter section is not applicable in a death case. The plaintiffs reply that all Code sections relating to a particular subject are in pari materia and should be read and considered together; that the four Codes should also be read together; and that they should be construed as parts of one statute. Continuing, the plaintiffs contend that, when the several provisions of the Code are so construed, it is clear the plaintiffs were entitled to maintain an action on the theory as pleaded in the second count of their complaint. Both parties concede at once that: "At common law a civil action for damages for the wrongful death of another could not be maintained by anyone. Such a right of action is not an inherent one, and it did not survive the death of either person to or by whom the wrong was done. The common-law rule was actio personalis moritur cum persona—the person committing the wrongful act causing death was wholly immune from any action of a civil nature. Human life was considered to be of such a character that its wrongful destruction could not be measured in terms of money. Where, therefore, an action for wrongful death now exists it is the creature of statute and exists only so far in favor of such persons as the legislative power has declared." 8 Cal. Jur. 948. In giving a new cause of action section 377, Code of Civil Procedure, extends to deaths "* * * caused by the wrongful act or neglect of another. * * *" Standing alone that section would not support the plaintiffs. However, section 1714¼, Civil Code, made certain things actionable that were not actionable theretofore. By its terms it expressly includes death cases. Another call of the statute is that the act complained of must result "from negligence in the operation of such motor vehicle. * * *" Still another call of the statute is that the negligence of the operator will be imputed to the owners if the operator was acting "with the permission, express or implied, of such" owners. These several calls extend the cause of action theretofore defined in section 377, Code of Civil Procedure; that is, they extend its operation to cover acts of imputed negligence. It has been held that section 377, Code of Civil Procedure, in so far as it made the operator of the instrumentality and his employers liable, created a joint and several liability. Grundel v. Union Iron Works, 127 Cal. 438, 441, 59 P. 826, 47 L. R. A. 467, 78 Am. St. Rep. 75. Following the same reasoning, section 1714¼, Civil Code, creates a joint and several liability against all of these defendants. All of these matters being considered, we have no doubt that when both statutes are read together the plaintiffs have a cause of action as claimed. The defendants cite Kramer v. Market Street Railroad Co., 25 Cal. 434. It is not helpful. The statute under consideration in that case created a cause of action for wrongful death and among other things provided that the action could be maintained by the "personal representatives." Not the decedent's representative, but his father, attempted to maintain the action. The court held he could not do so. The defendants also cite Pritchard v. Whitney Estate Co., 164 Cal. 564, 129 P. 989. The statute before the court in that action stated that certain actions could be commenced on behalf of certain relatives, naming them, but not naming a nephew. Nevertheless, the plaintiff, as administrator, attempted to maintain the action on behalf of a nephew only. The court held that could not be done. Neither decision contains anything opposed to what we have said.

[3] After the jury had deliberated on its verdict for a while, it returned into court with a verdict for plaintiffs, awarding $3,000 damages against the defendant Unger and $2,000 damages against the defendants Daniels. The trial court refused to accept it and directed the jury to retire and further consider its verdict. Later the jury returned into court and presented a verdict awarding $5,000 damages against the defendant Unger and $5,000 damages against the defendants Daniels. The defendants concede that if the verdict was informal or insufficient the action of the trial court was proper. However, they contend the verdict was neither informal nor insufficient. In this connection they state a hypothetical case where the damages against the operator might be $30,000 or more, as damages for the death of one person. Following the provisions of section 1714¼, Civil Code, they point out that in the same hypothetical case the damages against the owners could not be in excess of $5,000. The illustration is not convincing. In the instant case the ju-

ry had the right under the law and the evidence to bring in a verdict against the operator of the automobile for less than $5,000; but, if it did so, under the clear terms of the statute the damages against the owners should have been in the same sum. The first verdict was not in proper form. The court did not err in sending the jury back. 27 R. C. L. 890.

[4, 5] The defendants earnestly contend that the award of $5,000 is grossly excessive. The plaintiffs with the same earnestness contend to the contrary. We agree with the contention made by the plaintiffs. The decedent was sixty-eight years of age at the time of her death. She had an expectancy of about ten years. The proof ran in two different channels. There was evidence that the decedent contributed to Mrs. West, one of her daughters, spending money and money for clothes, and during the year preceding her death she so contributed to Mrs. West $125. To another daughter, Mrs. Warren, the contributions in money extended over the period 1927 to 1931 and amounted to $600, or $120 annually. On this data the jury could have found that if the decedent had not been killed she probably would have made further contributions in the sum of $2,450 during the remainder of her life expectancy. On the date of the death of her husband the decedent went to live with another daughter, Mrs. Olcott. The household consisted of Mr. and Mrs. Olcott, Mrs. West, and the decedent. For two years prior to the date of the accident Mrs. Olcott was the proprietor of a candy store. Mrs. West was employed to assist her. During that period the decedent kept house for Mrs. Olcott's family. She did a great deal of the housework, the greater part of it, although Mrs. Olcott assisted. The decedent did the cooking and made Mrs. Olcott's clothes. As to the reasonable value of the services of a housekeeper in such a household there was no direct evidence. While the decedent was in Mrs. Olcott's home she paid $40 per month for her board and room until the last five or six months, and then she paid $20. This court will take judicial notice of the fact that many servants are compensated in part by being furnished board and room and the balance at so much money per month. We cannot say that some are not paid a fixed sum and a charge over for board and room. If the jury found the services of the decedent as housekeeper, cook, and seamstress were worth $50 per month, she paying for her board and room, this court may not say as a matter of law that it erred. The contributions of such services were therefore an additional factor of from $1,200 to $3,600, depending on the charge for board and room and the changing value of the service rendered. Her income from rents and dividends amounted to $41 per month. She received from her son $20 to $30 per month. Her total receipts varied from $744 to $852 annually. Considering all of these facts we are unable to state that the amount allowed is so plainly unjust and oppressive as to suggest passion, prejudice or corruption on the part of the jury.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

CAMINETTI v. BOARD OF TRUSTEES OF JACKSON UNION HIGH SCHOOL DIST. et al. *

Civ. 4971.

District Court of Appeal, Third District, California.

Dec. 9, 1933.

Hearing Granted by Supreme Court Feb. 5, 1934.

1. Pleading ⇐343.

Judgment on pleadings *held* erroneously entered in mandamus proceeding by school teacher to recover salary in that direct issues were presented which could be determined only on introduction of evidence (School Code, § 5.681).

Judgment was erroneously entered on pleadings, since issues raised by pleadings were qualifications of petitioner entitling her to teach in high school during year in question, and question of her willingness and ability to render services required, and amount of salary to which she would be entitled if she had rendered such services; the answer denying that petitioner was employed as teacher, upon the contrary specifically alleging that she was not so employed, with further allegation that she voluntarily withdrew her certificate of qualification from office of superintendent of schools of county, thereby preventing her automatic re-election for following year, for which recovery was sought.

2. Mandamus ⇐168(2).

Answer to school teacher's petition for mandamus to recover salary alleging credentials were withdrawn in May preceding year for which recovery was sought, it could not be assumed that teacher was automatically re-employed, in absence of evidence supporting such contention (School Code, § 5.681).

3. Schools and school districts ⇐133.

Board of trustees had no power to elect or employ teacher unless her certificate of qualifications was in full force and on file in

office of superintendent of schools at time of appointment (School Code, § 5.420).

4. Schools and school districts ⇐133.

School teacher whose credentials were not on file in office of county superintendent could not be legally or automatically re-employed to teach in school (School Code, § 5.420).

5. Mandamus ⇐3(2).

"Mandamus" is equitable proceeding deemed to apply only when there is no plain, speedy, or adequate remedy at law.

[Ed. Note.—For other definitions of "Mandamus," see Words & Phrases.]

6. Mandamus ⇐154(3).

Mandamus should not issue unless it clearly appears by uncontroverted allegations of pleadings that one is absolutely entitled to employment or office from which he is unlawfully excluded.

Appeal from Superior Court, Amador County; J. T. B. Warne, Judge.

Mandamus by Evelyn M. Caminetti against the Board of Trustees of Jackson Union High School District and others. Judgment for petitioner, and respondents appeal.

Reversed.

Ralph McGee and T. G. Negrich, both of San Francisco, for appellants.

Snyder & Snyder, of Jackson, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The respondents below have appealed from a judgment which was rendered by the superior court of Amador county, directing a writ of mandamus to issue requiring the trustees of Jackson Union High School district to pay petitioner $1,841.25 in compensation of her salary as teacher in that school for the year beginning July 1, 1931. Judgment to that effect was entered upon the pleadings which were filed in this case.

It is contended the petition fails to state facts sufficient to constitute a cause of action, and that the special demurrer should have been sustained for the reason that it does not appear the petitioner was legally qualified to teach in that school because her certificate was not on file in the office of the superintendent of schools at the time of her alleged re-election as required by sections 5.420 and 5.740 of the School Code. It is further asserted the writ should not have issued because it appears the petitioner had a plain, speedy, and adequate remedy in a suit at law for money due and owing to her.

The complaint alleges that petitioner was employed and taught English in the Jackson Union High School during the year beginning September 2, 1930, and that "said plaintiff has been employed as such teacher, pursuant to said employment, continuously thereafter, from the said 2nd day of September, 1930, to and including the school term * * * for the year beginning July 1, 1931, and ending June 30, 1932"; that on or about September 7, 1931, and repeatedly thereafter, she presented herself to the trustees at said school for the purpose of continuing her services as a teacher, and during the entire school year of 1931–1932, she was ready, willing, and able to perform her services as such teacher, but that, on the last-mentioned date, said trustees informed her that she had not been re-elected as a teacher for that term, and that her services were no longer desired; that she was therefore not permitted to continue as a teacher in said school after July 1, 1931; that "at all the times herein mentioned, plaintiff held, and now holds, a general secondary teacher's certificate entitling her to teach in all high schools in the State of California"; that in a previous proceeding between the same parties another writ of mandamus was issued October 13, 1931, from the superior court of Amador county determining the status of this petitioner as a teacher in that school, in which proceeding the court then found:

"It is hereby ordered, adjudged and decreed that the petitioner above named, Evelyn M. Bacigalupi, is now and has been ever since the commencement of this proceeding, entitled to perform the duties and services of a probationary teacher in the English Department of the Jackson Joint Union High School. * * *

"It is further ordered, adjudged and decreed that a peremptory writ of mandamus issue out of and under the seal of this Court directed to the Board of Trustees of the Jackson Joint Union High School and to Walter H. Taylor, Peter L. Cassinelli, W. E. Eskew, George E. Vela and Thomas Hedgpeth, as such Trustees, and to each of them, as such Trustees of said school and said school district, commanding them, and each of them, forthwith to assign said petitioner, Evelyn M. Bacigalupi to a class or classes in the English Department as a probationary teacher in the English Department of the said Jackson Joint Union High School, in the said Jackson Joint Union High School District, County of Amador, State of California, and that petitioner have judgment for her costs taxed in the sum of $31.25."

It was further alleged that, notwithstanding said mandate, the trustees wrongfully refused to permit petitioner to teach in said school during the year of 1931–1932, or any part thereof, and that there is therefore due and owing to her under and pursuant to her

said contract of employment, for the period during which she held herself in readiness to perform her duties as such teacher, the sum of $1,800, for which sum the petitioner demands judgment, and a mandate directing the trustees to forthwith pay the same. The petition in this case contains no allegations that petitioner was not employed in teaching elsewhere during the year for which she demands compensation, nor does it allege that she had complied with the requirements of sections 5.420 and 5.740 of the School Code, by filing or keeping her certificate registered with the superintendent of schools.

A demurrer on the grounds that the petition fails to state facts sufficient to constitute a cause of action, and that it affirmatively appears that she has a plain, speedy, and adequate remedy at law, was overruled. The defendants then filed an answer denying that the petitioner was ever employed as a teacher in said school except for the year 1930–1931, for which services she was fully compensated. It was also denied that petitioner was ready, willing, or able to perform the services of a teacher of English in said school during any part of the year 1931–1932, or that she was qualified to teach in said school during that year, or that she earned or was entitled to the sum of $1,800, or any sum whatever for her services as teacher during the last-mentioned year, and affirmatively alleges that, "on or about the ——— day of May, 1931, the plaintiff voluntarily and of her own accord withdrew from the office of the Superintendent of Schools of the County of Amador, State of California, * * * her certificate as a teacher and thereafter and on or about January 21, 1932, she again filed her credentials and certificate in the office of the Superintendent of Schools of said County of Amador; that at no time from on or about the ——— day of May, 1931, to on or about January 21, 1932, did the plaintiff have any certificate filed or credentials registered with the Superintendent of Schools of said County of Amador." The answer prays that petitioner take nothing by her action.

Upon motion of the petitioner, judgment on the pleadings was rendered, and the trustees were directed to forthwith pay petitioner the sum of $1,800, plus the costs of suit incurred in the former proceeding. From this judgment the respondents below have appealed.

[1] Judgment on the pleadings was erroneously rendered in this proceeding for the reason that direct issues are presented which may be determined only upon the introduction of evidence. The issues which are raised by the pleadings are the qualifications of the petitioner entitling her to teach in the Jackson High School during the year 1931–1932, the question of her willingness and ability to render the services required, and the amount of salary to which she would be entitled if she had rendered the services.

[2] The answer denies that the petitioner was employed as a teacher in the Jackson High School for the year 1931–1932. Upon the contrary, it specifically alleges she was not so employed, and further asserts that she voluntarily withdrew her certificate of qualifications from the office of the superintendent of schools of Amador county "on the ——— day of May, 1931," and that these credentials remained absent from that office until January 21, 1932. Since the petitioner relies upon the theory that she was automatically re-elected for the year 1931–1932, for failure on the part of the trustees to properly notify her in writing of her discharge, it is apparent that, if she removed her credentials from the files of the superintendent of schools while the trustees still had power to terminate her services, she may not claim to have been automatically re-elected for the reason that a necessary element constituting the implied contract of re-election required by section 5.420 of the School Code was then absent. Section 5.681 of the School Code, as it existed prior to August 14, 1931, authorized the board to dispense with the services of a probationary teacher for an ensuing year by giving her written notice thereof on or before the 10th day of June. Since the answer alleges that the petitioner's credentials were withdrawn in May, 1931, and that she was not employed as a teacher for that year, it may not be assumed she was automatically re-employed, in the absence of evidence in support of her contention.

[3] The board of trustees had no power to elect or employ a teacher unless her certificate of qualifications was in full force and on file in the office of the superintendent of schools "at the time of such appointment." It is apparent that the credentials must also be on file in that office at the time of the automatic re-election of a teacher by virtue of failure to notify her of the termination of her services as required by law. This time did not expire until June 10th. Such automatic re-election is deemed to be an implied contract renewing the employment. Section 5.420 of the School Code evidently applies to the automatic re-election of a teacher just as it does to the original contract of employment. That section provides: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to employ for positions requiring certification qualifications, only persons who hold legal certificates in full force and effect, and on file at the time of such appointment in the office of the county superintendent of schools, to serve as substitutes, probationary or permanent employees."

Moreover, section 5.740 of the School Code further provides that no requisition for a warrant shall be drawn in favor of any teacher "unless he was employed by the board of trustees * * * as provided in this Code."

[4] It follows that, if the credentials of the petitioner were not on file, as the answer specifically alleges they were not, then she could not have been legally or automatically re-employed to teach in that school. Under such circumstances she would not be entitled to compensation.

[5, 6] Mandamus is an equitable proceeding deemed to apply only when there is no plain, speedy, or adequate remedy at law. Unless it clearly appears by uncontroverted allegations of the pleadings that one is absolutely entitled to an employment or office from which he is unlawfully excluded, the writ should not issue. Section 1085, Code Civ. Proc.; Saxton v. Board of Education, 206 Cal. 758, 766, 276 P. 998. In the present case it is undisputed that the petitioner did not perform any service as a teacher in the Jackson High School during the year 1931–1932. It would be inequitable to mulct the Jackson district with an $1,800 salary for which no services were rendered, unless it clearly appears that the claimant was legally entitled to the school, that she was wrongfully excluded therefrom, and that she was legally and otherwise willing and able to render the services, and that at all times she held herself in readiness to do so. These issues are all disputed by the pleadings. It was therefore erroneous for the trial court to render judgment on the pleadings, thus depriving the trustees of the opportunity of proving their defense.

The petitioner asserts that the decree which was rendered October 13, 1931, in the former mandamus proceeding, heretofore mentioned, conclusively establishes her status as a teacher entitling her to perform the services of a teacher in the Jackson High School for the year 1931–1932, and that, since that decree became final for failure to appeal therefrom, the trustees are precluded from now setting up any defense in conflict therewith. Since the former mandamus proceeding is not before us in this case, except as hereinbefore quoted, we are unable to determine just what issues were presented in that action. It will be observed, however, that that decree merely recites that "Evelyn M. Bacigalupi is now [October 13, 1931, the time of rendering the decree] and has been ever since the commencement of this proceeding, entitled to perform the duties and services of a probationary teacher in the English department of the Jackson Joint Union High School District." There is, and obviously there could be, no allegation in the first proceeding that she was thereafter qualified or entitled to teach in that school. The allegation to that effect in the present proceeding is specifically denied. It is affirmatively alleged her credentials were not replaced on file in the office of the superintendent of schools until January 21, 1932, which is approximately three months after the rendering of the former writ, which, for the purpose of argument, may be deemed to have established her status up to that date. In the absence of any allegation to the contrary, it may be assumed that status would continue. But certainly, in the present case, in view of an affirmative allegation of the answer to the contrary it may not be assumed the status declared by a former proceeding continues throughout the year. There is therefore a portion of the year, at least, during which the question of her qualifications and right to serve the Jackson High School as a teacher therein, and to recover a stipulated salary therefor, are undetermined issues, making it erroneous for the trial court to have rendered judgment on the pleadings.

On the petitioner's theory that her status as a probationary teacher entitling her to perform the services as such in the Jackson High School for the year 1931–1932 was completely established by the decree which was rendered in the previous mandamus proceeding, which we do not concede, and that nothing remains in this action except to render judgment under the contract for a stipulated salary, and to procure an order to pay the same, it may be doubtful whether mandamus would lie, since a plain, speedy, and adequate remedy would seem to exist under such circumstances in a simple suit at law for money due and owing. In view of what has been previously said regarding the error in rendering a judgment on the pleadings, it is unnecessary to determine the remaining problems raised upon this appeal.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 684

STEVENS v. BRYSON, Public Administrator.

Civ. 9019.

District Court of Appeal, First District, Division 2, California.

Dec. 11, 1933.

1. Executors and administrators ⇐437(3).

Action by wife against administrator of deceased husband to rescind her deed conveying land to husband, brought two years and eight months after discovery of husband's fraud by wife who offered no excuse for delay in bringing action, *held* barred by laches, regardless of whether prejudice resulted to administrator from delay (Civ. Code, § 1691).

2. Equity ⇐72(1).

As respects laches barring action, requirement of prejudice to defendant resulting

from plaintiff's delay in bringing action applies only to cases in which delay merely affects remedy, and not the right.

3. Contracts ⊂270(1).

One seeking right of rescission must affirmatively show that he acted promptly upon discovering facts which entitle him to rescind (Civ. Code, § 1691).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Ida Stevens, sometimes known as Ida G. Stevens, formerly Ida Benjamin, against Frank Bryson, Public Administrator of Los Angeles County, as the administrator of the estate of Junius H. Stevens, deceased. From a judgment for defendant, plaintiff appeals.

Affirmed.

E. L. Brady, of Los Angeles, for appellant.

Loyd Wright, Charles E. Millikan, and S. Earl Wright, all of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff brought this action against the administrator of the estate of her deceased husband seeking the cancellation of a deed. At the close of plaintiff's case, defendant made a motion for nonsuit, which motion was granted, and judgment was entered in favor of defendant. Plaintiff appeals from said judgment.

Plaintiff and deceased were married in 1923. In November, 1924, the parties entered into an arrangement whereby plaintiff conveyed to the deceased an undivided one-half interest in a piece of real property located in Los Angeles and the deceased conveyed to plaintiff an undivided one-half interest in a piece of real property located in Kings county. Thereafter these pieces of real property stood in the names of plaintiff and deceased as tenants in common. Deceased died in October, 1928, and defendant was appointed as administrator of the estate in November, 1928. This action to cancel the conveyance made by plaintiff to the deceased in 1924 was not commenced until June, 1931.

In her complaint plaintiff alleged in effect that deceased had obtained said conveyance by fraud, duress, and undue influence. She further alleged "that plaintiff first discovered the falsities and tricks and deceptions which the decedent played upon her in the matters and things above set out a short time after decedent's death in October, 1928." Defendant answered denying practically all of the material allegations of the complaint. Defendant further alleged that plaintiff's alleged cause of action was barred by laches and the statute of limitations. At the trial plaintiff testified that deceased forced her to sign the deed, and further testified that she first learned of the falsity of certain alleged representations in October, 1928.

[1] We find no error in the trial court's ruling. Respondent urges several grounds in support thereof, but we deem it unnecessary to discuss all of them. Appellant's cause of action for cancellation of the deed was essentially one for rescission. Assuming without deciding that her allegations of discovery within three years prior to the commencement of the action were sufficient to prevent the running of the statute of limitations (see Consolidated Reservoir & Power Company v. Bowen, 216 Cal. 787, 16 P.(2d) 271), we are nevertheless of the opinion that appellant was not entitled to prevail in this action for rescission. The right to rescind is governed by section 1691 of the Civil Code, and said right is dependent upon prompt action upon discovery of the facts. Campbell v. Title Guarantee, etc., Co., 121 Cal. App. 374, 9 P.(2d) 264. If it be conceded for the purpose of this discussion that appellant might have rescinded or brought an action for that purpose provided she acted promptly after the death of her husband and the alleged discovery of the facts, she certainly may not be said to have acted promptly when she failed to take any action for two years and eight months thereafter. She neither pleaded nor proved any excuse whatever for the delay from October, 1928, to June, 1931, and this delay was fatal. Campbell v. Title Guarantee, etc., Company, supra, and cases therein cited.

[2, 3] Appellant contends that "the defense of laches is not sufficient, no prejudice having been shown by the defendant." Authorities are cited by appellant showing the conditions under which laches may be urged as a defense barring the remedy in equitable actions generally. See 10 Cal. Jur. 530 and cases cited. While there is some general language in the decisions which apparently lends support to appellant's contention, we believe that the requirement of prejudice resulting from delay should be confined to those cases in which delay merely affects the remedy and not the right. In cases involving rescission, failure to act promptly affects the right. Section 1691 of the Civil Code requires prompt action regardless of the question of whether prejudice may result from delay, and a person seeking to avail himself of the provisions of that section must affirmatively show that he has acted promptly. The distinction between actions for rescission where delay affects the right and other actions where delay merely affects the remedy is clearly suggested in Victor Oil Company v.

Drum, 184 Cal. 226, at page 243, 193 P. 243, 250, where the Supreme Court, in discussing the "defense of laches," said: "The distinction must also be borne in mind between such a case as the present and one where relief against fraud is sought by way of rescission. There the party defrauded, *as a condition of his right to rescind,* must act promptly upon discovering the facts which give him the right." (Italics ours.) We are therefore of the opinion that the question of whether prejudice resulted from the delay was immaterial in the case before us.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

136 Cal.App. 63

MACK v. MASSACHUSETTS BONDING & INS. CO.

Civ. 9065.

District Court of Appeal, First District, Division 2, California.

Dec. 26, 1933.

Brokers ⇐4.

Where real estate brokers were prospective land purchaser's agents and, until end of 1931 at least, it was understood that deposits be retained by them until full purchase price was paid, and brokers retained such deposits, surety on brokers' bond expiring December 31, 1931, *held* not liable, no demand being made for return of deposits before January 2, 1932.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Daniel W. Mack against the Massachusetts Bonding & Insurance Company and others. Plaintiff voluntarily dismissed as to defendants not named, and, from a judgment in favor of named defendant, plaintiff appeals.

Affirmed.

Silas W. Mack and John Thompson, both of Monterey, for appellant.

Wyckoff, Gardner & Parker, of Watsonville, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover a penalty on a real estate broker's bond. The cause was tried without a jury, and findings and judgment were for the bonding company. Prior to trial the plaintiff voluntarily dismissed as to the brokers.

The appeal presents a simple question of fact. During the year 1931 the plaintiff delivered to the brokers at various times sums of money to be used by the brokers in the purchase of two lots owned by the Ellis Landing & Dock Company. The full purchase price was fixed at $5,400. When the first payment was made the plaintiff accepted a receipt from the brokers reading: "This is an option for 180 days, terms to be made then or deposit refunded." Subsequent receipts were accepted "on account of option," or "on account of lots." On December 29, 1931, the brokers gave the plaintiff a receipt for $1,100, representing all payments theretofore made. At plaintiff's request this receipt was dated back to May 19, 1931. It recited that the total purchase price of the lots was $5,130, payable $1,100 cash and the balance in January, 1932, the deposit to be forfeited if full purchase price was not paid as agreed. The difference between the original price of $5,400 and that of $5,130 was a discount of 5 per cent. which the owner would allow for payment of the full purchase price in cash. The plaintiff agreed to these terms in writing. The bonding company was surety for the brokers for the period ending December 31, 1931. On January 1, 1932, the plaintiff expressed his approval in writing of the arrangements made with the brokers.

Thereafter the plaintiff became dissatisfied and commenced this action on the theory that the brokers had misappropriated the moneys deposited with them. The trial court found that the bond expired on December 31, 1931; that no money was appropriated by the parties to their personal use, that they did retain the moneys so deposited, but that no demand was made for the return thereof on or before January 2, 1932, and that neither of the brokers was at any time an agent or broker of or for the owner of the property.

These findings are fully sustained by the evidence, and it cannot be contended that they are not. The evidence further shows that the brokers were at all times agents of the plaintiff, that the moneys were paid to them voluntarily, and that, until the end of the year 1931, at least, the understanding of the parties was that the brokers should retain the deposits until the full purchase price was paid so that the purchaser might obtain the benefit of the cash discount. The liability of the surety company expired December 31, 1931. What might have occurred thereafter between the brokers and the appellant does not affect this litigation.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

136 Cal.App. 65

SMITH v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 9493.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1933.

Certiorari ⊂=4.

Where superior court affirmed judgment of municipal court made payable in merchandise only, writ of review was not proper remedy for alleged lack of jurisdiction of municipal court to make judgment so payable, since petitioner could have execution issued on judgment for stated sum, if municipal court lacked such jurisdiction.

Petition by Sidney Smith for writ of review to Superior Court of the County of Los Angeles and others.

Writ denied.

Andrew M. Strong, of Los Angeles, for petitioner.

PER CURIAM.

This is on petition for rehearing, after denial by this court of a petition for writ of review of a judgment of the superior court entered on appeal from a judgment of the municipal court of the city of Los Angeles.

The judgment of the municipal court was rendered in an action arising out of a contract between the parties to that action. The judgment was to the effect "that the plaintiff have judgment against Horne's Zoological Arena Company in the sum of $187.50, and that the said judgment be satisfied only in merchandise and not in money." The petition for writ of review herein is directed against the judgment of the superior court affirming said judgment of the municipal court. In support of the petition for writ of review it was contended by petitioner that the trial court had no jurisdiction to enter a judgment payable in goods only, and that the superior court exceeded its jurisdiction in affirming such judgment. We denied the petition for writ of review because we were of the opinion that the superior court, as a court of appeal, had jurisdiction either to reverse or to affirm the judgment. Also, it appeared on the face of the petition that the municipal court did not exceed its jurisdiction in rendering judgment for the sum of $187.50, in an action whereby the plaintiff sought to recover that sum. If there was any excess of jurisdiction in the rendition of the judgment in the municipal court, such excess was not in the amount of the judgment, but was only in the direction contained therein that the judgment be satisfied only in merchandise and not in money. If the municipal court was without authority to make that specific direction concerning the satisfaction of the judgment, then there remains no reason why the petitioner as plaintiff in that action may not demand and have execution on the judgment for the stated amount, without qualification by the said additional clause of the judgment. Petitioner's appropriate relief is not by way of writ of review of the judgment of the superior court rendered by it in disposing of the appeal.

The petition for rehearing is denied.

136 Cal.App. 10

PEOPLE v. JAMESON.

Cr. 259.

District Court of Appeal, Fourth District, California.

Dec. 20, 1933.

Criminal law ⊂=200(7).

Acquittal of rape *held* not to require acquittal of lewd and lascivious conduct, elements of rape and included offenses not being same as those of lewd and lascivious conduct (Pen. Code, §§ 220, 261, 288, 664).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Allison Jameson was convicted of lewd and lascivious conduct, and he appeals.

Affirmed.

Edw. L. Johnson, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, Justice.

The defendant was accused by two counts of an information of the crime of rape and of the crime of lewd and lascivious conduct. The jury acquitted him on the first charge and convicted him on the second. He has appealed from the judgment and the order denying his motion for new trial. As his sole ground for a reversal, he urges that, as but one act was proved, the verdicts are inconsistent, and that an acquittal on the first count must be held to effect an acquittal on the second.

Defendant is of the age of fifty-nine years and the girl involved is of the age of nine years. There can be no good purpose served in detailing any of the evidence here. We have examined the record carefully, and have

reached the following conclusions: (1) The evidence fully justified the jury in acquitting the defendant of the charge of rape. (2) While the evidence might be construed so that a conviction of either of the included offenses of attempt to commit rape or assault with intent to commit rape might have been upheld, it points most strongly to the offense charged in the second count of the information. (3) The evidence supports the conviction under the second count of the information.

The elements of the crime of rape and its included offenses are not the same as those of lewd and lascivious conduct. Sections 288, 220, 261, 664, Pen. Code; People v. Parker, 74 Cal. App. 540, 241 P. 401; People v. McAfee, 82 Cal. App. 389, 255 P. 839.

Under the facts before us, the verdict of acquittal of the crime of rape is not inconsistent with the verdict of guilty of the crime of lewd and lascivious conduct, and the acquittal of the first offense does not effect an acquittal of the second.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

MORRIS v. PACIFIC ELECTRIC RY. CO. et al.*

Civ. 8118.

District Court of Appeal, Second District, Division 2, California.

Dec. 12, 1933.

Rehearing Denied Jan. 11, 1934.

Hearing Granted by Supreme Court Feb. 9, 1934.

1. Appeal and error ⇐928(1).

On plaintiff's appeal, evidence must be construed most favorably to plaintiff in considering propriety of defendant's refused instruction.

2 Railroads ⇐351(12).

In action involving collision of automobile with electric engine, instruction that motorist, if driving more than 40 miles per hour, was negligent, *held* improperly refused under evidence.

3. Railroads ⇐324(3).

Motorist's violation of speed statute *held* conclusive evidence of negligence (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

4. Appeal and error ⇐1067.

In action involving collision between automobile and electric engine, refusing instruction warranted by evidence that, if motorist drove more than 40 miles per hour just before accident, he was negligent, *held* prejudicial error (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Charles W. Morris against the Pacific Electric Railway Company and another. From the judgment for plaintiff, defendants appeal.

Reversed.

Frank Carr, of Oakland, and E. E. Morris and C. W. Cornell, both of Los Angeles, for appellants.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

CRAIG, Justice.

In an action for damages alleged to have been sustained as a result of a collision between an electric engine and an automobile, a verdict and judgment were entered in favor of the plaintiff. The defendants appealed.

[1, 2] Evidence offered by the respective parties tended to show that the plaintiff was driving at a rate of 45 to 50 miles per hour when about 75 feet from the intersection, whereas he swore that he was driving not more than 25 or 30 miles per hour at or about the time of the accident. The defendants requested that the jury be instructed to the effect that it would be unlawful to drive faster than 40 miles per hour, and that, if they should believe that he had been driving at and just prior to the accident at a greater rate than 40 miles per hour, he would be guilty of negligence as a matter of law and could not recover. The refusal to give this instruction is the principal ground assigned for a reversal of the judgment. Much space in the respondent's briefs is devoted to contending that there is an entire lack of evidence to show that the plaintiff's car was traveling as fast as 40 miles per hour at the time of the collision. We think that, from the testimony of the numerous witnesses, there is ample evidence, if construed most favorably to respondent, as it must be in considering the propriety of the instruction offered, to have justified it.

[3, 4] Such evidence, if believed by the jury, would entitle them to conclude under proper instructions, and the defendants were justified in asking that they determine, whether or not the plaintiff was acting within the law or was exceeding the statutory limit of speed at the time of the impact. We need but quote from one of numerous decisions upon

the point. "As said in Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706, 710: 'While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence (citing cases). Therefore, the statement that such an act is "of itself negligence" or "negligence as a matter of law" or "negligence per se" (equivalent expressions) is, in this state, strictly correct.' See, also, Baillargeon v. Myers, 180 Cal. 507, 508, 182 P. 37; Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 P. 887; Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010." Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045, 1046. To the same effect are Taylor v. Cockrell, 116 Cal. App. 596, 3 P.(2d) 16; Fitzpatrick v. Haskell, 117 Cal. App. 684, 4 P.(2d) 580; Thompson v. Dentman (Cal. App.) 21 P.(2d) 1009. As in the case of Taylor v. Cockrell, supra, both the facts in suit and the trial took place before the amendment of section 113 of the California Vehicle Act in 1931 (see St. 1927, p. 1436, § 30; St. 1931, p. 2120, § 34). We think the refusal on the part of the trial court to give this instruction was prejudicially erroneous.

The judgment is reversed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

135 Cal.App. 687

WARD et al. v. GREAT WESTERN POWER CO. OF CALIFORNIA et al.

GOODSPEED et al. v. SAME.

Civ. 4938, 4939.

District Court of Appeal, Third District, California.

Dec. 11, 1933.

Hearing Denied by Supreme Court Feb. 8, 1934.

1. Corporations ⇐503(3).

Upon showing by defendant corporation that principal place of business is not in county wherein action is pending, plaintiff has burden of proof to defeat motion for change of venue (Const. art. 12, § 16).

2. Corporations ⇐503(3).

Allegations of verified complaints and supporting affidavits in actions to recover damages for fraud *held* to support venue against defendant corporations in county other than county of their principal place of business on theory that liability was incurred in county of suit (Const. art. 12, § 16).

Appeals from Superior Court, Butte County; Henry Deirup, Judge.

Separate actions by Bertha Ward and another and by Isabelle A. Goodspeed and another against the Great Western Power Company of California and another. From orders denying motions for change of venue, the defendants appeal.

Orders affirmed.

Thos. J. Straub and W. H. Spaulding, both of San Francisco, W. R. Dunn, of Sacramento, and George F. Jones, of Oroville, for appellants.

Ware & Ware, of Chico, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

These are appeals from orders denying motions for change of venue. The actions were brought in Butte county, and the corporate defendants moved to change the place of trial to the city and county of San Francisco, where they have their principal place of business. The cases were consolidated, as they involve identical issues.

The complaints are quite lengthy, but it is only necessary for the purpose of this appeal to refer to the facts involving venue. The actions are for recovery of damages for fraud. It is alleged that the Western Canal Company was a corporation wholly owned, operated, and controlled by the Great Western Power Company, a corporation, and that the two corporations were public utilities for the purpose of furnishing water for the irrigation of lands within the area where lay the lands of the two plaintiffs.

The alleged fraud consisted in inducing plaintiffs to make payments of money to defendant Western Canal Company on the alleged false and fraudulent representations that defendant Western Canal Company was a mutual water company, and that plaintiffs could not get water from the company except by purchase of its capital stock, the same to become appurtenant to the lands to be irrigated, and that water would not be furnished plaintiffs unless they so became stockholders. It is then alleged that plaintiffs entered into such contracts to buy stock, make payments upon account thereof, and that they received nothing of value and have been damaged thereby.

It is also alleged in each of the causes of action that all the false representations of defendants were made in Butte county, and each of the contracts for the purchase of the capital stock in the Western Canal Company were made in Butte county, and the stock

therein delivered to plaintiffs in Butte county, and the breach occurred in the county of Butte.

Affidavits were filed by defendants in support of their motion, and plaintiffs replied relying upon the allegations of their verified complaints and counter affidavits.

This being an action solely against a corporation, resort must be had to the Constitution which governs such actions.

[1] Article 12, § 16, provides that "a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, * * *" and, where the corporation has shown that the principal place of business is not in the county wherein the action is pending, the burden of proof is upon the plaintiff to defeat the motion. Hammond v. Ocean Shore Development Co., 22 Cal. App. 167, 133 P. 978.

[2] It is the contention of defendants that no liability arose against either of them until plaintiffs paid the money, that the actions were not on the contracts, but are for damages for fraud, and that the damages arose and the liability arose at the time and place where they suffered the alleged damage; that is, when and at the place where they paid over the money.

As authority for this contention, appellants rely principally upon the case of Krogh v. Pacific Gateway, etc., Co., 11 Cal. App. 237, 104 P. 698, 699. There a corporate defendant had its principal place of business in San Joaquin county and was sued in an action to recover damages for false and fraudulent representation relating to the sale of certain shares of defendant's stock. The instrument there under consideration alleged that the parties had entered into a contract whereby, upon the payment of certain money in the future, defendant would then transfer to plaintiff certain oil-bearing lands. In discussing the case, the court said: "It cannot be said from any facts set forth in the complaint that the contract sued upon was made, or was to be performed, or that the alleged liability arose, or that its breach occurred, in Fresno county. But it does appear by the affidavit that the principal place of defendant's business is in San Joaquin county. The only contract shown by the complaint was made, and was to be performed subsequently to the representations made, at Fresno county. No obligation or liability or breach occurred at Fresno county so far as appears. The alleged representations made by Abrams may have induced plaintiff to subscribe for the stock, and pay his money to defendant for the same, but this took place, as appears from the complaint, after the representations were made, and not until then did any obligation arise, and defendant's alleged breach occurred still later."

In the instant case it appears from direct allegation in the complaint that the contract sued upon was made and was to be performed, and the liability arose and the breach occurred all in Butte county. In the Krogh Case, supra, it was alleged in the complaint "the defendant * * * represented to plaintiff that defendant had entered into a contract * * * whereby upon the payment of a certain sum of money * * * they would transfer to defendant certain * * * lands * * * and that the money so paid would be used to pay Abrams and Brandt for said land; that should plaintiff purchase 25,000 shares, and pay $5,000 therefor, the money so paid would be applied * * * and that defendant would thereupon proceed to develop said property; * * * that 'plaintiff, believing said representations * * * thereafter subscribed for 25,000 shares. * * *'" Thus it appears that the breach was not of the original agreement, but of the subsequent promises which differentiate it from the case at bar.

Defendant cites a number of cases discussing action for libel and malicious prosecution, but we are here considering an action for damages for fraud and the rule applicable to libel and malicious prosecution is not governing.

The law seems to be clear that one may bring an action for rescission in the county where the contract sought to be rescinded was made. Nakata v. Guarantee Mortgage Co., 60 Cal. App. 260, 212 P. 937. In that case the District Court of Appeal held the action was for damages, and said: "From what we have just quoted it is patent that the plaintiff attempted to allege a cause of action as for fraud; that the tort was committed in Fresno county, and that he sued in that county for the damage which he incurred by the commission of the wrong complained of." Upon an application for a transfer to the Supreme Court, that court said: "* * * We deem it proper to say that we are inclined to agree with the petitioners that the action is one for the rescission of contract, for the prayer of the complaint is for the amount of money already paid and for the collection of the plaintiff's promissory note. Kelley v. Owens, 120 Cal. 502, 510, 47 P. 369, 52 P. 797. Such an action may be brought in the county where the contract sought to be rescinded was made."

In Hiett v. Inland Finance Corporation, 204 Cal. 195, 267 P. 320, it was held that, where an action was brought for the collection of a note and mortgage on the ground of duress and menace, it is proper to bring the action in the county where the contract was made; it therefore appears that not only may an action be maintained where the breach of the contract occurred, but even in

rescission, or in an action based on duress or menace, where the action is on the case, it may likewise be maintained in the county where the contract was made.

It is also contended by appellants that the allegations and statements in plaintiffs' verified complaints and affidavits are mere conclusions, and do not constitute evidence, not only as to the statement on the questions as to the place where the alleged tort was committed, but also as to certain other allegations.

The affidavits are too long to set forth in this opinion, but, in the affidavit of Mary Jane Ward relative to the place where the contracts mentioned in the complaint were made, it is said: "That all of the contracts for the purchase of capital stock and referred to in plaintiffs' complaint were made, executed and delivered in said Butte county; that each of said contracts in the first two counts of plaintiffs' complaint was prepared and submitted to and signed by the said Charles Ward in Butte county; that the contract referred to in the third count to plaintiff's complaint was prepared, submitted to and signed by plaintiffs in said Butte county; that after having been signed by the contracting purchasers, as aforesaid, each of said contracts was submitted to defendants for their approval; that after each of said contracts had been approved by defendants and signed by defendant Western Canal Company, each of them was separately, by defendants' representative and agent, delivered personally to the respective contracting purchasers therein named in said Butte county; and that each of said contracts was wholly in the possession and under the control of defendants until such delivery, and none of said contracts was made or in effect until such delivery by defendant's representative and agent, as aforesaid"—and substantially the same averments are found relative to where the contracts were made in the Goodspeed case.

As to the place of payment, if that is material, it is alleged in the verified complaints in both actions that all of the payments were made in the county of Butte. In contravention of these allegations the local manager of the canal company filed an affidavit alleging that the defendants never kept or had any account with any bank in the county of Butte and that affiant never received any payments from plaintiffs on account of the transactions set forth in their complaints, but that certain bank checks were delivered by plaintiffs to affiant payable to Western Canal Company for payment of stock, which checks were transmitted to San Francisco to defendant canal company, and were by the canal company indorsed and deposited in a bank in San Francisco for collection.

It is urged by defendants the allegations made as to payment were pure conclusions and were therefore to be disregarded. We cannot agree with defendants as to this, and believe that sufficient allegations are set forth in the complaints and affidavits of plaintiffs not only as to the place where the contracts were made, but where the payments were likewise made, and, the court having decided upon conflicting evidence, we must hold that a proper showing was made to retain the trial of the action in the county of Butte in both cases.

Therefore, upon authority of Nakata v. Guarantee Mortgage Co., supra, and the facts established by plaintiffs, we must hold that the county of Butte was the proper county in which to maintain the actions.

The orders are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

136 Cal.App. 31

ARAGON et ux. v. PARSONS et al.

Civ. 1099.

District Court of Appeal, Fourth District, California.

Dec. 21, 1933.

Appeal and error ⇨786.

On appeal from order granting plaintiffs new trial because of insufficiency of evidence to sustain adverse verdict, where full examination of entire record was necessary to decide questions presented, requiring assistance of briefs, court could not grant motion to dismiss or affirm order under court rule (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Jose Aragon and wife against Harold Kent Parsons and another. Verdict for defendants, and from an order granting plaintiffs' motion for a new trial, defendants appeal. On motion to dismiss the appeal or affirm the order.

Motion denied.

Stickney & Stickney, of San Diego, for appellants.

W. K. Brown and Edgar B. Hervey, both of San Diego, for respondents.

MARKS, Justice.

This is a motion to dismiss the appeal or affirm an order granting a motion for new trial, under the provisions of section 3, rule V,

Rules of the Supreme Court and District Courts of Appeal.

The action grew out of a collision of motor vehicles in an intersection of public streets in the city of San Diego in which Celia Elias de Aragon, wife of Jose Aragon, was injured. The jury returned verdicts for the defendants. The trial court granted the plaintiffs' motion for new trial "upon the ground of the insufficiency of the evidence to sustain the verdicts."

We have examined appellants' opening briefs and the papers submitted on this motion, and find counsel in sharp disagreement upon the evidence before the trial court, the inferences to be drawn from it, as well as the law applicable to the questions presented. The defendants maintain that there was competent and uncontradicted evidence supporting the verdicts and no evidence upon which a verdict for the plaintiffs could be predicated. The plaintiffs assert that the evidence was conflicting on material questions.

While we are not unmindful of the broad powers given the trial judge in granting a motion for new trial upon the ground of insufficiency of the evidence to sustain the verdict, we are of the opinion that in this case a full examination of the entire record will be necessary in order to decide the questions presented, and that we should have the assistance of briefs from both parties. Such being the case, we cannot grant the motion, under the rule announced in City of Los Angeles v. Los Angeles-Inyo Farms Co., 126 Cal. App. 61, 14 P.(2d) 339, and Thompson v. Boyer, 127 Cal. App. 149, 15 P.(2d) 541.

Motion denied.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 60

CARTER v. CARR et al.

Civ. 1295.

District Court of Appeal, Fourth District, California.

Dec. 22, 1933.

Appeal and error ⇐659(3).

Motion for diminution of record to have included instructions and to raise an additional point *held* granted, where appellants contended that instructions bore directly on evidence alleged to have been erroneously received, disclosed purpose for which it was admitted, and would assist court in determining appeal on merits.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by J. C. Carter against S. G. Carr and another. From the judgment, defendants appeal. On defendants' motion for diminution of record on appeal.

Motion granted.

Walter J. Little and W. Eugene Craven, both of Los Angeles, Sutherland, Dearing & Jertberg, of Fresno, and William M. Byrne, of Los Angeles, for appellants.

M. G. Gallaher and C. M. Ozias, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is a motion by the appellants upon suggestion of diminution of record to have inserted in and made a part of the transcript on appeal the instructions given by the trial court to the jury.

The action is one involving alleged misrepresentations in the sale of cattle. Certain of the issues were submitted to a jury, and the parties seem to sharply disagree as to whether the entire verdict was advisory in nature, as to just what was submitted to the jury, and as to whether or not the trial court adopted the verdict of the jury in making its findings. In their opening brief the appellants claim, among other things, that the proper measure of damages was not applied and that certain evidence relating to damage was erroneously received. The respondent, in his brief, contends that this evidence was properly admitted for an entirely different purpose. In making this motion the appellants contend that the instructions as given bear a direct relationship to the evidence received, disclose the purpose for which the same was admitted, and will be of assistance to this court in the determination of the appeal on its merits. The motion further asks that the appellant Seaboard Dairy Credit Corporation be permitted to raise a point in its closing brief which was not raised in its opening brief, namely, that the court erred in its instructions to the jury as to the proper measure of damages. It is contended that the consideration of this point is made necessary by certain contentions made by the respondent in his brief, bearing upon the purpose for which certain of the evidence was admitted.

If, as claimed, the court submitted a part of the issues to the jury and adopted its verdict thereon, or if the verdict was not merely advisory as to certain issues, the instructions given may be material and of assistance in determining the merits of the appeal. The case is not before us on its merits at this time, and we do not feel called upon to make a detailed study of the record on this motion and again when the case is finally

submitted. If it should develop on final consideration that these instructions, and any possible error in the giving of them, have no proper bearing on the decision of this appeal, no harm will result to respondent from the granting of this motion.

The motion is granted, the addition to the transcript to be made at the expense of the appellants, and the appellant corporation is given permission to raise the additional point referred to.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 573

PEOPLE v. RAMEY.

Cr. 2431, 2449.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1933.

Rehearing Denied Dec. 20, 1933.

Hearing Denied by Supreme Court Jan. 4, 1934.

1. Criminal law ⇐1069(6).

Provision of court rule that, if application stating grounds of appeal is not filed within five days, appeal shall be dismissed, is mandatory (Rules of Supreme and District Courts of Appeal, rule 2, § 7).

2. Criminal law ⇐1023(12).

Order sustaining demurrer to petition for writ of error coram nobis filed after judgment of conviction *held* not appealable, where issue was same as that involved in appeal from judgment.

3. Criminal law ⇐997.

Where facts alleged in petition for writ of error coram nobis were known to trial court before judgment of conviction, demurrer to petition was properly sustained without leave to amend.

4. Larceny ⇐68(1).

Evidence supporting charge of grand theft of yearling heifer *held* to make case for jury.

5. Criminal law ⇐232.

Failure to advise accused of right to counsel at time of preliminary hearing *held* not fatal to commitment, where justice of peace advised accused and codefendant fully respecting their legal rights when they were arraigned (Pen. Code, § 858).

6. Criminal law ⇐274.

District attorney's statement to brother of accused charged with grand theft of heifer shot with rifle that accused making application for probation stands in better condition before court if his previous record is good *held* not to amount to legal fraud (Pen. Code, § 1203).

Facts disclosed that district attorney, in talking to accused's brother, said that he did not know anything about case, and that, if accused aided or assisted others in killing and taking the animal, he would be a principal under the Code, and, on his assistant's statement that accused's codefendants had confessed and that so far as he knew accused had not been guilty of any previous stealing or killing of cattle, district attorney replied that he did not know about that, but that, if a man is guilty and enters plea of guilty and makes application for probation, he stands in better condition before court if his previous record is good. District attorney testified that when he made such statement he did not have in mind statute prohibiting granting of probation to one committing grand theft when armed with deadly weapon.

7. Criminal law ⇐274.

Refusal to permit accused to change plea from guilty to not guilty of grand theft of yearling heifer *held* not abuse of discretion, in absence of showing in record of legal fraud influencing accused to enter plea.

8. Criminal law ⇐1023(3).

Orders denying motions for leave to withdraw plea of guilty and to quash preliminary hearing, having been made before judgment, were not appealable; any error therein being reviewable on appeal from judgment (Pen. Code, § 1237).

Appeal from Superior Court, Ventura County; J. J. Trabucco, Judge.

Monte Ramey was convicted of grand theft on his plea of guilty, and, from such judgment and from orders denying his motions for leave to withdraw the plea and to quash and set aside preliminary hearing preceding filing of information and denying motion for writ of error coram nobis, defendant appeals.

Judgment affirmed, and appeals from orders denying motions dismissed.

Thomas Gould, Jr., of Ventura, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

On May 25, 1933, an information was filed charging defendant, jointly with John Rockwell and Burt Hathaway, with the crime of grand theft, in unlawfully taking a yearling heifer belonging to one Weber. On the same day, at 2 p. m., the three defendants were arraigned in the superior court, and each pleaded guilty to the charge and made oral application for probation, hearing on which was set for June 5th. At the time of such hearing, defendant, Ramey, expressed a desire for the assistance of counsel, and the court appointed present counsel to represent him. On June 7, 1933, such counsel moved on behalf of Ramey for permission to withdraw the plea of guilty theretofore entered and for leave to enter a plea of not guilty; also for an order quashing and setting aside the preliminary hearing preceding the filing of the information. Testimony was taken both in support of and in opposition to such motions, and on June 12, 1933, an order was made denying them and denying Ramey's application for probation, and he was sentenced to San Quentin. From such orders and judgment of conviction said defendant has appealed.

On July 21, 1933, said defendant, Ramey, filed his petition in the lower court for a writ of error coram nobis. A demurrer to said petition was filed by the district attorney and was sustained by the court without leave to amend. An appeal is also taken from the order sustaining such demurrer.

[1-3] A motion has been filed to dismiss the latter appeal because of noncompliance with section 7, rule II, of the Rules of the Supreme and District Courts of Appeal, which requires the appellant in an appeal "from an order made after judgment," among others, within five days after giving notice of appeal, to "file with the clerk and present an application to the trial court, stating in general terms the grounds of appeal," etc. The record here fails to show that this was done. The section cited also provides that, if such application is not filed within the time prescribed, "the appeal shall be dismissed." Such language has been held to be mandatory on many occasions, and in our opinion it is opposed to any other construction. The facts presented on the appeal from the order made after judgment were fully presented to the trial court prior to judgment, and the issue is the same as that involved in the appeal from such judgment. Under such circumstances the later order is not appealable. People v. Brattingham, 91 Cal. App. 527, 267 P. 120. The facts set forth in the petition for the writ of coram nobis were all known to the court prior to judgment, and the demurrer was properly sustained without leave to amend. Asbell v. State, 62 Kan. 209, 61 P. 690, 691.

[4] The evidence taken at the preliminary hearing shows that the three defendants had gone hunting; Ramey taking a rifle which he borrowed for the occasion. The heifer was shot by defendant Rockwell, and all three participated in cutting it up and carrying it away. None of the defendants was represented by counsel at such preliminary hearing, but all of them took the stand after being advised by the magistrate that they were not asked or obliged so to do, and that whatever they said might be used against them. A jury might well have concluded, from the testimony of Hathaway and Rockwell, that the party went out to get fresh beef instead of deer meat, and the force of such evidence is not shaken by the weak denials of Ramey.

After the arrest, John Ramey, a brother of appellant, went to the district attorney, who was an old friend of his, to see what the trouble was. He was frankly told by the prosecuting officer that the facts of the case were not known to him personally, and that all he could say was that if Monte Ramey aided or assisted the others in the killing and taking he would be a principal under the Code. The district attorney further said: "It is a good deal like a man who might drive a car up to a bank and his companions or a couple of others go into the bank and hold up and rob the cashier and likely kill him, or something. The man who stayed outside in the car would be guilty of murder if the cashier was killed, or robbery if any money was taken." An assistant to the district attorney, who was present, and who had investigated the case to some extent, then remarked that the other two men had confessed, and also that so far as he then knew defendant, Ramey, had not been guilty of any previous stealing or killing of cattle; whereupon the district attorney replied: "I don't know about that. If a man is guilty and he enters a plea of guilty and makes an application for probation, of course he always stands in a better condition before the court if his previous record is good;" that ordinarily he (the prosecuting officer) never made any objection one way or the other; that probation was a matter which was left entirely with the court; and that "if he [Ramey] does plead guilty he might make an application for probation, and what the probation officers would do with it is something I can't tell." After the interview above mentioned, John Ramey visited his brother in the jail. Shortly thereafter the three defendants were taken before the court and each pleaded guilty.

[5] Appellant urges that he was not legally committed, for the reason that he was not advised of his legal rights and because the court should have permitted a change of plea. It is admitted that the justice of the peace

advised the three defendants fully as to their legal rights at the time they were brought before him and arraigned, but appellant apparently considers that it was a fatal error to fail to advise him of his right to counsel at the time of the preliminary hearing. In our opinion the magistrate did all he was required to do by section 858 of the Penal Code, and appellant was legally committed.

[6] It is also contended that the action of the district attorney amounted to a legal fraud. With such contention we cannot agree. He did not hold out any inducements or make any misrepresentations which resulted in the entering of the plea of guilty. In fact he told John Ramey that he knew nothing about the case and correctly stated the law concerning the effect of aiding and abetting a criminal act. It is true the district attorney testified that he did not have section 1203 of the Penal Code in mind at the time he stated the law relative to probation, and that, if he had, he would not have said anything; but we fail to see anything in what he did that amounts to legal or any other kind of fraud.

[7] Appellant further contends that he was not in fact guilty of the crime charged, but at the most only of the crime of receiving stolen property, the heifer not having been killed by him (People v. Smith, 112 Cal. 333, 44 P. 663; State v. Butler, 65 N. C. 309), and should have been given a chance to prove that he did not steal it. The record before us would justify the trial court in the conclusion it apparently reached, viz. that at the time appellant filed his motion for permission to change his plea he well knew what the probation officer's report recommended, that he entered his plea with full knowledge of the facts and in the hope of obtaining probation but without the knowledge that it would probably be denied, and that, when that fact was ascertained, the plea was attempted to be changed. In view of the fact that the record does not show something amounting to legal fraud influencing appellant to enter such plea, we cannot find any abuse of the broad discretion which the court has in determining the motions addressed to it.

The report of the probation officer filed June 5, 1933, contains no reference to section 1203 of the Penal Code, but, on the ground of "no extenuating circumstances," recommends that probation be denied. A supplemental report was filed June 12, calling the attention of the court to such section of the Code and to the fact that one of appellant's codefendants used a rifle in connection with the perpetration of the crime, and stating that "the question is therefore placed before the court whether or not probation must necessarily be denied" in accordance with the provisions of such section. At appellant's request the court at the hearing permitted him to present witnesses who testified to his former good character and that in their opinion he would make good if given probation. We find nothing in the record indicating that the court denied probation because it felt that the provision in section 1203 of the Penal Code as to the possession or use of a deadly weapon prevented its entertaining or granting the application for probation. The point has been passed on in People v. Andrich et al. (Cal. App.) 26 P.(2d) 902, adversely to the claim of appellant herein. As to that decision we of course have no comment to make; but, assuming it to be correct, legislation would seem to be needed, as it has extended the prohibition against probation to cases entirely outside the reason for the rule.

We see no merit in appellant's contention that the district attorney was guilty of misconduct, or that any act of his prejudiced appellant either at the preliminary hearing or at the hearing on the motions.

[8] The orders appealed from all being made prior to judgment, no right of appeal therefrom exists under section 1237 of the Penal Code. Any error therein would be reached, however, on the appeal from the judgment of conviction.

The motion to dismiss the appeal in Cr. 2449 is granted, and said appeal is dismissed, as also are the appeals from the orders in Cr. 2431. The judgment in the latter case is affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

On Rehearing.

PER CURIAM.

Rehearing denied. There is nothing in the record before us which could be construed as a reflection on the action of counsel for appellant in making the motions he did, and we heartily commend the earnestness, able work, and sacrifice on his part in performing his duties, after appointment by the court and without compensation, as a worthy example to be followed by attorneys in the proper defense of their clients.

136 Cal.App. 15

PEOPLE v. WHEELER et al.

Cr. 1299.

District Court of Appeal, Third District, California.

Dec. 21, 1933.

Criminal law ⇨1130(4).

Where transcript on appeal was filed September 15, 1933, and no briefs were filed within time allowed, judgments and orders would be affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Sacramento County; L. M. Shelley, Judge.

William O. Wheeler and others were convicted of robbery in the first degree, and they appeal.

Affirmed.

George E. Foote, of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellants were convicted in the superior court of Sacramento county of a felony, to wit, robbery of the first degree.

The transcript on appeal was filed in this court September 15, 1933. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on December 4, 1933.

No briefs having been filed and the time therefor having expired, pursuant to the provisions of section 1253 of the Penal Code, the judgments and the orders are affirmed.

136 Cal.App. 1

PEOPLE v. POGGI.

Cr. 2421.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1933.

1. Criminal law ⇨1168(4).

In robbery prosecution, refusal to withdraw admission in evidence of gun admitted for purpose of illustration only when attempt to lay foundation for its admission failed, if error, *held* not prejudicial.

2. Criminal law ⇨1035(3).

Defendant could not complain of trial judge's alleged misconduct by reason of his remarks, where remarks were not improper and defendant made no assignment of misconduct at time remarks were made.

3. Criminal law ⇨1044.

In robbery prosecution, admitting testimony of codefendant *held* not prejudicial, in absence of request for instruction to disregard or motion to strike testimony, where testimony disclosed nothing connecting defendant with crime.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Thomas G. Poggi was convicted of robbery, and he appeals.

Affirmed.

Henry C. Huntington, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

This is a bank robbery case. The crime was committed by one Crowley together with another man who, according to the contention of the prosecution, was the defendant Poggi. The defendant, having been convicted, appeals from the judgment and from the order denying his motion for a new trial.

The evidence is amply sufficient to prove that appellant was present at the time and place of the robbery, and that he took part in that proceeding. Only three points are suggested in support of the appeal. These are that the court committed prejudicial error in admitting in evidence a gun which was not positively identified and was not found in possession of the appellant; that the trial judge was guilty of misconduct in certain comments made by him; and that testimony of the said Crowley was improperly admitted.

[1] The gun thus received in evidence was shown to have been found (one week after the date of the robbery) in an apartment occupied by appellant and his wife. It was not otherwise shown to be the property of appellant. The only evidence that it was a gun used at the robbery consists of testimony of witnesses who, when this gun was shown to them, said that it was similar to the gun used by one of the men who held up the bank. In ruling upon the objection to the admission of the gun in evidence, the court said: "The gun is received in evidence, not as though a foundation had been laid it was the actual gun, but upon the evidence it was similar in appearance to the gun used, being used for the purpose of illustration only, at this time." The point urged by appellant is that, the gun having been admitted in evidence for the pur-

pose of illustration only and the attempt to lay a foundation for its admission having failed, the court should have withdrawn its admission in evidence for any purpose and left it marked for identification only. Even if the ruling of the court on this point was erroneous (which we think it not necessary to decide), the error was not prejudicial and does not present a sufficient ground for reversal.

[2] The assignment of misconduct by reason of remarks made by the trial judge is without merit. The remarks themselves were not improper, and appellant made no assignment of misconduct at the time.

[3] The assignment of error in the admission of the testimony of the witness Crowley is not supported by any statement in the brief, of the testimony given by Crowley, and we are not given any definite reason why it should be held that the court erred in permitting him to testify. It is suggested by the Attorney General that the transcript discloses no instruction requested that the jury disregard the testimony of Crowley, and no motion made to strike such testimony from the record. It seems to be conceded on both sides that his testimony disclosed nothing which in any way connected the defendant with the crime. Under these circumstances, there could have been no prejudicial error committed.

There being no other reason shown for reversal, it is ordered that the judgment and the order denying defendant's motion for a new trial be, and the same are, affirmed.

We concur: HOUSER, J.; YORK, J.

136 Cal.App. 12

DRUMM v. HART.

Civ. 805!.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1933.

1. Release ⇐29(1).

Release executed by injured passenger in automobile operated as complete bar to action, though effected pursuant to settlement entered into with husband of driver of automobile.

Release was effected by virtue of two written instruments, one a settlement entered into whereby husband of driver was unconditionally released from further liability, and the other a sight draft for the sum of money mentioned in the settlement which was issued by an insurance company naming insured and passengers as claimants for damages received through the accident, purporting on its face to be a release for damages resulting from the accident and being signed by passengers as payees.

2. Release ⇐38.

Payment for settlement of unliquidated claim for damages operates as compensation for injuries.

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

Action by Ferne Drumm against Marie S. Hart. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Jennings & Belcher, of Los Angeles, for appellant.

J. F. Frick, of Lompoc, and Preisker, Goble & Twitchell, of Santa Maria, for respondent.

STEPHENS, Presiding Justice.

Marie S. Hart was operating an automobile in a heavy fog, and the machine collided with a freight train, injuring a guest passenger, Ferne Drumm, who thereafter sued Mrs. Hart for damages. A jury found for the plaintiff in the sum of $7,000, and defendant appeals from the judgment entered thereon.

The issue before us very largely lies around the effect of two written instruments, one a settlement entered into whereby Herbert H. Hart was unconditionally released from further liability, and the other a sight draft for the sum of money mentioned in the settlement. The sight draft, issued by an insurance company, names H. H. Hart as the insured and Ferne and Louis S. Drumm as claimants for damages received through the accident. It purports on its face to be a release for damages resulting from the accident, and is signed by both Ferne and Louis S. Drumm as payees. In a like situation in Garcia v. California Truck Company, 183 Cal. 767, at 769, 192 P. 708, the Supreme Court said that, unless the release was avoided in some legitimate way, it would constitute an insuperable bar to recovery. For further authority on the point, see Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 P. 1165; Hawber v. Raley, 92 Cal. App. 701, 268 P. 943, 945, and Chetwood v. California National Bank, 113 Cal. 414, 45 P. 704.

[1, 2] The plaintiff sought to establish at the trial that because of the injuries sustained she was mentally unable to understand what she had signed, and that therefore the release did not bind her. There was conflict-

ing evidence received on this point, but the court did not submit the question to the jury, instead instructing that neither of the instruments had any effect on the case, as Mrs. Hart and not Mr. Hart was the defendant. It was the evident theory of the court that the action was against Marie S. Hart, and that what affected H. H. Hart was not material or relevant, and that the receipt, though signed by plaintiff in the case, did not constitute a release from her. This was reversible error. The release receipt of the injured party on the back of the sight draft brings the case within the doctrine that payment for a settlement of an unliquidated claim for damages operates as compensation for the injuries. Tompkins v. Clay St. R. R. Co., supra. The principle is well stated in Hawber v. Raley, supra, a case very similar to the instant one: "Nor does it matter, as plaintiff urges, that the settlement was made with Mrs. Emery, the owner of the automobile in which plaintiff was riding, and not with Mr. Emery, who was driving the same, for, as already shown, the application of the rule is based upon the fundamental fact that, where there is a single injury, there is but one cause of action, indivisible and inseparable for which both in law and good conscience there can be but one satisfaction." We do not think Wallner v. Barry, 207 Cal. 465, 279 P. 148, affects the above rule.

It may be that both Mr. and Mrs. Drumm accepted the settlement and received and receipted for the money under the apprehension that the insurance liability of Mr. Hart was alone affected thereby. The release, however, is in broad terms; no attempt at rescission or reformation has been made, and the only attack upon the release—the mental condition of the plaintiff at the time it was signed—was kept from the jury because the court concluded as a matter of law that the release did not affect Mrs. Hart in any case.

At the trial appellant sought to show that the automobile driven by Mrs. Hart was owned by Mr. Hart and that it was being driven with his permission. It was the theory of appellant that these facts would make Mr. Hart a joint tort-feasor (Civ. Code, § 1714¼), and that the release to him would therefore release Mrs. Hart. The trial court refused to permit the establishment of these facts. We think it unnecessary to go into this interesting question since the release signed by Mr. and Mrs. Drumm, as it reaches us from the trial court, stands at its face value and purports to cover the damages for the injury.

The judgment is reversed, and the cause remanded for trial.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

HELLMAN v. LOS ANGELES RY. CORPORATION.*

Civ. 8074.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1933.

Rehearing Denied Jan. 6, 1934.

Hearing Denied by Supreme Court Feb. 5, 1934.

1. Limitation of actions ⇨127(5).

Count in amended complaint alleging injury to passenger boarding street car due to conductor's negligence in jerking passenger up steps of car *held* not to state different "cause of action," as respects limitations, than original complaint which alleged that premature starting of car caused accident.

The amendment of complaint by addition of a new count thereto did not state a new "cause of action," which is merely an obligation sought to be enforced, because the two acts alleged were but different invasions of plaintiff's primary right and different breaches of same duty, and there was but one injury, and it was immaterial whether it resulted from negligence of motorman or of conductor, since in either case it was violation of same obligation.

[Ed. Note.—For other definitions of "Cause of Action," see Words & Phrases.]

2. Carriers ⇨320(8).

Evidence that passenger was injured either as result of sudden starting of street car after she had placed foot on first step and hand on handrail, or because conductor negligently pulled her up steps after car started, *held* sufficient to take case to jury.

3. Trial ⇨160, 171.

Trial court's power to direct verdict and grant motion for nonsuit is same.

4. Trial ⇨165, 178.

On defendant's motions for directed verdict and for nonsuit, conflicting evidence must be disregarded, and plaintiff's evidence be given all value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom.

5. Carriers ⇨321(23).

Instruction that pleadings admitted that plaintiff boarded street car at regular stopping place with bona fide intention of becoming passenger *held* not erroneous because of contention that plaintiff boarded car after it was set in motion; instruction having reference to stopping place only, not to manner of boarding, or whether car was in motion.

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 28 P.(2d) 384.

6. Trial ⇐194(18).

In action for injuries sustained while attempting to board street car, instructions *held* not erroneous as apprising jury that plaintiff was passenger, and that street railway was liable for slightest negligence.

Instructions were to effect that, if jury found from evidence that plaintiff boarded car before it was set in motion, jury must find that plaintiff was passenger, regardless of whether street railway or its employees actually knew of her presence thereon. Other instructions related to degree of care due from carrier toward passengers for hire, and others given on defendant's behalf clearly set forth plaintiff's claim that she boarded car when it was standing still, and that it was thereafter suddenly started. In view of all such instructions, jury could not have been misled into believing that reference in certain instructions for plaintiff to act of boarding car referred to anything excepting acts of plaintiff after she had reached lower steps of car before it was in motion.

7. Carriers ⇐247(1).

Carrier's acceptance of person as passenger is necessary to create such relationship, but such acceptance may be implied.

8. Carriers ⇐247(3).

One boarding street car at regular stopping place becomes passenger whether carrier actually knows of his presence on car or not, knowledge being implied.

9. Carriers ⇐316(1).

Where complaint in action for injuries to passenger boarding street car contained general allegation of negligence, in addition to specific allegations, res ipsa loquitur doctrine could be applied.

10. Carriers ⇐321(21).

Where explanation respecting cause of injury to passenger while boarding street car as alleged in complaint, as well as passenger's testimony, left much uncertainty as to how accident occurred, court properly instructed jury as to res ipsa loquitur doctrine.

11. Carriers ⇐321(21).

Instruction that, if plaintiff was passenger and was injured on steps of street car by reason of sudden starting thereof, burden was on company to show freedom from negligence, and submitting res ipsa loquitur doctrine, *held* not erroneous as putting burden on company of showing that it was not negligent.

Giving of such instruction could not have misled jury into believing that burden was on street railway of showing its freedom from contributory negligence, in view of several other instructions that burden was on plaintiff to prove by preponderance of all the evidence that defendant was negligent, and that burden was on plaintiff to prove that defendant was guilty of some one or more acts of negligence charged in complaint; that, though company was bound to exercise highest degree of skill, it was not insurer of passenger's safety; and that no presumption of negligence arose against company until cause of accident was proved.

12. Carriers ⇐348(13).

Instruction that burden was on street railroad of establishing by preponderance of evidence defense of contributory negligence of plaintiff injured while boarding street car *held* not erroneous or misleading.

13. Carriers ⇐348(14).

Instruction that plaintiff was not contributorily negligent in going on street car steps preparatory to boarding car *held* improperly given as submitting plaintiff's contributory negligence even if she tried to board moving street car, though pleadings were limited to her boarding standing car.

14. Carriers ⇐315(1).

Where plaintiff's pleadings sought recovery for injuries sustained after boarding standing street car, she could not recover or introduce evidence showing injury occurred while boarding moving street car.

15. Trial ⇐203(1).

Either party has right to have instruction given on his own theory of case when supported by evidence.

16. Carriers ⇐348(12).

Instruction that, after operators discovered plaintiff in position of danger on lower step of street car, it was their duty to take such measures to avoid injury to plaintiff as ordinarily careful person would have done, *held* not prejudicial to street railway.

17. Damages ⇐132(6).

$11,500 to 66 year old woman having life expectancy of 11 years for transverse fracture of tibia, confining her to bed for nearly six weeks, involving much pain and suffering and subsequent permanent injury, and decreasing her earning capacity from $200 monthly to about $7.50 weekly, *held* not excessive.

18. Appeal and error ⇐1004(1).
New trial ⇐77(2).

Neither trial court nor appellate court should set aside verdict because it is excessive unless it is so excessive as to indicate passion and prejudice.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Jennie Hellman against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Kemper Campbell and Chas. L. Nichols, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

From a judgment in favor of plaintiff defendant has appealed.

On August 10, 1929, plaintiff was injured, as the original complaint alleges, by the negligent starting of one of defendant's street cars after "intending in good faith to become a passenger," she had "grasped the upright handrail at the rear entrance way and placed one foot on the bottom step * * * and before plaintiff could take any precaution to protect herself." Such specific act of negligence is the only negligence alleged in the original complaint.

At the trial, on November 30, 1930, more than a year after the accident, plaintiff filed an amended complaint, setting up in the first count thereof a general allegation of negligence, viz., "that at said time defendant, through its agents and employees aforesaid, carelessly and negligently, and in violation of its duty toward plaintiff, operated said street car and thereby caused plaintiff to sustain the injuries hereinafter set forth," followed by the allegation of the specific act of negligence set forth in the original complaint. A second cause of action following the language of the first cause of action included such general allegation of negligence, but, instead of the specific allegation of negligence in starting the car prematurely as the sole cause of plaintiff's injury, it alleged as the proximate cause of such injury such negligent starting combined with the act of the conductor, who "negligently and carelessly took hold of plaintiff and jerked plaintiff up the steps of said car and onto the rear platform thereof," after she had so grasped the handrail and placed one foot on the lower step.

Defendant's demurrer to such amended complaint, filed simultaneously with its answer, was overruled. Both the demurrer and the answer raised the bar of the statute of limitations as a defense to such second cause of action. Appellant urges that the court erred (1) in overruling the demurrer, (2) in denying its motion for a nonsuit as well as a directed verdict, and (3) in its instructions to the jury.

[1] 1. Appellant urges that the second cause of action set forth in the amended complaint is a new and distinct cause of action barred by the statute.

The "cause of action * * * was simply the obligation sought to be enforced." Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 707, 84 Am. St. Rep. 53. Appellant urges that the obligation sought to be enforced in the original complaint and the first cause of action in the amended complaint is the duty of defendant to keep the car standing until plaintiff entered the same, and, in the second, it was the duty of defendant to have its conductor assist her in a careful and prudent manner, and, inasmuch as the latter is a different obligation not alleged within the statutory period, the demurrer should have been sustained. In our opinion appellant is taking too limited a view of defendant's real obligation, which we think was to protect plaintiff from the negligence of itself or employees while she was boarding the car as a passenger.

The act of the conductor followed immediately, and because of that of the motorman, and plaintiff's primary right to have conditions safe for her in reaching the platform after stepping on the first step when the car was allegedly standing still, and defendant's concurrent duty to protect her while so doing, should not be limited, because in the first instance she alleged but one breach of such duty. The two acts were but different invasions of her primary right and different breaches of the same duty. There was but one injury, and it was immaterial whether it resulted from the negligence of the motorman or of the conductor. In either case it was a violation of the same obligation.

[2] 2. Appellant urges that the evidence is insufficient to sustain the verdict, and that its motion for nonsuit and a directed verdict should have been granted.

Plaintiff testified that she first saw defendant's car as it approached the safety zone for passengers, as she was crossing the street; that when she entered the zone the car was standing "at the end of the zone where it stops. It had come to a complete stop. I walked right in front of the car and then walked into the safety zone to the back of the car. I walked alongside the car and observed two ladies getting on the car. * * * The car was standing there and I got on the first step. I got on with my right foot and then stepped on with the left foot and as I did so the car gave a kind of a lurch and by that time the conductor saw me and grabbed me under the arm and pulled me up. * * * I couldn't say positively it was the sudden starting of the car or pulling me up that threw me so quick. * * * The conductor pulled me up bodily and hit my leg—I don't know whether against the railing or the step. * * * The first time I noticed pain was when I got on the platform." This evi-

dence would seem to make a prima facie case under the allegations of the complaint, which placed plaintiff on the lower step before either alleged act of negligence occurred. Of course, we have omitted all evidence conflicting therewith.

[3, 4] The power of the court to direct a verdict and grant a motion for nonsuit is the same. Conflicting evidence must be disregarded and plaintiff's evidence must be given "all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence." In re Estate of Lances, 216 Cal. 397, 14 P.(2d) 768. Applying that rule to plaintiff's evidence here, we are forced to conclude that the court committed no error in denying such motion and in refusing to direct a verdict in defendant's favor.

[5, 6] 3. Appellant urges that plaintiff's instruction No. II is erroneous in charging that "it is admitted by the pleadings in this action that plaintiff boarded the said street car at a regular stopping place, with a bona fide intention of becoming a passenger thereon," for the reason that appellant alleged and strenuously contended that plaintiff boarded the car after it was placed in motion. The language quoted has reference to the "stopping place" only, not to plaintiff's manner of boarding the car or as to whether or not the car was in motion. The remaining part of the instruction states, however, that, "if you find from all the evidence in this case that plaintiff did board said car *before it was set in motion by defendant*, then you must find that plaintiff was a passenger on said car and this is true regardless of whether or not defendant or its employees actually knew of her presence on the car." (Italics ours.) Appellant urges that such instruction, with plaintiff's instructions III, IV, V, and VI, relative to the degree of care due from a carrier of passengers for hire toward such passengers, advised the jury that plaintiff was a passenger, and that defendant was liable for the slightest negligence. Instruction II, however, is based upon the hypothesis that the "boarding" referred to was prior to the time the car was set in motion by defendant, and we fail to see how, taking the instructions as a whole, the jury could possibly have been confused. Instruction IV refers to the care to be exercised in the "safe carriage of passengers" and the responsibility "for injuries received by a passenger *while in the course of transportation*," and in connection with II, which advises the jurors that, if they find that plaintiff boarded said car before it was set in motion, they must find she was a passenger regardless of whether or not defendant knew of her presence in the car, there would seem to be no possibility of applying such instructions to an attempted boarding of such car while it was in motion. Defendant's instruction C, given by the court, told the jury that a passenger who attempts to board a moving car assumes all the risks thereof and cannot recover for injuries sustained thereby. Defendant's instructions D, E, and H set out clearly the claim of plaintiff that she boarded the car when it was standing still, and that it was thereafter suddenly started, and that the burden was on plaintiff to prove such facts, and that as a result thereof she was injured, and that she could not recover unless she proved such facts, and, on the other hand, that, if they found that the car was in motion when plaintiff attempted to board same, and was so injured, she could not recover, and that they must find for defendant. Plaintiff's instruction No. I also clearly sets forth the issue raised by the complaint to be that the "car was not in motion" when plaintiff undertook to board same, and that it was negligently started thereafter, injuring plaintiff, and that the defense was that the car was started before plaintiff attempted to board it, and the injury was caused by her own negligence. In our opinion, such instructions leave the question of whether or not plaintiff was a passenger to the jury, and do not instruct them that plaintiff was a passenger. The first paragraph of plaintiff's instruction No. V tells the jury that it was defendant's duty to hold the car a sufficient length of time to enable passengers desiring to do so to board said car in safety, and in and of itself might convey the idea to the jury that defendant was negligent if it started the car before plaintiff attempted to board it. We think no such conclusion could be reached by the jury, however, considering all the instructions, and the balance of such instruction No. V, which advises the jury that, if they find from all of the evidence "*that the defendant started the car while plaintiff, as a passenger was on the steps of the car and in the act of boarding it*, without giving her sufficient time to reach a place of safety," and that plaintiff was injured as a result thereof, then they must find defendant guilty of negligence. In view of all of the instructions, we do not believe that the jury could have misunderstood the reference in plaintiff's instruction No. VII to "the act of boarding the car" to refer to anything excepting the acts of plaintiff *after she had reached the lower steps of the car before it was in motion.*

[7, 8] The acceptance of a person by the carrier as a passenger is, of course, necessary to create such relationship, but such acceptance does not have to be expressed; it may be implied. "One who boards a street car at a regular stopping place becomes a passenger, whether or not the carrier actually knows of his presence on the car. In such a case knowledge is implied." Ivancich v. Davies, 186 Cal. 520, 523, 199 P. 784, 786. In the cited case, the plaintiff jumped onto the running board of a jitney bus after it had started and

gone from ten to fifteen feet past its stopping place. The driver did not see plaintiff, who was injured by the negligence of the driver in passing too close to a truck standing at the curb. He was held to be a passenger, notwithstanding the fact that he boarded the bus while it was in motion, that he rode on the running board, had not paid his fare, and the driver had no actual knowledge of his presence on the bus. Here plaintiff boarded the car while it was at a regular stopping place, and, according to her testimony, while it was *standing* there. If the jury believed her testimony, it had a right to find that she was a passenger.

[9, 10] Appellant urges that the court erred in giving plaintiff's instructions VIII and XI. Instruction No. VIII in effect tells the jury that it was the duty of appellant to afford a reasonable time for plaintiff to board its car because it was a place where cars stop for such purpose, and the car was caused to stop there for that purpose, and then says: "And if you find from all the evidence that plaintiff was a passenger and was injured without fault on her part *while on the steps of the car* for the purpose of boarding the same, by reason of a sudden starting of the car, the burden is thrown upon the defendant company to show that such injury was not the result of its own negligence." (Italics ours.) Instruction No. XI told the jury that plaintiff had established a prima facie case against defendant, if they found from all the evidence that she was injured, *while a passenger upon defendant's car, from the starting of the car;* that in such a case there is a presumption that the accident was caused by defendant's negligence, "and the duty was then on defendant to show that the injury was the result of inevitable casualty which human foresight and care could not prevent, for the law holds defendant responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs." (Italics ours.)

Appellant urges that, inasmuch as the complaint sets out two specific acts of negligence which caused the injury, there is no room for the application of the doctrine of res ipsa loquitur which the instructions quoted inject into the case. Such criticism would be sound if the complaint contained only the two specific allegations of negligence. Marovich v. Central Cal. Traction Co., 191 Cal. 295, 216 P. 595. Where the complaint, in addition to the specific allegations of negligence, also contains a general allegation of negligence, the rule is that one injured while a passenger on a car being operated by a carrier of passengers is entitled to the presumption arising from the doctrine of res ipsa loquitur. Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 P. 519, 527. That such injuries as the evidence shows the plaintiff here sustained do not ordinarily arise after one has reached the lower step of a street car preparatory to boarding same, if the motorman and conductor have exercised due care, is clear, and the presumption exists that defendant was negligent in starting the car under the circumstances shown by plaintiff's evidence. The explanation of the accident as alleged in the complaint, as well as plaintiff's testimony of how the injury occurred, leaves much uncertainty as to just how it was caused. "Where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine." Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 6, 207 P. 378, 380, 26 A. L. R. 1462.

The injury, occurring as it did on a car in complete control of defendant, and according to plaintiff's testimony, after she "had mounted the lower step, prior to the starting of the car," plaintiff being a heavy woman, 67 years of age, it might well be found under the circumstances to be negligence to have started the car at all until she had reached a place of safety, and the circumstances of the accident in the light of plaintiff's evidence and pleading would seem to make the doctrine of res ipsa loquitur particularly applicable.

[11] Appellant urges that the instructions erroneously put the burden upon it of showing that defendant was not negligent, whereas all that is required is for it to meet such presumption by its evidence.

An instruction similar to No. VIII above shown, to the effect that, it having been shown that plaintiff was a passenger on defendant's car and was injured without fault on her part by the action of the car, "the burden of proving that there has been no negligence was cast upon defendant," was questioned as so shifting the burden of proof and considered by the Supreme Court in the case of Bonneau v. North Shore R. R. Co., 152 Cal. 406, 93 P. 106, 125 Am. St. Rep. 68. The court held, on page 410 of 152 Cal., 93 P. 106, 108, that the language quoted above "had nothing to do with declaring any rule as to the burden of proof in the case." See, also, Cody v. Market St. Ry. Co., 148 Cal. 90, 82 P. 666; McCurrie v. Southern Pac. Co., 122 Cal. 561, 55 P. 324. We see no material difference between the instructions given here and in the Bonneau Case, even though instruction No. VIII here does not inform the jury that the facts stated, if found, "make a prima facie case." The instruction here fairly implied that the finding of such facts makes a showing of negligence sufficient to cause defendant to produce evidence sufficient to meet it to prevent the evidence from preponderating in plaintiff's favor. The language in the latter part of instruction No. XI is substantially the same as that given in another instruction in the Bonneau Case, and which was apparently ap-

proved in such case. Following such case similar language was approved in the case of Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 181 P. 669. The Supreme Court, in denying a rehearing of such case, takes occasion to say that such denial shall not be taken "as a complete approval" of such language, but the court held that, while the instruction was open to criticism because of the use of such language, it could not have misled the jury when considered in connection with other instructions given as to the effect of a presumption and the requirement that plaintiff prove his case by a preponderance of the evidence.

The court instructed the jury here that the burden was upon plaintiff to prove by a preponderance of all the evidence that, while she was attempting to board the standing car, it was suddenly placed in motion, causing the injuries of which she complained, and also that, while it was incumbent upon defendant to prove by a preponderance of the evidence that plaintiff was guilty of contributory negligence, "it is not incumbent upon the defendant to establish its freedom from negligence," and several times charged that the burden was upon plaintiff to prove that defendant was guilty of some one or more acts of negligence charged in the complaint, and that, if the evidence was equally balanced as to whether the car was standing when plaintiff attempted to board it or whether she attempted to board it after it was started, she could not recover, and that, while defendant was bound to exercise the highest degree of skill, it was not an insurer of the safety of its passengers, and that no presumption of negligence arose against defendant until the cause of the accident is proven. Inasmuch as the instructions involving the doctrine res ipsa loquitur are expressly limited to the first cause of action, based on the alleged negligence in starting the car after plaintiff was on the step, we fail to see how the jury could have been misled thereby in view of all the instructions. Nor did either instruction tell the jury to bring in a verdict in favor of plaintiff. They simply advised, in effect, that, under the facts stated, a prima facie case of negligence was made. In this respect a very material difference exists between the instructions given here and that given in the case of Seitzman v. Srere Corporation, 116 Cal. App. 674, 3 P.(2d) 58, which told the jury to bring in a verdict for plaintiff on such prima facie case unless the evidence negatived it and established by a preponderance of the evidence that the injury was not the result of defendant's negligence.

[12] Nor do we see any error in plaintiff's instruction No. XIII, which in effect told the jury that the burden of establishing the defense of contributory negligence of plaintiff by a preponderance of the evidence was upon defendant, or how the jury could have been misled thereby.

[13, 14] Plaintiff's instruction No. XIV advised the jury that it was for them to determine from all the evidence whether or not plaintiff was guilty of contributory negligence in going upon the steps of the car preparatory to boarding it, and instruction No. XV that, even though they should find from all the evidence that plaintiff undertook to board the car while the same was in motion, such fact did not constitute negligence as a matter of law, but was a question of fact for the jury "to determine whether the act of plaintiff in so doing constituted negligence on her part." Appellant urges that such instructions are clearly erroneous, as they in effect charge that, even if the jury found that plaintiff did board a moving car, such fact would not prevent a recovery. In our opinion, under the amended complaint, which alleges the boarding of the car while standing still and plaintiff's injury thereafter through the negligence of defendant, such instructions should not have been given. Both of them permit the jury to weigh matters foreign to the issue raised by the amended complaint. If plaintiff was injured while boarding a moving car she cannot recover under the case alleged. Nor would she be permitted under her pleadings to introduce evidence to show that she was so injured, as such evidence would disprove the allegations of her own pleading. Hanton v. Pacific Electric Ry. Co., 178 Cal. 616, 174 P. 61. If the jurors believed that plaintiff was injured while *boarding a moving car*, they could not have found a verdict for plaintiff, but must have found for defendant under all the instructions given them on the issues made by the pleadings. The instructions here complained of bear no resemblance to that given in the case of Starkey v. Market Street Ry. Co., 90 Cal. App. 249, 265 P. 839, where the express language of the instruction advised the jury that plaintiff could recover, notwithstanding the jury found that he boarded a moving car, if they found that the injury was caused by the sudden starting of the car after plaintiff boarded same and before he reached a place of safety. The instruction there also advised the jury that, if they found from all of the evidence that plaintiff in that case had reason to believe and did believe that the car was stopping for the purpose of permitting plaintiff to board same, and they further found that a person of ordinary prudence and caution under the same circumstances would have attempted to board it, plaintiff would not have been guilty of contributory negligence in doing so while the car was in motion. There, as here, "the gist of the action was the *starting and putting in motion a standing car* while plaintiff was boarding it. This was the only issue presented by the pleadings and the evidence. A re-

covery therefore, based upon any other ground or theory, cannot be sustained." Starkey v. Market Street Ry. Co., supra, page 256 of 90 Cal. App., 265 P. 839, 842. As we have said, the instructions criticized here do not direct a recovery upon a theory different from the one raised by the pleadings. They are but instructions on contributory negligence, and we fail to see how the jury could be confused by them, in view of the many instructions advising them that plaintiff could only recover on proof of the fact that the car was standing when boarded by her and afterwards started, causing the injury. Nor in our opinion, considering all the evidence, could the jury have found that she boarded the car after it was started. Her testimony is positive on that point. The motorman testified that when he started the car he did not see any one on the steps or in the safety zone near them; that through his rear vision mirror he could "see the ground for a distance of 8 or 10 feet from the steps toward the front of the car," and that "if anybody was standing by the car I could see them practically to the front of the car." The conductor testified: "My motorman called for bells, which I gave him after looking at the safety zone and finding no one there. After we had gone forty or fifty feet I heard a noise and saw a woman standing on the lower step." It is clear that the conductor did not mean to say that no one was in the safety zone, but that he saw no one in the zone about to board the car. The testimony is without conflict that plaintiff walked in front of the car as it stood by the safety zone, held by the traffic signal which was against it, and that she walked alongside the car to the rear entrance. The conductor says that plaintiff was so short that he could not reach her over the bar of the fare box and so went out the exit and "got behind" her in the entrance. It is almost impossible to believe that a short heavy woman 67 years of age, attempting to board a moving car, would have first been heard and seen after the car traveled forty or fifty feet, even at the slow speed of five or six miles per hour. It is equally hard to see how plaintiff could have traveled from the front of the car to the rear step between the time the motorman looked in his rear vision mirror and saw no one and started the car. And it is difficult to see how the jury could do otherwise than conclude that plaintiff was on the steps and out of the motorman's sight when he started the car, and that the conductor was busy taking fares and failed to see the short woman who was on the lower step.

Appellant also urges that the two instructions above referred to are in conflict with defendant's "C," which advised the jury that "a passenger who voluntarily attempts to board a moving car assumes all the risks thereof and cannot recover for injuries sustained thereby." In our opinion it might well be questioned if such instruction "C" is correct as a general statement of law; but as applied to the issue raised by the pleadings here, we think it is eminently correct. Plaintiff's instructions XIV and XV simply advise the jury that it is not negligence as a matter of law to attempt to board a moving car, but is a question of fact for them to decide; and they do not instruct the jurors, upon the facts stated therein, to bring in a verdict for any one. Nor does defendant's instruction "C" contain any such affirmative direction. It does say that under the facts stated plaintiff could not recover, but not because she would be guilty of contributory negligence—the instruction does not mention the word "negligence"—but because, if the facts therein were found to be true, they would expressly negative the facts plaintiff relied on to prove the negligence alleged. Under the circumstances we see no prejudicial conflict. Under the evidence in this case and under the various affirmative instructions as to the issues and findings of fact necessary to support a verdict in favor of the respective parties, we can only conclude that the jury found that the injury was the result of negligence occurring after plaintiff had boarded the standing car, and that it found that she did not attempt to board a car in motion.

[15, 16] Plaintiff's instruction No. XVIII is criticized as charging on a question of fact, omitting certain necessary conditions, viz., reference to the defense of contributory negligence and the question of proximate cause, and in that it permits the jury to find defendant liable for negligence not pleaded or proved. Such instruction reads as follows, the criticized language being italicized: "I instruct you that *after discovering the presence of plaintiff and the fact that plaintiff was in a position of danger*, it was the duty of defendant to take *such measures* to avoid injury to plaintiff as an ordinarily careful and prudent person would have done; so, if you find from all the evidence that defendant failed to meet *this duty*, then you must find that defendant was guilty of negligence." We cannot recommend the instruction as a model of perfection of general application, but under the evidence of this case we think the facts it instructs upon are undisputed, and that it leaves to the jury the determination of the only fact in dispute. The conductor testified, as we have said, that he did not see (discover) plaintiff until she was on the lower step of the car. That she was then in a position of danger is the only conclusion that can be drawn from the evidence. Whether defendant after such discovery took such steps as an ordinarily careful and prudent person (the only degree of care required by such instruction) would have taken is left to the jury. We see no prejudicial error in instructing upon facts

not disputed. The evidence shows that plaintiff was at the time standing on the steps, and that the car was then in motion. This instruction can only refer to the second cause of action, as the car had already been started, suddenly or otherwise. Under plaintiff's theory of the case she was then a passenger and entitled to be protected as such by the exercise of the highest degree of care; and it would seem that, if defendant thereafter failed to act as an ordinarily prudent person would have acted, it would unquestionably be guilty of negligence. Either party has the right to have an instruction given on his own theory of the case when there is evidence to support it. Chicago City Ry. Co. v. Gates, 135 Ill. App. 180. There is nothing in the instruction that would permit the jury to speculate on what either the conductor or the motorman would or could have done *if either of them had sooner seen her.* Possibly the language could have been more specific in its reference to the particular measures actually taken by the conductor, but we do not see how the jury could apply the language to any other *measures* than those taken; and we think it was the duty of the jurors under the instruction to apply to such measures the test laid down, in determining whether defendant was or was not thereafter negligent. We fail to see that such instruction permits the jury to go outside of the issues in any respect.

The instruction in question being a laconic statement of what would be negligence if certain facts were found, it was not necessary to include elements in it that would be necessary before the court could properly direct the jury to find a verdict. If it had so directed the jury, it would of necessity have had to state all the elements necessary to justify a verdict, viz., the fact that plaintiff herself was not guilty of contributory negligence, and that the negligence stated was the proximate cause of the injury. But such rule has no application to the instruction given. Chicago City Ry. Co. v. Gates, supra.

[17] Appellant urges that the verdict of $11,500 is excessive. The evidence shows that plaintiff was 66 years of age at the time of the accident, with a life expectancy of 11 years; that there was a transverse fracture of the upper third of the tibia, "with an angle, I think, running down"; that her leg was put in a fracture box and plaintiff remained in bed for almost six weeks, "causing very much suffering"; that plaintiff had to have her sister turn her every time she changed position; that she "was in such pain" that she "could hardly stand it"; that "such condition continued for several months, and my leg pains me yet"; that after she got out of bed she used crutches for two or three months and after that a cane; that she was still using a cane at the time of the trial, some fifteen months after the accident; that her injury affected her ability to work, in that she cannot do close work for the reason that she gets so nervous she has to lay it down, and she cannot use a sewing machine, but has to do work by hand; that she never had trouble with her knee before of any kind. A doctor testified that "the condition of plaintiff's right knee is reasonably probable to be permanent." The evidence further shows that plaintiff's medical expenses amounted to $286.75; that her average monthly earnings for a year or two prior to the accident was $200; that she returned to work in February of 1930, and that her average weekly earnings between the date of the accident and the time she returned to work was about $7.50. It is evident that the jury must have based a large part of its verdict on the pain and suffering resulting from the accident.

[18] It is well settled that a trial court, and much less an appellate court, should not set aside a verdict because the verdict is deemed excessive unless it is so excessive as to indicate passion and prejudice. James v. Oakland Traction Co., 10 Cal. App. 785, 800, 103 P. 1082. In this case one of the grounds for defendant's motion for a new trial was the alleged excessive amount of the verdict, and the motion was denied. In view of the fact that the amount was fixed in the first place by the jury, and that the trial judge, who heard the evidence, considered the question of excessive damages on motion for a new trial and did not conclude that the amount allowed was unreasonable, we cannot say that the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury," which we understand is the test on appeal. Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83, 84.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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RICHTER v. LARABEE.

Civ. 4904.

District Court of Appeal, Third District, California.

Dec. 21, 1933.

1. Appeal and error ⇐1011(1).

Findings of trial court based on conflicting evidence are conclusive on appeal if supported by any evidence.

2. Negligence ⇐134(4).

Evidence, in action for destruction of plaintiff's property by fire, sustained finding of defendant's negligence in permitting grass fire to escape from defendant's land (St. 1931, p. 1644, § 2).

There was evidence that defendant, who had obtained a permit to burn grass on his own land, left grass fire to go to his house for dinner after fire department had apparently put down the flames. There was evidence, however, that embers of the fire were still smoking, and that there was a strong wind blowing, and that the fire broke out again after defendant left it.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by F. J. Richter against L. L. Larabee. Judgment for plaintiff, and defendant appeals.

Affirmed.

Henry & Bedeau, of Sacramento, for appellant.

J. S. Daly, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in the sum of $500 for and on account of the destruction of property on lands belonging to him, by a fire alleged to have been set by the defendant for the purpose of burning grass on lands belonging to the defendant, and which fire it is alleged was negligently allowed to escape from the defendant's lands. The cause was tried by the court sitting without a jury. From this judgment the defendant appeals.

The record shows that on or about the 12th day of June, 1932, the defendant obtained from D. W. Babcock, fire warden, a permit to burn grass on certain lands belonging to him. It appears from the record that the day was warm, the grass was dry, and a wind was blowing from where the fire was started toward the plaintiff's property, estimated at between 12 to 15 miles per hour. There is some testimony that no wind was blowing when the fire was actually started, but that it came up in gusts. However, at about 11 o'clock of the day on which the fire was started, it got out of control of the defendant, and was burning toward the lands owned by the plaintiff. At this time the defendant called for assistance, and the fire department of Hagginwood, also the county fire warden, came to the scene and assisted in apparently extinguishing the flames. The record shows that the defendant complied with the legal requirements preparatory to setting a fire. The court, however, found that the defendant was negligent in relation thereto, and awarded damages to the plaintiff to cover the value of the property destroyed by fire.

The appellant strongly insists that the finding of the court that the defendant was negligent in relation to the fire is not supported by the testimony, and so far as the record discloses, the actions of the appellant would indicate that he took all reasonable precautions prior to starting the fire; but that is not all that is required by the act of the Legislature relating to the civil liability of one for failure to control a fire.

Section 2 of the act of the Legislature, approved June 12, 1931, reads: "Any person who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire, is liable to the owner of such property for the damages thereto caused by such fire." Stats. 1931, p. 1644. This act purports to repeal section 3344 of the Political Code, and also, section 3346a of the Civil Code, neither of which sections are mentioned in the title; but as no question is raised as to treble damages, we need not consider whether such portion of the act is violative of section 24 of article 4 of the Constitution. In the foregoing act the liability for the destruction of another's property by fire may arise not only from negligently setting the fire, but also from negligently permitting the fire to escape.

As we read the transcript it appears that some time between 12 and 1 o'clock of the day in question, the fire was supposed to be extinguished; that is, to the extent that there were no visible flames upon the burned premises. That the fire was not put out is conclusively established by the fact that it sprang up again in two different places. After the fire was apparently extinguished, all of the parties left the premises, and the defendant went to his home about a quarter of a mile distant for the purpose of eating his dinner. While there a fire broke out in the neighborhood of a point designated in the transcript as "Banta's Mill." The defendant went to this place and watched the fire, and while there, the second fire sprang up near the plaintiff's property and destroyed that portion thereof for which damages were allowed.

[1, 2] Upon this appeal the appellant sets forth much testimony upon which it is claimed the court should have found a judgment in his favor. However, the findings of the court are based upon conflicting evidence, and if there is any evidence to support the findings of the court, we are concluded thereby. That there is such testimony appears from the following excerpts thereof. The defendant testified in part as follows:

"Q. At the time you started the fire, what was the condition of the wind? A. I think, in fact I know, there was not a strong wind blowing; there was a tendency to a breeze, southeast.

"Q. After you started the fire with your three companions, what, if anything, happened? A. Well, we burned a very small corner out there.

"Q. About how much? A. I would say, possibly 50 feet square. It was burning very slowly and burning nicely. It seemed as though there was a gust of wind coming from the other way, and the grass was pretty dry, and it started to burn away from us."

The witness then went on to describe the fire, and the fact of the fire warden having come to his assistance, and the fire appearing to be out, and then testified:

"Q. After he left what did you do? (This, referring to E. W. Davis, county fire warden.) A. Went to my house and sat down to eat my dinner.

"Q. Did you notice a second fire start? A. When I was eating my dinner I saw a big column of smoke through the window to the north.

"Q. Where was that fire at that time burning with reference to the burned area of your fire? A. Well, up to the north, right on the same line of fire as mine.

"Q. Well, after the fire department went away, you went away; you left the place; you left it supposing the fire was out; in other words, you did not remain there after the fire department went away, did you? A. I remained on my property, yes.

"Q. But that was down a quarter of a mile, was it not? A. Yes, it was.

"Q. And you went up and ate your dinner, and then you got in your car, did you not, and drove up to where the fire was before it had started up again? A. Yes.

"Q. You don't know what time this fire broke out the second time? A. No."

Mr. H. L. Davis, county fire warden, testified as follows:

"Q. Tell the court what you did when you got there in reference to this fire? A. We came back to Camp Comfort and we were there, oh, quite some time,—we left, and I asked the man at Camp Comfort if he would watch it so in case it should happen to make a smolder and come up again, he would be able to catch it."

Fred Newell, an employee working on the golf links across the Auburn boulevard from where the fire was burning, testified as follows:

"Q. Was the wind blowing? A. Yes.

"Q. Strongly or mildly? A. Strong.

"Q. Did the fire burn continuous or did they get it almost out? A. I couldn't tell you; I wasn't over there. It was still smoking, that is all I know.

"Q. Still smoking all the time? A. Yes, after the fire department left.

"Q. You were within a short distance and you saw it? A. I was about a block away, block and a half.

"(Question by the court): When was the first time that you saw the fire after it was put out, or very nearly put out? A. The first time?

"Q. The Court: The first time you saw it after it started up again, if it did start up? A. You mean before the first one?

"Q. The Court: No. You saw the fire on the Larabee place then? A. About 12, between 12 and 1.

"Q. The Court: You saw it put out, but still continue smoking? A. Yes.

"The Court: How long after that was it active again? A. Must have been about one o'clock, or a little after.

"Q. They put the fire out, that first fire you saw burning? A. Well, they got it almost out, I would say I couldn't say it was out, I couldn't say it wasn't out. It was still smoking over there behind the buildings, the pump-house, up near his pump-house."

The witness Drexler stated a wind was blowing on the morning the fire was started.

The witness Wood testified that he helped to put the fire out; that the fire was apparently out; he further testified that it broke out again.

The witness Hortzman testified that the wind was blowing with a velocity of about 15 miles per hour.

While, as stated, there is considerable testimony as to what was done in putting out the fire and getting it under control, it is undisputed that after the Hagginwood Fire Department and the fire warden went away, the defendant left the burned premises, went away to his dinner at a point a quarter of a mile distant, and took no action toward seeing that the premises were watched or precautions taken to prevent the fire from again becoming active.

The summary of the testimony which we have set forth shows that the embers of the fire were still smoking; that this smoke was seen by a witness who was at work at a

distance of a block or a block and a half away; and that this smoking continued all the time until the fire broke out again, as we have stated.

In support of the judgment of the court the respondent cites the case of Jennings v. Weibel, 204 Cal. 488, 268 P. 901, where it is held not only that the trial court is the judge of the credibility of witnesses, but that the variableness of the wind should have prompted the exercise of the utmost vigilance to cut off all avenues of escape.

Likewise, the case of McGillivray v. Hampton, 39 Cal. App. 726, 179 P. 733, where it appears that the fire was left still smoldering when the defendant left the grounds where the fire had been started, and went away to eat his lunch.

In further support of the judgment the case of Cobb v. Twitchell, 91 Fla. 539, 108 So. 186, 45 A. L. R. 865, is cited as a further instance where the fire was supposed to have been extinguished, when in fact it broke out again after a space of about two hours. The judgment in favor of the plaintiff on the grounds of negligence was supported.

A number of cases are cited by the appellant, but they do not contravene the principles enunciated in the cases just cited.

This court, in three cases not cited by any of the parties to this action, has had before it the question of destruction of property by fire after the same was supposed to have been extinguished.

In Paiva v. California Door Co., 75 Cal. App. 323, 242 P. 887, 890, a fire was left smoldering in the stump of a tree, and had been smoldering for a day or two. The question was as to the origin of the fire. This court said: "Since no fires were kindled on defendant's premises on the 17th, it logically follows that it must have been burning on the morning of that day and prior thereto. Taking it then as a justifiable inference that the stump was burning on Monday morning, and giving consideration to the further proved fact that a strong wind was blowing past the stump in the general direction of the place where the fire started, it would not be unreasonable, in the absence of other explanation, to infer that the fire was caused by sparks from the burning stump." The facts in that case show that the fire had smoldered for a considerable length of time; that there was no other fire kindled on the premises involved, and the question was as to whether the circumstances were sufficient to justify the inference that the fire which damaged the plaintiff's property in that action came from the stump that was left smoldering. This court held such testimony sufficient to send the cause to the jury and reversed the order of the trial court granting a nonsuit.

In Young v. San Joaquin Light & Power Corp., 83 Cal. App. 585, 257 P. 152, the fire was started in the morning on premises belonging to the defendant, and there, as here, was supposed to have been extinguished. However, during the afternoon smoke was seen to arise from the premises where the fire had been started, and later in the day it broke forth and destroyed adjoining property belonging to the plaintiff. In that case we held that the circumstances reasonably justified the inference of the trial court that the fire was caused by the negligence of the defendant's agents in going off and leaving the fire without making sure that it was extinguished.

Again, in Kennedy v. Minarets & Western R. Co., 90 Cal. App. 563, 266 P. 353, this court had occasion to examine the question of negligence in allowing a fire to smolder, which thereafter broke out and destroyed much property. In that case, fire had been started by employees of the defendant, and a certain log which had been covered up with dirt was allowed to smolder for two or three days. There was much testimony as to the fire being out, and as to the smoldering of the log, but after the log had smoldered for considerable time, the fire broke out in some dry grass close by, and this court held that such testimony created a reasonable inference that the fire started from the smoldering log, and that the defendant's agents were guilty of negligence in allowing the log to remain smoldering.

In the Kennedy Case, supra, this court went into the question of negligence in allowing the fire to smolder, and cited a great many cases having to do with that subject. A reference to the Kennedy Case is sufficient to show that the trial court in the instant case was justified in holding the defendant guilty of negligence in not safeguarding the premises after the fire was supposed to have been extinguished, and going away to eat his dinner while there were still smoldering embers, and while, according to his own testimony, the wind was blowing in gusts.

While it may not be said that the defendant was negligent in any of the preparations made by him to control the fire, there is plenty of evidence in the record to justify the trial court in coming to the conclusion that the defendant was guilty of negligence in going off and leaving the same unguarded.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

SESSIONS et ux. v. TROTT et ux.*

Civ. 8098.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1933.

Rehearing Denied Jan. 6, 1934.

Hearing Granted by Supreme Court Feb. 5, 1934.

1. Trial ⇐397(1).

Findings are essential on all material issues.

2. Appeal and error ⇐1071(6).

Failure to find on material issues renders decision against law and there must be reversal.

3. Trial ⇐397(1).

In action for damages for misrepresentations in exchange of real property, findings were fatally defective where there was no finding as to injury and none as to damages.

4. Fraud ⇐59(2).

Damages for deceit in sale of property is difference between actual value and value as represented.

5. Appeal and error ⇐1122(1).

Where there was no finding as to injury or damages in action for damages for misrepresentations in exchange of real properties, reviewing court would not supply missing finding under record (Code Civ. Proc. § 956a).

Evidence as to damages was not so definite that appellate court could make finding and have no substantial doubt as to its correctness. Two witnesses testified as experts as to value of property, and if their opinions were accepted result would not be amount allowed by trial court.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Horace Sessions and wife against Herman H. Trott and wife, for damages for misrepresentations in an exchange of real properties. From an adverse judgment, defendants appeal.

Reversed.

Franklin W. Peck, of Los Angeles, and Arthur L. Erb and Richard C. Waltz, both of Beverly Hills, for appellants.

Rosecrans & Emme and Bayard R. Rountree, all of Los Angeles, for respondents.

CRAIG, Justice.

A judgment having been rendered in favor of the plaintiffs in an action for damages alleged to have resulted from misrepresentations by the defendants in an exchange of real properties, the latter appealed.

[1-4] It is contended that the findings of fact contain no finding on certain material issues. There is no finding of injury or of damage unless a certain conclusion of law be deemed a finding. There are findings against appellants on other issues, such as willful and fraudulent statements and belief by respondents in the truth of such representations, and it appears as a conclusion of law therefrom "that plaintiffs are entitled to receive from the defendants the sum of $3500." No citation is required to support the proposition that findings are essential on all material issues. The failure to find on material issues renders the decision "against law." Knoch v. Haizlip, 163 Cal. 20, 124 P. 997, and cases there cited. In such cases there must be a reversal. James v. Haley, 212 Cal. 142, 297 P. 920. In the decision last cited this rule was applied to the issues in reference to damages. Without question the findings in the instant case are fatally defective. There is no finding as to injury and none as to damages. Whether or not plaintiffs were injured by the deceit practiced by the defendants, admitting that such was practiced as found elsewhere in the findings, was a most material issue. As is properly asserted in respondents' brief, and there quoted from Hines v. Brode, 168 Cal. 507, 143 P. 729, the damages for deceit in the sale of property is the difference between the actual value of the property and its value had it been as represented. It is legally conceivable that notwithstanding the deceit practiced by a vendor and the reliance by the vendee upon false representations made, the actual value may turn out to be as much or more than it would have been had the representations been true. In Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A. L. R. 555, the findings of fact contain all elements necessary to determine the amount of damage sustained and upon that basis found that the plaintiff had been injured. In this it is clearly distinguishable from the findings before us.

[5] We are asked to supply the missing finding under the authority of section 956a of the Code of Civil Procedure, and Linberg v. Stanto, supra, is cited in that connection. The evidence there concerning the amount of damages was so definite and conclusive that the appellate court could make a finding and have no substantial doubt as to its correctness. We cannot say that this is true here. Two witnesses testified as experts as to the value of the property in question. If their opinions were to be accepted, the result would not be the amount of $3,500 allowed by the trial court, but a much larger sum.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 374.

We are not willing upon the record before us to assume the burden of performing the duty of the trial court to supply findings upon material issues as to injury and damages omitted.

The judgment is reversed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

137 Cal.App.Supp. 781

PEOPLE v. LUND.

Cr. A 993.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 21, 1933.

1. Vagrancy ⇐1.

One living with and on earnings of prostitute may be convicted as vagrant (Pen. Code, § 647, subd. 5).

2. Vagrancy ⇐1.

Proof that defendant was living with and on earnings of prostitute justified conviction for vagrancy, in absence of suggestion of reform, though conduct complained of occurred outside trial court's jurisdiction (Pen. Code, § 647, subd. 5).

Appeal from Municipal Court of City of Los Angeles; Clement D. Nye, Judge.

Oscar Lund was convicted of vagrancy, and he appeals.

Affirmed.

Henry C. Huntington, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Ernest K. Maine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

BISHOP, Presiding Judge.

We are of the opinion that the defendant's conviction of vagrancy in the municipal court of the city of Los Angeles should be affirmed, even though the evidence of the conduct on his part which stamped him as a vagrant did not reveal any such conduct in Los Angeles city.

[1] Defendant was charged with being an idle, lewd, and dissolute person, and so a vagrant, under the provisions of subdivision 5, section 647, Penal Code. By his admissions, and by the testimony of others, it clearly appeared that for some time he had been living with, and on the earnings of, one identified by several witnesses as a prostitute and a proprietor of houses of prostitution. Such proof warranted the jury in finding that he was a vagrant, as charged. People v. Craig (1907) 152 Cal. 42, 91 P. 997.

The difficult question presented by this appeal arises from the fact that, so far as was established by the evidence, the defendant's cohabitation with the prostitute did not take place within the city of Los Angeles, but within a neighboring township of more than 30,000 population, over whose misdemeanors the trial court had no jurisdiction. Sections 1425 and 1462, Penal Code. The evidence raises a strong suspicion that on the occasion of one of his arrests the defendant had just come from the then residence of the prostitute in the city of Los Angeles. But a mere suspicion, however strong, will not support this judgment, and there is no proof that the defendant was conducting himself as a vagrant on any of his several appearances in the city of Los Angeles.

[2] Authorities squarely in point on our problem are disappointingly lacking. We are not without guidance, however. There is strong support for our conclusion in People v. Craig, supra, where the lawfulness of an arrest on a charge of vagrancy was the turning point of the case. The arrest had been made without a warrant; it could only be justified, the Supreme Court pointed out, if the person arrested had committed a misdemeanor in the arresting officer's presence, not some time in the past, but on the occasion of the arrest. The actions demonstrating that the person arrested was a vagrant had all taken place, it appeared, some time prior to, not on the occasion of, the arrest. The conclusion reached was that the arrest was legal, the court stating (page 47 of 152 Cal., 91 P. 997, 1000): "Vagrancy differs from most other offenses in the fact that it is chronic, rather than acute; that it continues after it is complete, and thereby subjects the offender to arrest at any time before he reforms." Plainly the Supreme Court's conclusion was that one is guilty of being a vagrant at any time and place where he is found, so long as the character remains unchanged, although then and there innocent of any act demonstrating his character.

A situation not without analogy is reviewed in State v. Hennessy (1921) 114 Wash. 351, 195 P. 211. The defendant had been convicted on a charge of being a member of the Industrial Workers of the World. The argument was made that the defendant could not be convicted in Clarke county on such a charge, for it was not shown that there was an organization of the I. W. W. in that county, and it did appear that he had become a member of the organization, not in Clarke county, but in Yakima county. The Washington Supreme Court answered the ar-

gument by the statement that no matter where the defendant became a member, he was a member wherever found, and he was properly convicted because such. Similarly, we conclude, a person charged with vagrancy in that he is a dissolute person, is a vagrant while he remains such dissolute person, and a conviction should be upheld even though the acts, which warrant the conclusion, occurred outside the jurisdiction.

This case does not present the problem of one standing convicted of being a vagrant in a new environment on evidence of his life among associates he had abandoned. There is here no suggestion of reform. Defendant, by his own declarations, competent to establish a fact not a part of the corpus delicti, was in the city of Los Angeles September 20. The evidence is definite that he was living with the prostitute on September 6, 17, and 18. After his presence in the city of Los Angeles on the 20th, he returned to her place of abode, where his clothes were hanging in the closet with those of his dissolute companion. The jury were justified in concluding that he was, in Los Angeles, what he proved himself to be in the neighboring township, both immediately before and after his presence here, a vagrant.

The judgment and order are affirmed.

We concur: FOX, J.; SHINN, J.

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219 Cal. 632

CONLIN et al. v. BLANCHARD et al. (two cases).

CLUTTER v. CONLIN et al.

L. A. 13733.

Supreme Court of California.

Dec. 30, 1933.

Rehearing Denied Jan. 29, 1934.

1. Judgment ⇐518.

In ejectment action, allegation that conveyances upon which defendant relied to prove his chain of title were invalid constituted direct and not collateral attack upon decrees adjudging that title was in defendant's predecessors in interest.

2. Judgment ⇐12.

Decree rendered in action to foreclose assessment lien against property owner who died before action was instituted *held* void because court had no jurisdiction, and of no effect against owner's heirs.

3. Judgment ⇐486(1).

Void decree was assailable directly or collaterally.

4. Judgment ⇐509.

Public administrator's failure to appear and defend on behalf of estate in quiet title action wherein plaintiff's case rested upon foreclosure decree against testator and known to be void by plaintiff and administrator *held* fraud upon heirs against whom decree rendered was of no effect.

In Bank.

Appeals from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Two actions by Francis M. Conlin and others against Lola A. Blanchard and others. J. O. Clutter intervened in the first action and filed a cross-complaint in the second action. From a judgment for intervener and cross-complainant, plaintiffs appeal.

Reversed, with directions.

For prior opinion see 22 P.(2d) 755.

Rehearing denied. SHENK and CURTIS, JJ., voting for a modification of the order of reversal by striking therefrom "directions to trial court."

Edwin J. Miller, of Los Angeles, for appellants.

Vernon W. Hunt, Sylvester Hoffmann, Gallaudet & Hoffmann, and Rex Hardy, all of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2. Upon further consideration, we are satisfied that said court has correctly determined the issues, and we therefore adopt the following portion of the opinion of Mr. Presiding Justice Nourse, as the opinion of this court:

Plaintiffs brought two actions in ejectment. The defendant Clutter intervened in the first and filed a cross-complaint in the second, claiming title to the real property involved. Plaintiffs demanded a trial by jury, which the trial court denied. Trial was had before the court upon Clutter's complaint in intervention and cross-complaint and a consolidated judgment covering both cases was entered quieting his title to the property and denying plaintiffs a trial upon the issues raised in their complaints. From this consolidated judgment the plaintiffs have appealed upon typewritten transcripts, and the defendant Clutter alone appears as respondent.

On June 17, 1924, Sam H. Conlin died testate in the state of Missouri. The plaintiffs herein are the heirs or devisees under his will. At the time of his death Conlin was the owner of record of the real property involved in this litigation. On February 25, 1925, an assessment was attempted to be levied upon this property to cover the proportionate cost of a local public improvement. On November 13, 1925, an action was commenced against Sam H. Conlin to foreclose the lien of this assessment and service of summons therein was had by publication based upon affidavits stating that Conlin could not be found. The default of Conlin was thereafter taken and a decree of foreclosure was entered against him on April 23, 1926. Following the issuance of the commissioner's deed, the South Holding Corporation, claiming ownership of the property through conveyance of the grantee of the commissioner's deed, commenced an action against the public administrator as administrator of the estate of Sam H. Conlin on April 15, 1929. The petition of the public administrator for letters disclosed that Sam H. Conlin died on June 17, 1924, and also alleged that the public administrator was to be appointed for the purpose of a quiet title action only and that the interest of the estate in the property involved did not exceed the sum of $10. The public administrator did not defend the action, but stipulated that it might be heard on the default calendar, and judgment was thereupon entered quieting title against him. In that action the heirs of Sam H. Conlin were not sued, did not appear, and had no knowledge of the proceeding until long after the decree was entered.

In this proceeding the respondent Clutter, as the successor in interest of the party prevailing in the quiet title action, pleaded the chain whereby he claimed title to the property, omitting, however, the reference to the proceedings to foreclose the assessment lien and the proceeding to quiet title just mentioned. The plaintiffs answering denied the right and title of all those grantors and

grantees pleaded in the chain of title and affirmatively pleaded that the conveyance to this respondent was null and void and that respondent took the conveyance with full knowledge of the claims of these appellants after their lis pendens was duly recorded. In attempting to prove the chain of title under which he claimed, the respondent offered in evidence the record of the quiet title action instituted against the public administrator including the petition of the public administrator for letters. He also offered in evidence the commissioner's certificate of sale on foreclosure and the commissioner's deed reciting that it was issued pursuant to a decree in foreclosure dated April 23, 1926. Having closed his case, the appellants offered in evidence the entire record in the foreclosure suit and this was admitted without objection from the respondent. From this it appears that the complaint to foreclose the assessment lien was filed November 13, 1925, and that the lien attached for work completed on February 25, 1925. The appellants also offered in evidence two notices of pendency of these actions, one recorded June 16, 1930, and the other recorded October 29, 1929. Respondent's pleadings disclosed that his first interest in the property was acquired December 15, 1929, and that he actually became a purchaser under a trustee's sale on June 17, 1930.

[1] Though the pleadings do not set forth the prior actions in detail or specifically allege their invalidities, both causes were tried upon the theory that those were the only issues involved and the evidence of those proceedings was admitted either at respondent's instance or without his objection. Having alleged the invalidities of the conveyances upon which respondent relied to prove his chain of title, the appellants made a direct and not a collateral attack upon those decrees. Follette v. Pac. L. & P. Corp., 189 Cal. 193, 205, 208 P. 295, 23 A. L. R. 965; Swallow v. Tungsten Products Co., 205 Cal. 207, 210, 270 P. 366; Moakley v. L. A. Pac. Ry. Co., 99 Cal. App. 74, 79, 277 P. 883; Anglo-California Trust v. Kelley, 117 Cal. App. 692, 694, 4 P. (2d) 604.

[2, 3] It is true that as to the foreclosure proceeding the allegations are not as full as those in the cases cited, but respondent offered the deed in evidence and told the court that he had no objection to the admission of the entire record and this was a necessary link in the proof of his chain of title. These proceedings were void and not merely voidable because the court had no jurisdiction to entertain them; the defendant named therein having died before the proceedings were instituted. 15 R. C. L. 621, 622; Garrison v. Blanchard (Cal. App.) 16 P.(2d) 273; and see In re Estate of Parsell, 190 Cal. 454, 456, 213 P. 40, 25 A. L. R. 1561. That decree having been rendered against a dead man had no legal effect against his heirs in whom the title to the property vested immediately upon his death. These parties did not have their day in court, and so far as their interest in the property is concerned that decree is just the same as if it had been rendered against one who was an entire stranger to the title. Technically, because of the pleadings here, the attack upon the foreclosure decree may be said to be collateral and not direct; but this is immaterial because being void it is assailable in either manner.

[4] Coming to the action to quiet title, the proceedings disclose a clear case of extrinsic fraud practiced upon the heirs and upon the court to prevent the real owners of the property from claiming their rights in the premises. That record discloses that the date of the death of Conlin was known to the plaintiff therein and to the public administrator before those proceedings were instituted. They thus knew that the title to the property in suit was vested in these heirs who resided in a foreign state. They knew that the decree of foreclosure was void for want of jurisdiction of the court entering it. The plaintiff prevailed upon the public administrator to file an answer before he was legally appointed as administrator of the estate and it prevailed upon him to default at the trial and to fail to offer any defense on the part of the estate or to represent the true owners in a defense of the property. Inasmuch as plaintiff's whole case in the quiet title action rested upon a void decree in foreclosure known to be void by both the plaintiff and the defendant therein, the failure of the administrator to appear and defend on behalf of the estate was a fraud upon the court as well as upon the heirs. To permit the successor in interest of that plaintiff to come into a court of equity and to prevail solely on proof of a judgment obtained in that manner it would be necessary to disregard all rules applicable to the equity side of the court.

It is suggested that, notwithstanding these considerations, the respondent should still prevail because the appellants are in some way estopped from asserting their title. There was no proof of any facts which would warrant the conclusion of the trial court that these plaintiffs were estopped. There was no evidence that the appellants by language or conduct led the respondent to change his position in any respect. 10 Cal. Jur. 624; City of Los Angeles v. Babcock, 102 Cal. App. 571, 576, 283 P. 314. The whole record discloses that respondent is the victim of the fraud of his predecessors in interest and that he acquired title to the property after the appellants asserted their rights and filed their lis pendens. The suggestion now made that respondent was an innocent purchaser was not raised in the trial court, and * * * is not available to respondent at this time.

The judgment is reversed and the trial court is directed to enter judgment for plaintiffs in accordance with the views expressed in this opinion.

219 Cal. 593

STENDERUP v. BROADWAY STATE BANK OF LOS ANGELES et al.

L. A. 13594.

Supreme Court of California.

Dec. 29, 1933.

1. **Judgment** ⇐460(4).

Complaint *held* to allege extrinsic and collateral fraud supporting decree vacating judgment in suit against bank and purchaser thereof for accounting of money collected on notes not purchased.

Complaint alleged that the bank officers falsely testified in accounting suit that bank collected less than amount actually collected on notes for fraudulent purpose of deceiving court and plaintiff, and that bank fraudulently withheld from court information that amount of overdrafts and charges constituting "suspense account" had been collected in violation of its duty as trustee for stockholders who assigned their rights to plaintiff.

2. **Judgment** ⇐632.

In action to set aside judgment for fraud, defendants who were not parties to judgment could not rely upon such judgment to relieve them of meeting plaintiff's action for fraudulent conversion of plaintiff's property.

3. **Judgment** ⇐445.

In action to set aside judgment because of civil conspiracy, defendants could not rely upon former judgment for protection.

4. **Trusts** ⇐371(2).

Under allegation that bank and purchaser thereof in suit for accounting falsely represented that they had not collected stockholders' notes which were assigned to plaintiff, bank and its purchaser *held* involuntary trustees and required to meet allegations of complaint on its merits.

THOMPSON, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Peter Stenderup against the Broadway State Bank of Los Angeles and another. From a judgment sustaining defendants' demurrer, plaintiff appeals.

Reversed, with directions to overrule demurrer.

For prior opinion, see 22 P.(2d) 227.

Edwin J. Miller, of Los Angeles, for appellant.

Bicksler, Smith, Parke & Catlin and Bicksler, Parke & Catlin, all of Los Angeles, for respondents.

PRESTON, Justice.

We hereby adopt, as a portion of this opinion, the following statement prepared by Mr. Justice Sturtevant as a part of the decision heretofore rendered herein by the honorable District Court of Appeal, First Appellate District, Division 2:

"Claiming that a judgment in an accounting suit was fraudulently obtained, the plaintiff commenced an action against the defendants. The defendants appeared and filed a demurrer; the demurrer was sustained without leave to amend and judgment was entered in favor of the defendants for their costs. From that judgment the plaintiff appealed. After the demurrer was sustained the plaintiff appeared and moved to set aside the order sustaining the demurrer and to allow him to file an amended complaint. The motion was denied, and from that order the plaintiff has appealed. The order herein last mentioned contained a direction that the action be dismissed. The defendants thereafter made a motion that said language be stricken out. The motion was granted. From the order granting that motion the plaintiff has also appealed. The briefs are confined to, and this opinion will be confined to, a consideration of the appeal from the judgment.

"In language reasonably free from objection the plaintiff alleged the following facts: Prior to March 15, 1928, the Broadway State Bank had been duly organized and was transacting business in Los Angeles. It had a capital stock and the shares were owned by a number of stockholders. W. D. Howard, representing L. B. Howard, his wife, purchased the bank. The purchase was accomplished by purchasing all of the stock from the stockholders and obtaining from the directors written resignations. The price paid was $35,000. At the time of the purchase the bank held certain notes of doubtful value. Under the terms of the purchasing agreement those notes aggregating $31,100 were not purchased but were taken out of the assets of the bank and impounded and left in the possession of the bank for collection and liquidation. They were to be so held by the bank from the date of the purchase, March 15, 1928, to March 15, 1929. On the latter date on demand made the bank agreed to turn over to the former stockholders all moneys collected from the impounded notes, or other notes in lieu thereof, and all of the notes that had not been collected. For some reason the bank did not make the settlement on March 15, 1929, and the stockholders assigned their rights to the plaintiff and he commenced an action for an accounting. He sued the bank and Mrs. Howard. The defendants answered and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff. Among other things it found that the defendant bank had collected

$14,021.68 prior to March 15, 1929, and $1,227.97 after March 15, 1929. For the $14,021.68 collected the court found that the bank elected to retain the same and to surrender several notes specified in the findings. It also found that the defendant bank held impounded notes which, with those just mentioned, aggregated $27,107.69, which it had placed in the possession of the court. The court awarded the plaintiff judgment for $1,227.97 with interest and it also directed that said unpaid notes in the sum of $27,107.69 which were then in the possession of the court, should be turned over to the plaintiff as the property of plaintiff's assignors. The judgment on said findings was thereafter entered. No appeal was taken. After the plaintiff obtained possession of the notes so turned over to him, he attempted to collect them. After he had proceeded for a while in his effort to collect, he alleges that he learned that five of the notes aggregating $9,816.78, which had been turned over to him as uncollected, had, in fact, been wholly paid. In the accounting suit the bank admitted that it had held the impounded notes as trustee. It is alleged that Mr. W. D. Howard, as manager, and Mr. Charles S. Lewis, as cashier, testified that the bank had collected, between March 15, 1928, and March 15, 1929, the sum of $14.021.68, and after March 15, 1929, it collected $1,090.73 and no more, and that the defendants produced the impounded notes in open court, placed them in the custody of the clerk, and offered to surrender them to the plaintiff. It is also alleged that the plaintiff knew nothing as to what collections had been made; that no testimony was offered except the testimony of the defendants, that the plaintiff relied on that testimony and that the trial court accepted it and acted on it and rendered the judgment above mentioned. Continuing, it is alleged that after the decree in the accounting suit had become final the plaintiff learned, and the fact is alleged, that the testimony given by the officers of the defendant bank was false and fraudulent and that the bank had in fact collected $9,816.78 more than as testified by its officers, and that it did these things for the fraudulent purpose of deceiving the court and deceiving the plaintiff in the accounting suit, and that the bank and its cashier knew that the bank had collected $9,816.78 not mentioned in said testimony. In this connection by proper averment it is stated that the defendants conspired to do these things. Furthermore, it is alleged that they concealed the facts from the plaintiff and from the court. Continuing, the plaintiff alleges that the impounded assets, $31,100, included some overdrafts and charges constituting a 'suspense account' aggregating $4,980.59; that prior to the trial of the accounting suit all of said sum had been collected, but that the bank fraudulently withheld said information from the court and violated its duty as a trustee of plaintiff's assignors. Then follow similar allegations of false testimony by the defendants, reliance on the same by the plaintiff and the trial court, and the deception of the court. As a second cause of action the plaintiff pleaded a common count as for moneys had and received. However, in numerous places, it clearly appears from the statements of counsel that the second cause of action is based on the specific facts set forth in the first count. The demurrer of the defendants was addressed to the complaint and to each of the counts contained therein."

[1] It will be noted from the above recital of facts that it is substantially averred that plaintiff and also his assignors prior to the institution of the former action for an accounting, and during its pendency, applied to defendant bank and its officers for information respecting the notes and accounts upon which payments had been made and also respecting the notes and accounts which remained uncollected, but that said bank and said defendants, with the intention of cheating and defrauding plaintiff, neglected and refused to furnish him or his assignors with all or any of this said information and that by reason of this fact he was unable to controvert and did not attempt to controvert the account as tendered to the court by the said bank. If this conduct was, as alleged, for the fraudulent purpose of preventing information as to the status of these notes from reaching plaintiff, and to deceive him and the court, it was conduct extrinsic and collateral to the issue made by the pleadings and authorized relief in equity under the rule relating to extraneous fraud, recently discussed, and perhaps extended, by this court in the case of Caldwell v. Taylor, 23 P.(2d) 758. See, also, Merrill v. First National Bank, 94 Cal. 59, 29 P. 242. Although the point is not made, it would seem that plaintiff could justify his conduct by excusable mistake superinduced by said acts and conduct of the defendants, which were collateral to the issue tried by the court. Bacon v. Bacon, 150 Cal. 477, 486–488, 89 P. 317; Soule v. Bacon, 150 Cal. 495, 89 P. 324.

[2, 3] It should also be noted here that in the former action only defendant bank and L. B. Howard were made defendants. Here the defendants are said bank, Chas. H. Lewis, and W. D. Howard. It is only the bank that is the defendant in both actions. Moreover, in the former action the court expressly confined its judgment to the bank to the exclusion of defendant L. B. Howard. Defendants Lewis and W. D. Howard are therefore in no position to rely upon that former judgment to relieve them of the duty of meeting this action for fraudulent conversion of plaintiff's property. Besides, we are pointed to no reason why plaintiff has not shown actionable

injury resulting from the pleaded civil conspiracy in which neither defendant bank nor the defendants Lewis and Howard, or either of them, could rely upon the former judgment for protection. Mox, Inc., v. Woods, 202 Cal. 675, 262 P. 302.

[4] The defendants, under the allegations of the complaint, are involuntary trustees of the property of plaintiff. We see no reason why they should not be required to meet the allegations of the complaint on its merits.

The judgment accordingly is reversed, with directions to the court below to overrule the demurrer. This conclusion renders all other appeals immaterial and therefore they are hereby dismissed.

We concur: LANGDON, J.; SHENK, J.; CURTIS, J.

IRA F. THOMPSON, Justice.

I dissent. I cannot agree that the fraud of the bank in this case was extrinsic. It was a false statement going to the merits of the original action and was not designed to keep the adverse party from having his day in court. Suppose the witness for the bank had taken the stand and sworn to the false statements, thus committing perjury, equity could grant no relief because of the intrinsic nature of the fraud. It may be possible to avoid the effect of the judgment by proving a conspiracy, as is suggested in the latter part of the opinion. But nevertheless, the nature of the fraud, i. e., whether intrinsic or extrinsic, is not changed by that circumstance.

I concur: WASTE, C. J.

219 Cal. 532

PEOPLE v. HAINLINE.

Cr. 3663.

Supreme Court of California.

Dec. 18, 1933.

As Modified on Denial of Rehearing Jan. 16, 1934.

1. Criminal law ⇐982.

"Probation" is not right of accused, but is act of grace and clemency which may be granted by court whereby seemingly deserving accused may escape penalty imposed by law for offense of which he is convicted (Pen. Code, § 1203 et seq., as amended).

[Ed. Note.—For other definitions of "Probation," see Words & Phrases.]

2. Criminal law ⇐982.

Statutory right to dismissal of burglary prosecution did not vest until end of probation period, until which time order of probation was subject to revocation at discretion of court (Pen. Code, § 1203 et seq., as amended).

3. Constitutional law ⇐203.
Criminal law ⇐1201.

Statute providing that, where probationer is subsequently prosecuted, prior conviction may be proved as if probation had not been granted, *held* not unconstitutional as ex post facto law (Pen. Code, § 1203, subd. 4).

4. Criminal law ⇐1201.

Burglary to which defendant pleaded guilty *held* properly considered as prior conviction under amended statute, notwithstanding amendment was made after defendant had pleaded guilty and was on probation preliminary to acquisition of statutory right to dismissal of burglary prosecution (Pen. Code, § 1203, subd. 4).

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Lester Hainline was convicted on an amended information charging burglary and prior conviction, and he appeals.

Affirmed.

For prior opinion, see 21 P.(2d) 965.

W. C. Dalzell and David Silverman, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

SEAWELL, Justice.

On March 28, 1927, appellant, upon his plea of guilty, was convicted of the crime of burglary, and was granted probation. Having served the term of his probation, he was permitted to withdraw his plea of guilty and enter a plea of not guilty on April 20, 1928, and the court thereupon dismissed the information pursuant to the provisions of section 1203, Penal Code.

On September 17, 1932, the appellant and one Don Guzman were jointly charged in two counts of the information filed against them with the commission of two distinct burglaries; the first being committed on or about July 23, 1932, and the second on or about August 26, 1932. Upon arraignment, upon the request of defendant Guzman, his time to plead was continued to September 23, 1932. Appellant Hainline waived time to plead, and forthwith entered a plea of not guilty. The trial of the charges against him was set for October 5, 1932. On that day the district attorney's motion to amend the information as to Hainline by incorporating in it a prior

conviction of burglary against him pronounced on March 28, 1927, was granted. In all other respects the two informations were substantially alike. Said prior conviction of burglary was the same offense for which appellant had been granted probation on March 28, 1927, upon his plea of guilty as above described. Appellant was arraigned on the amended indictment, pleaded not guilty to both counts, and denied that he had suffered the previous conviction. He went to trial and the jury found against him as to both counts, and also against his denial that he had suffered a previous conviction. Judgment upon the verdicts followed.

There is no merit whatever in the assignment of error to the effect that the evidence taken at the preliminary examination does not support the allegations of the information.

[1] The next point raised by appellant has to do with the construction of the Probation Act (see Pen. Code § 1203 et seq., as amended). Probation is not, of itself, a right of a defendant. The act does not purport to repeal any provision of substantive criminal law. "Probation" is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. People v. Payne, 106 Cal. App. 609, 289 P. 909, and cases therein cited. No person is entitled to be placed on probation as a matter of right. It is a power which may be exercised in the discretion of the court to the end, as expressed in the act itself, "that amends may be made to society for the breach of the law; for any injury done to any person resulting from such breach and generally and specifically for the reformation and rehabilitation of the probationer. * * *" (Pen. Code, § 1203, subd. 1.) Where any one of the foregoing purposes of the law has failed there is no just or logical reason why a probationer who has deliberately refused to accept the advantages with which the rehabilitating provisions of the law clothe him, and has returned to a life of crime, should be heard to invoke the benefits of a grace which saved him from the stigma of felony and which was conferred upon him in consideration of a pledge of future honest conduct and good citizenship. As a matter of comparative justice it would be giving to such a person an advantage above others who had never had the grace of probation extended to them upon conviction of their first offense.

If, prior to the 1927 amendment, any doubt existed in the minds of lawyers, judges, and laymen as to the status of those who committed a second felony, such doubt was removed by said amendment (St. 1927, p. 1493), which strips them of all the privileges and rights which were restored to them by the provisions of the original act upon the completion of their probationary term.

Section 1203, subdivision 4, provides: "Every defendant who has fulfilled the conditions of his probation for the *entire period* thereof * * * shall * * * be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities *resulting from the offense or crime of which he has been convicted.* * * * The probationer may make such application and change of plea in person or by attorney authorized in writing; provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." (Italics supplied.)

[2-4] The concluding portion of the act, which provides that if the probationer commits a second offense he shall forfeit all the rights with which he was clothed at the time the court ordered the information dismissed, constitutes the amendment of 1927 (St. 1927, p. 1493). Said amendment became effective July 29, 1927. The order of dismissal in the probation proceeding was not made until April 20, 1928. Appellant was not entitled to have the order made at an earlier day, as his time for probation did not expire prior to April 20, 1928, and it was at all times subject to revocation at the discretion of the court. Some nine months before the day arrived on which he hoped to immune himself against the consequences of his criminal act, the legislature amended the act as above pointed out. Said 1927 amendment did not abridge or affect in any way appellant's rights under the law as it stood from the time of the commission of his crime to and including judgment entered thereon. He was granted all the benefits which the law could at any time have conferred upon him. Conceding his term of probation had actually been completed before the amendment went into effect, we know of no legal grounds upon which he could rest his claim of exemption from the penalties of the law as to future crimes committed by him. The probationary law was not enacted with a purpose of immunizing the criminally inclined from the consequences of the penalties which substantive penal statutes mete out to habitual criminals generally. Said amendment simply and justly provides that persons who have refused to profit by the grace extended to them upon the first offense shall, upon conviction of a subsequent felony, suffer the penalty of the law as prescribed for the punishment of all

other offenders. The amendment is not ex post facto and violates no constitutional provisions of the federal or state government, and is in harmony with our statutes. It provides clearly for the punishment of future crimes.

The early case of Ex parte Gutierrez, 45 Cal. 429, the leading authority on the point herein presented, quotes with approval the following excerpt from Cooley on Constitutional Limitations, which is decisive of this case: "And a law is not objectionable as ex post facto which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that in providing for such heavier penalties the prior conviction authorized to be taken into account may have taken place before the law was passed. In such cases it is the second or subsequent offense that is punished, not the first." See, also, People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786.

No other question is presented for decision.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; THOMPSON, J.

EGAN v. McCRAY.*

L. A. 14329.

Supreme Court of California.

Dec. 29, 1933.

Rehearing Granted Jan. 25, 1934.

Dismissal and nonsuit ⇐81(5).

Order erroneously entered dismissing action by court mistakenly believing it had no jurisdiction was void on its face, and court never lost jurisdiction, and hence could vacate order of dismissal.

IRA F. THOMPSON, J., WASTE, C. J., and SHENK, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by D. Webster Egan against Irene C. McCray. The action was dismissed, and later the order of dismissal was vacated, and defendant appeals from the order vacating the order of dismissal.

Affirmed.

Prior opinion, 21 P.(2d) 613.

Bodkin & Lucas, G. Stuart Silliman, and Henry G. Bodkin, all of Los Angeles (Bourke Jones, of Los Angeles, of counsel), for appellant.

Frank Lober and D. Webster Egan, both of Los Angeles, for respondent.

PRESTON, Justice.

This action, instituted August 2, 1929, was at issue and on for trial on April 29, 1930. It involves a money demand for $1,346.08. At the time the case was called for trial, the court, acting under the mistaken belief that it had been bereft of jurisdiction thereof by the provisions of the statutes of 1929 (Stats. 1929, chap. 477, p. 837, in effect August 14, 1929), gave an order, which was entered in the minutes only, purporting to dismiss the action. Later, and on October 16, 1930, on motion of the plaintiff after due notice, the court vacated said order of dismissal and restored the cause to the calendar. From this last-mentioned order defendant has appealed, asserting that the order of dismissal became final and remained in full force and effect and the trial court was without power to interfere with it.

Appellant is in error and overlooks the fact that the order of dismissal was void on its face; hence the trial court never lost jurisdiction of the cause. The court could not, by a mistaken act of negation, despoil itself of jurisdiction. The order, being a nullity, could be "lopped off" at any time. People v. Davis, 143 Cal. 673, 675, 77 P. 651; People v. Greene, 74 Cal. 400, 405, 16 P. 197, 5 Am. St. Rep. 448.

The interesting question argued as to whether in any case a minute order of dismissal, to be effective for any purpose, must be followed by a judgment on the merits, need not be determined.

The order is affirmed.

We concur: SEAWELL, J.; CURTIS, J.; LANGDON, J.

IRA F. THOMPSON, Justice (concurring).

I concur in the conclusion reached, but dissent from that portion of the opinion which announces that the order of dismissal was void on its face. No doubt the order was erroneous, but it also seems perfectly clear to me that the court had jurisdiction to decide erroneously. Gray v. Hall, 203 Cal. 306, 314, 265 P. 246; Baird v. Smith, 216 Cal. 408, 412, 14 P.(2d) 749. I concur, however, upon authority of Consolidated Construction Co. v. Pacific E. R. Co., 184 Cal. 244, 193 P. 238,

wherein it is held that the order of dismissal does not become effective as a judgment until the order is entered as a judgment in the judgment book, unless, of course, the dismissal is one under section 581 of the Code of Civil Procedure. This is not such a case.

We concur: WASTE, C. J.; SHENK, J.

219 Cal. 566

WARBASSE v. STATE BAR OF CALIFORNIA.

L. A. 14233.

Supreme Court of California.

Dec. 28, 1933.

1. Attorney and client ⇐10.

Petitioner *held* entitled to admission to practice of law in California, notwithstanding suspension in New York for two years because clerk in his office had solicited cases.

2. Attorney and client ⇐10.

Where applicant for admission to bar had been suspended and reinstated in another state, California court may go behind action of court in other state, and determine for itself from record whether applicant is eligible to admission to practice of law in California.

3. Attorney and client ⇐10.

Fact that attorney had paid penalty in another state by two years' suspension from practice did not necessarily require that he be admitted to practice in California on mere formal proof of moral fitness.

In Bank.

Petition by Herbert N. Warbasse, to review the action of the Committee of Bar Examiners of the State Bar of California, refusing to recommend the admission of petitioner to the practice of law in California.

Petitioner admitted.

Herbert N. Warbasse, of Brooklyn, N. Y., and Andrew J. Copp, Jr., of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

[1] Application was made by petitioner to this court for admission to practice law in this state notwithstanding the refusal of the board of bar examiners to recommend his admission. His application has the dual title, "Petition to Review Decision of Board of Bar Examiners," and "Petition to Invoke Inherent Power of Supreme Court for Admission to Bar of California." The record before us contains a copy of petitioner's application to the board of bar examiners which states that petitioner is now a resident of the state of California; that he is a graduate of Lafayette College with degrees of A. B. and A. M. and has a degree of LL. B. from the New York Law School; that he was admitted to practice law by the Supreme Court of New York, Appellate Division, Second Department, in 1902, thereby becoming entitled to practice in all of the courts of the state of New York, and that he was admitted to practice in the United States District Courts and Circuit Courts, Eastern District of New York in 1908; that immediately after his admission he was employed as an editor on a legal encyclopedia under William McKinney; that he then became a partner in the law firm of Warbasse & Warbasse in Brooklyn, N. Y., with a general practice; that in 1912 he was appointed assistant district attorney of Kings county (Brooklyn), N. Y., and resigned from the position of chief assistant district attorney in 1922 to enter private practice; that on March 7, 1930, he was suspended from practice on the charge that a clerk in his office had solicited cases; and that he was reinstated in March, 1932. In addition, the record consists of the certificate of admission to the bar and good standing of applicant issued by a justice of the Court of Appeals of the state of New York verifying the fact that petitioner was admitted to practice in New York on July 1, 1902, and was an attorney in good standing except for a period of two years from March 7, 1930, during which time he was suspended by the Appellate Division of the New York Supreme Court; that he has been reinstated by an order of that court made on March 29, 1932, and is now an attorney in good standing in the state of New York; the sponsor's certificate, and letters of recommendation from the several judges of the Appellate Division, Second Department, of the Supreme Court of the state of New York, from judges of the Supreme Court of New York, and from attorneys and business men of Brooklyn, N. Y., the community in which petitioner resided and previously practiced law. It also contains the stenographic report of one of the hearings in this state before the board of bar examiners, together with a letter by petitioner setting forth the subject-matter of a subsequent hearing before the board of bar examiners when a stenographic report was not made. It also contains a copy of the charges made against petitioner on the occasion of his suspension in New York, a transcript of the testimony taken before the referee, together with the report of the official referee, which was to the effect that the charge had been established that one of the clerks in petition-

er's office, one James Basil by name, had in fact solicited cases for the office, and that, regardless of whether petitioner was in fact actually cognizant of the practice, it was not consistent with his duties as an attorney to turn over the business management of the office to a layman employee, making no inquiries as to the specific methods used in securing business, and that under such circumstances petitioner must be deemed to be chargeable with the knowledge of what took place in his office, and recommending, therefore, that petitioner be suspended from practice for the period of one year.

There is no question presented as to petitioner's legal training and ability. He is a college graduate with A. B. and A. M. degrees. He likewise has a degree of LL. B., and was assistant district attorney of Brooklyn, N. Y., for some ten years. The resolution of the board of bar examiners denying his application makes no reference to his legal ability, but states that it is denied upon the ground that "applicant has failed to show that he is possessed of the requisite good moral character and to meet the burden of proving that he is entitled to the high regard and confidence of the public and of removing all reasonable doubt of moral unfitness." No letters or other evidence derogatory to petitioner's character are presented, other than that embodied in the transcript of the testimony taken at the hearing before the referee in New York upon the charge that cases were solicited by at least one clerk in his office. It follows that this stenographic record comprises all of the testimony adverse to petitioner.

We have examined the record of the proceeding before the referee in New York, and fail to find any word of testimony that petitioner was actually aware that soliciting of cases, or ambulance chasing, was being practiced in his office by any of his subordinates. He emphatically denied that he had any knowledge of such practice, and this denial was corroborated by the testimony of each and every witness who was interrogated with reference to the situation. Thus, James Basil testified that he was employed by Ralph Capone, the head office manager, whom petitioner had retained as office manager when he took over the practice of his deceased predecessor, and to whom he intrusted the entire handling of the office affairs, including instructions to the clerks and investigators. When asked why he stated he was employed by Ralph Capone, he replied: "Because we never had any dealings with Mr. Warbasse. Mr. Warbasse was absolutely inviolate. Mr. Warbasse had absolutely nothing to do with it. Mr. Warbasse didn't know what was going on, because Mr. Capone employed us." Moreover, none of the witnesses who were interrogated with reference to whether or not their cases had been solicited by any one from petitioner's office testified to any contract directly with petitioner, or to any circumstance which would furnish support to an inference that petitioner had any actual knowledge that their cases had been procured by solicitation. Although there is in the record the testimony of one of the clerks in the office, William Petracone, to the effect that, when he asked for a raise in salary, "he said he would give me a chance to make more money, and he asked me if I would solicit cases. I told him I didn't think that was my work," which upon a cursory reading might seem to refer to petitioner, it is quite apparent from his subsequent testimony that he was in fact referring to Ralph Capone as asking him to solicit cases and not petitioner. And, although the volume of negligence cases in the office was unusually large, we think it possible that petitioner may have been in ignorance of the fact that any of these cases had been procured by solicitation. He had undoubtedly acquired a wide reputation as a trial lawyer during his practice as assistant district attorney which would tend to bring him in this type of business, and, furthermore, he took over the practice of a lawyer with a wide Italian clientele who had apparently specialized in that type of case. It must be admitted, on the other hand, that there is ample evidence in the record of the hearing before the referee in New York to support the charge that ambulance chasing was in fact being carried on as a regular practice in petitioner's office under the supervision of Ralph Capone, the office manager, who handled all of the administrative business of the office. In fact, petitioner openly admitted in court that, subsequent to his appearance before the referee, he had caused an investigation to be made of cases pending in his office and had become convinced that some of them, at least, had been procured by solicitation. As before indicated, the report of the referee admits that there is a dearth of testimony to prove that petitioner had actual knowledge of the practice, but held that petitioner, as head of the office, was chargeable with constructive knowledge of what was in fact going on in the office, and that he was responsible for any unethical conduct continuously practiced by his subordinates. The report of the referee expressly found that the usual concomitants to ambulance chasing, such as the settling of cases irrespective of their merits, and inadequate attention to cases thus procured, were absent in petitioner's case as he was an able attorney and gave adequate attention to the preparation and presentation of his cases.

[2, 3] There can be no doubt that, despite the fact that petitioner has been reinstated in the state of New York, and, so far as that state is concerned, his suspension may be considered to be expunged from the record, we may go behind the action of the court in that

particular case to determine for ourselves from the record presented whether or not he is eligible to admission to practice law in this state. In re McCue, 211 Cal. 57, 293 P. 47. Likewise, the fact that he has already expiated his offense and paid the penalty by suspension for two years in New York does not necessarily require that he be admitted to practice in this state upon mere formal proof of his moral fitness. For, if the record of the hearing before the referee in New York clearly showed that petitioner had in fact knowingly participated in the practice of ambulance chasing, we would undoubtedly be warranted in requiring exceptionally strong proof of his rehabilitation. However, the record presents a grave question of whether or not petitioner was in fact aware of the practice in his office, which was a fairly large one. We are mindful of the fact that from the circumstances shown a legitimate inference may possibly be drawn that petitioner was in fact aware of the practice. However, the record before us fails to carry to us a sense of conviction that such is the case. The referee before whom the hearing was held refused to draw such inference, and he was in a better position to correctly judge the facts than are we. This being the state of the record, we believe that the opinion of those who have had ample opportunity to know his character and to observe his conduct over a long period of years is entitled to a great deal of weight. There has been filed by petitioner letters of recommendation from judges, attorneys, and business men. Most of the letters are from judges of the Appellate Division, Second Department, of the Supreme Court, the court which suspended him. Although the number of letters is not unduly large, they are from persons whose positions indicate that they possess a real sense of responsibility for the integrity of the legal profession, and who, therefore, would not be induced by reasons of friendship, or any reason other than a sincere belief in his honesty and integrity, to recommend him for admission to our bar. The letters attest petitioner's ability, his wide experience, and the worth of his character. We believe that the writers thereof were giving an honest estimate of his character and that we may unqualifiedly accept that estimate.

Petitioner fully and fairly disclosed in his application to the board of bar examiners the fact of his suspension in New York, and made little, if any, attempt to exculpate himself from the fault of permitting such a system to be practiced in his office. It is true that petitioner did not in his application to this court emphasize the fact that the refusal of the board of bar examiners to recommend his admission was probably based upon his suspension in New York, but a frank statement of his suspension was contained in his application to said board of bar examiners which was incorporated in his petition. We are not inclined to criticize petitioner's failure in this regard, as we do not believe that it was a deliberate attempt to mislead the court. His application is denominated "Petition to Review Decision of Board of Bar Examiners," and it was self-evident that a review of such decision would necessarily disclose the fact of his suspension.

In view of the unconvincing character of the evidence presented in the transcript of testimony at the hearing before the referee in New York, hereinbefore discussed, the letters of high recommendation of petitioner by the justices of the courts of New York before whom he practiced over a long period of years, and a total absence of any letters or testimony derogatory to petitioner's character, we are of the opinion that he should be admitted to practice law in this state.

It is therefore the order of this court that petitioner be, and he is hereby, admitted to practice as an attorney and counselor at law, authorized to practice in all the courts of this state, and the clerk will deliver to him a certificate of such authority upon his taking the prescribed oath and signing the roll of attorneys.

219 Cal. 622

HERMANSON v. BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES et al.

L. A. 14305.

Supreme Court of California.

Dec. 29, 1933.

Rehearing Denied Jan. 26, 1934.

1. Mandamus ⇐105.

Ex-fireman *held* not entitled to mandamus to compel continuation of pension notwithstanding order of board of pension commissioners terminating pension was made without notice or hearing, where municipal charter provided that pension should cease when disability ceased, and trial court found that fireman's disability had ceased.

2. Limitation of actions ⇐34(2).

Ex-fireman's action to compel payment of pension, based on purported liability under municipal charter, which was law of state, was for "liability created by statute," and subject to three-year limitation statute (Code Civ. Proc. § 338, subd. 1).

[Ed. Note.—For other definitions of "Liability Created by Law," see Words & Phrases.]

3. Limitation of actions ⇐16.

Statute of limitations may be set up in special proceeding for writ of mandate (Code Civ. Proc. § 338, subd. 1).

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Mandamus by Paul H. Hermanson to compel the Board of Pension Commissioners of the City of Los Angeles and others to continue payment of pension. From judgment for the defendants, plaintiff appeals.

Affirmed.

Prior opinion, 20 P.(2d) 774.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Robert J. Stahl and Loren A. Butts, Deputy City Attys., all of Los Angeles, for respondents.

PER CURIAM.

This is a petition for a writ of mandate. Petitioner, while in the course of his duties as a member of the fire department of the city of Los Angeles, was injured, and, on February 25, 1925, was granted a pension of $1,020 per year, for disability. He received monthly payments until March, 1927, when, without notice to him and after examination by three practicing physicians, the respondent board concluded that his disability had ceased, and terminated the pension as of March 15, 1927. Petitioner was directed to report for active duty, and refused to do so. No demand for pension payments was made by him until over three years later, when, on April 17, 1930, he made such demand. Thereafter, on or about June 3, 1930, he commenced this proceeding in mandamus to compel respondents to make all payments which would have been made under the pension for the three-year period, and thereafter to continue payments indefinitely. The theory of petitioner is that the order terminating the pension was void because made without prior notice to him and opportunity for a hearing; and that the pension has been in existence during this whole period and is still in force.

The trial court found that subsequent to the order of termination, petitioner was not totally disabled from performing his duties, and that he was not entitled to the writ. Petitioner appealed.

[1] Section 182 of the Los Angeles city charter, by an amendment made after petitioner's pension had been granted, provides that the board of pension commissioners shall have power "to hear and determine all matters pertaining to the granting and termination of any pension award," and that the board shall make written findings, based upon the report of at least three physicians, "and such other evidence concerning such disability as it may have before it." Petitioner contends that under this section the board was exercising a judicial function, that "to hear and determine" meant to consider evidence on both sides, and that to proceed without notice to petitioner, and to terminate his pension without an opportunity for him to be heard constituted a deprivation of a vested right without due process of law.

Petitioner loses sight of the controlling provision of the charter, which reads: "* * * Any pension * * * shall cease when the disability or the result therefrom ceases." This provision was in the charter at the time he was given his pension. Its unequivocal language, considered together with the finding of the lower court that the disability had ceased, is conclusive against petitioner. The charter does not provide that the pension shall continue until terminated by the board after notice and hearing; on the contrary, it declares that the pension shall terminate when the justification for it, i. e., the disability, terminates. It may be conceded for the purposes of this appeal that petitioner could not be deprived of a right to receive a pension by an erroneous determination, without a hearing. The failure to grant a hearing would then be ground for an attack on the proceedings of the board, as a result of which petitioner might be given a hearing to determine anew, and properly, the question of disability. See Sheehan v. Board of Police Commissioners, 197 Cal. 70, 239 P. 844. But surely that is the extent of his right. He neglected to avail himself of it for over three years, and refused to make his services available to the city when, by the terms of the charter, he was no longer entitled to a pension. To permit him now to recover back payments, not because he is entitled to them, but because he was denied a technical right to a hearing, would be to grant a remedy against the city highly penal in its effect, and wholly without relation to the actual right claimed to be violated. It must not be forgotten that under the charter he is only entitled to a pension during the period of his disability, regardless of how that disability is ascertained or declared.

We conclude, with the trial court, that petitioner was not entitled to a writ of mandate. Whether he had a right to compel the board to hear him on the question of disability is a matter not before us, and, in view of the finding to the effect that the same had ceased, which finding is not attacked, an attempted enforcement of such right would probably be barren of beneficial result.

[2, 3] We have considered this case and

reached the foregoing conclusion on its merits, but we think it proper to add that the defense of the statute of limitations, as raised by respondent, is sound. This is an action based upon a purported liability under the municipal charter, which is a law of the state (Stern v. City Council, 25 Cal. App. 685, 688, 145 P. 167), and hence is a "liability created by statute," subject to the limitation provisions of section 338, subdivision 1, of the Code of Civil Procedure, which is three years. The statute of limitations may be set up in a special proceeding for a writ of mandate. Jones v. Police Commission, 141 Cal. 96, 74 P. 696; Harby v. Board of Education, 2 Cal. App. 418, 83 P. 1081; Curtin v. Police Commissioners, 74 Cal. App. 77, 239 P. 355. In Harby v. Board of Education, supra, where plaintiff had been removed from a position, the court further held that she was guilty of laches which served to bar her claim, because another person had been hired and compensated during the period following her removal. The court pointed out that in cases of this sort the application for relief should be promptly made, to protect the city against dual payment for the same service.

The judgment is affirmed.

219 Cal. 580

MINER et ux. v. DABNEY-JOHNSON OIL CORPORATION et al.

L. A. 14341.

Supreme Court of California.

Dec. 29, 1933.

1. Trial ⇐253(4).

Instruction that person in imminent danger is not required to exercise intelligence and judgment otherwise expected *held* erroneous in omitting statement that he must himself be without negligence.

2. Trial ⇐296(1).

Omission of essential element of cause from single instruction otherwise correct is ordinarily cured by instruction correctly stating such element.

3. Trial ⇐296(1).

Prejudicial error in materially incorrect statement of essential legal principle in instruction is not ordinarily cured by correct declaration of same principle in another instruction.

4. Trial ⇐296(4, 5).

Imminent peril instruction, omitting essential element of plaintiff's freedom from negligence, *held* not reversible error, in view of correct instruction supplying omission; two instructions not being conflicting.

Instruction supplying omission was that one suddenly confronted with imminent danger, without negligence on his part, is not required to exercise degree of care and skill required in commission of act after careful deliberation, but must act only as reasonably prudent man would under similar circumstances.

5. Trial ⇐296(4, 5).

Instruction that negligence is wrongful doing of act or wrongful omission to act cured defect in instruction not stating that contributory negligence may arise from commission, as well as omission, of act.

6. Trial ⇐296(3).

Instruction that defendants were jointly and severally liable, if their negligence proximately contributed to plaintiff's injury, *held* not prejudicial to defendants because of use of word "contributed," instead of "caused," in view of other instructions.

7. Trial ⇐251(8).

Instruction on doctrine of joint tort-feasors in action against truck driver, as party actually guilty of negligence causing plaintiff's injury, and truck owner, as driver's employer, *held* erroneous.

8. Trial ⇐296(3).

Erroneous instruction on doctrine of joint tort-feasors in action against truck owner and driver for injuries to another *held* not prejudicial to defendants, especially in view of correct instruction on respondeat superior doctrine.

9. Appeal and error ⇐1064(2).

Instruction that defendants were jointly and severally liable, if their negligence proximately contributed to plaintiff's injury, *held* not prejudicial to defendants as formula instruction directing verdict for plaintiff.

10. Automobiles ⇐246(7).

Instruction, embodying ordinance as to stopping, standing, and parking vehicles in streets and applying its provisions to facts, in action for injuries in collision between plaintiff's automobile and defendant's truck *held* not erroneous.

11. Trial ⇐228(3).

Instructions in action for injuries in collision between plaintiff's automobile and defendant's truck as to application of ordinance relating to stopping, standing, and parking vehicles in streets, and motor vehicle operator's duty to equip machine with lights, *held* not erroneous in stating that plaintiffs could not recover if their negligence proximately "caused," instead of "contributed" to, accident (St. 1923, pp. 546, 551, §§ 99, 106, 109).

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by A. G. Miner and wife against the Dabney-Johnson Oil Corporation and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

For prior opinion, see 22 P.(2d) 265.

Swaffield & Swaffield, Lawrence Hall, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellants.

Russell H. Pray, of Long Beach (Wahlfred Jacobson, of Long Beach, of counsel), for respondents.

CURTIS, Justice.

This cause was transferred to this court after decision by the District Court of Appeal. We are in full accord with the conclusion reached by the District Court of Appeal regarding the sufficiency of the evidence to support the judgment, and agree with that court "that the case presents a substantial conflict in the evidence." We question, however, the correctness of the determination of that court that the trial court so seriously erred in its instructions to the jury as to compel a reversal of the judgment.

[1] The first instruction to which the appellants object is as follows: "You are instructed that when a person is in imminent danger he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in such danger, so if a party in imminent danger has two ways open to him but has not the time to stop and investigate and determine which is the right or safe way and which is the wrong or unsafe way, his choosing of the latter is not, under the circumstances, negligence on his part." This instruction, the appellants contend, was erroneous, in that it omitted an essential element of the rule of imminent danger in that it failed to inform the jury that the person claiming the benefit of said rule must himself be "without negligence on his part." This contention must be sustained. Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540; Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724. It has even been held that under some circumstances the giving of such an instruction constituted "prejudicial error requiring a reversal of the judgment." Gootar v. Levin, 109 Cal. App. 703, 706, 293 P. 706, 707. However, in those cases but slight if any consideration was given to other instructions upon the same subject which might have had a tendency to nullify the erroneous effect of the instruction under review. In the present action the court gave another instruction upon the question of imminent peril which correctly stated said rule, and respondents contend that any error committed by the court in giving instruction No. 23 is cured by that instruction. This second instruction is in the following words: "You are instructed that one who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation; he is required to act only as a reasonably prudent man would act, under similar circumstances."

[2-4] The question is, therefore, squarely presented as to whether the giving of a concededly erroneous instruction is cured by the giving of a correct instruction upon the same subject. Appellants contend that in such a case the instructions are necessarily contradictory, and that it is impossible to determine from the record upon which theory the jury based their verdict, and, therefore, the judgment predicated thereon must be reversed. While this may be true generally, it is not the rule applied in all cases. The distinction between the two types of instructions and the reasons why the rule applies to one and not the other is stated as follows: "If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction." Soda v. Marriott, 118 Cal. App. 635, 643, 5 P. (2d) 675, 678. We think instruction 23 is included in the first class of instructions mentioned above where the omission is of an essential element of the instruction rather than of an incorrect statement to the jury of a principle of law. In instruction No. 23 the jury were correctly instructed as to the application of the doctrine of imminent peril with the exception that the court omitted to inform them that it was available only to a person "without negligence on his part." This omission in instruction No. 23 was supplied by instruction No. 31 which correctly stated the true doctrine. There was no conflict between the two instructions, as one instruction was silent as to the element in question while it was expressly stated in the other. It was in effect so held in the case of Marshall v. American Meter Co., 98 Cal. App. 759, 277 P. 894, 895, where we find the subject treated as follows: "Acting upon the request of the plaintiff, the court instructed the jury as follows: 'In time of imminent danger a person is not necessarily negligent because he fails to take every precaution or adopt every means of safety that a careful calculation subsequently shows he might have taken or adopted.' The defendants assert that the instruction fails to consider the conduct of the

plaintiff before the imminent danger arose. That is true; but it neither includes such conduct nor excludes such conduct. That was considered in other instructions specially addressed thereto. The instructions under consideration in Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724, were not so drawn. They expressly excluded and ignored plaintiff's prior conduct."

It will be observed that in the instruction considered in the cited case the same omission occurred which is found in instruction No. 23 in the present case, and it was that omission which the court referred to when mentioning "the conduct of the plaintiff before the imminent danger arose." A reading of pages 60 and 61 of 92 Cal. App., 267 P. 724, of the case of Vedder v. Bireley, supra, so indicates. We find a discussion of this subject in the case of Gaster v. Hinkley, 85 Cal. App. 55, 61, 258 P. 988, 991, which we think confirms our conclusion that the omission of this one element from the instruction was not reversible error under the circumstances of this case. While the instruction therein considered was not one which related to the doctrine of imminent peril, the decision states a general principle applicable to all instructions generally. In that case the court said: "Standing alone, this instruction was erroneous. The burden of proving the contributory negligence of the plaintiff rested upon the defendant. Not only must it appear that plaintiff was guilty of a lack of ordinary care for her own safety under the circumstances of the case, but also that this negligence contributed directly and proximately to the injuries which she sustained. Gett v. Pacific G. & E. Co., 192 Cal. 621, 631, 221 P. 376; 19 Cal. Jur. 649. To instruct the jury that it was only necessary that plaintiff's negligence should contribute 'in any wise' to the injuries which she sustained falls far short of the well-established rule that it must directly and proximately contribute to the injuries sustained. However, the jury was elsewhere fully and correctly instructed as to all the necessary elements constituting contributory negligence. All of the instructions must be read together, and construed as a whole. 24 Cal. Jur. 857, § 113. The omission of a necessary element from one instruction is not reversible error, provided it is supplied in other instructions."

We conclude from this discussion that the two instructions were not contradictory, and that when read together we do not think that the jury could have been misled or confused by them. This was to all intents and purposes the effect of the decision in Drury v. Los Angeles R. Corp., 102 Cal. App. 58, 64, 282 P. 525, 527, where we find the law upon the subject stated as follows: "The last instruction complained of involves the law applicable to the conduct of one who is suddenly placed in imminent danger of serious injury. It evidently refers to the incident disclosed by the evidence, from which it appears that, when Mrs. Drury was thrown from the moving car as it proceeded around the curve, she still clung to the handrail and was dragged until her feet were caught and crushed beneath the wheels of the car, while with the exercise of better judgment she might have released her hold of the handlebar and fallen to a place of greater safety on the pavement. This instruction read in part: 'When a person, without fault on his part, is suddenly put in a position of peril by the negligent act of another, even if in bewilderment he runs directly in the very danger which he fears he is not in fault. * * *' Standing alone, this is technically not a correct statement of the law. It was preceded by another instruction relative to the same subject which was given in greater detail, and its application was apparent. When these two instructions are read together, we are inclined to think the jury could not be misled thereby, particularly is this true in view of the fact that the jury were clearly informed that the plaintiff Ethel Drury could not recover if she was guilty of contributory negligence." As in the case just cited, the jury in the present case was definitely instructed that no recovery could be had by the plaintiffs if they were guilty of contributory negligence. Under these decisions of the courts of this state, we are of the opinion that the giving of instruction No. 23 was not reversible error.

[5] The next instruction of which the appellants complain reads as follows: "You are instructed that in order to hold the plaintiffs guilty of contributory negligence you must find from the evidence in the case that the plaintiff A. G. Miner failed to do that which a person of ordinary prudence and caution would have done under the same or similar circumstances." The contention is made that contributory negligence may arise from an act of commission as well as from an act of omission, and that the instruction complained of failed to state that contributory negligence might arise from an act of commission. However, in a number of other instructions negligence and contributory negligence were correctly defined and the jury were told that "negligence was the wrongful doing of an act, or the wrongful omission to act." This was the exact situation before the court in Gotsch v. Market Street Ry., 89 Cal. App. 477, 482, 265 P. 268, 270, and the court there held that: "The jury was instructed by the court on its own motion that 'contributory negligence' is such 'an act or omission on the part of plaintiff,' etc. This latter instruction cured any defect in the one complained of which was given at the suggestion of plaintiff."

[6] Appellants also complain of the following instruction: "You are instructed that if you find that defendants were negligent, as alleged in plaintiffs' complaint, and that their

negligence proximately contributed to any injury sustained by plaintiffs, then you are not to compare their negligence or determine which was more negligent or which contributed most to the injury, since both would be then jointly and severally liable and the plaintiffs may recover against either or both of them, provided, of course, they were free from contributory negligence; and in these circumstances, it you so find, it will be your duty in this case to render your verdict in favor of the plaintiffs and against the defendants." Appellants' first objection to this instruction is in the use of the words, "proximately contributed to any injuries sustained by plaintiffs." They contend that the instruction as worded is an incorrect statement of the law, is misleading to the jury, and prejudicial error, for the reason that in the place of the objectionable words the court should have, in referring to defendant's negligence, used the words, "proximate cause of the injury." As appellants state in their brief: "In the case of Power v. Crown Stage Company (1927) 82 Cal. App. 660, 671, 256 P. 457, it is expressly pointed out that such an instruction is erroneous; however, in this case it was held not to be prejudicial upon the grounds that it was corrected by other instructions." To the same effect is the case of Dougherty v. Ellingson, 97 Cal. App. 87, 275 P. 456. The same situation prevails in the present case. Therefore, the same reasons exist for holding that appellants were not prejudiced by the giving of this instruction in so far as the above objection is concerned.

[7, 8] Appellants further criticize that part of this instruction whereby the jury were instructed upon the doctrine of joint tort-feasors for the reason that this doctrine was entirely without the issues of the case. There are two defendants in the action, the Dabney-Johnson Oil Corporation and L. K. Black. The pleadings and the proof show that the action against these two defendants was predicated upon the theory that the corporation was the owner of the truck with which plaintiffs' machine collided, and that Black was the driver of the truck at the time of the accident. No claim was made at any time that the two defendants were joint tort-feasors, but it was sought to hold Black as the party actually guilty of the negligence that caused the plaintiffs' injuries, and the Dabney-Johnson Corporation, as the employer of Black, under the doctrine of respondeat superior. Under this state of the case the instruction, in so far as it instructed the jury upon the doctrine of joint tort-feasors, was clearly erroneous. We are at a loss, however, to perceive how this erroneous instruction prejudiced the rights of the appellants in any material respect. Appellants cite numerous authorities which hold in the particular instances recited therein that it was prejudicial error to instruct the jury upon an issue not within the evidence or the pleadings. It may readily be conceded that in certain cases, depending upon the facts in each particular case, the rule would be as contended for by the appellants. But appellants have not suggested, and we are unable of our own initiative to conceive, any reason why the giving of this instruction would unduly confuse the jury or in any way prejudice the rights of appellants. We may say, before leaving the subject, that the jury were correctly and minutely instructed upon the doctrine of respondeat superior, and were told explicitly that the Dabney-Johnson Corporation could only be held liable as the employer of Black and then only in case Black was guilty of negligence while acting in the course of his employment.

[9] A third objection to instruction No. 27 is predicated upon the contention that it is a formula instruction, and that it directs a verdict for the plaintiffs and entirely omits any reference to the element of proximate cause. As we have seen, the words "proximately contributed" were used in the instruction instead of "proximate cause," and we have, we think, shown that no prejudicial error was committed by the court in the use of said substituted words. No reason appears why a different ruling should be made regarding the objection to this instruction now under consideration. There is some question whether this is a formula instruction. It is not necessary for us, however, to pass upon this question in view of what we have just stated. We may state that the reasoning and conclusion of the court in Douglas v. Southern Pacific Co., 203 Cal. 390, 394, 395, 264 P. 237, in relation to an instruction in many respects similar to the one now before us, might well be applied to the present instruction.

[10, 11] Two other instructions were attacked by appellants, instruction No. 35 and instruction No. 36. Instruction No. 35 embodied a section of the city ordinance of the city of Long Beach, the city in which the collision occurred, relating to stopping, standing, and parking of vehicles in the streets of said city. It further contained a statement applying the provisions of said section of the ordinance to the facts of the present case. The appellate court held that said instruction was free from error, with which ruling we agree. As to instruction No. 36, the appellate court made no comment. It relates to the duty imposed upon the operator of a motor vehicle to equip his machine with lights, as required by sections 99, 106, and 109 of the California Vehicle Act (St. 1923, pp. 546, 551). In these two instructions, the jury was told that the plaintiffs could not recover if they were "guilty of negligence which was the proximate cause of the accident in question." The criticism of these two instructions is that they should have stated that the plaintiffs could not recover if they were guilty of negligence which proximately contributed

to the accident rather than negligence which was the proximate cause of the accident. An instruction in almost the precise language of these two instructions, in so far as it relates to the criticized portions thereof, was approved by the court in the case of Katz v. T. I. Butler Co., 81 Cal. App. 747, 750, 254 P. 679. We think this decision fully answers the objection of appellants to these two instructions.

The jury was fully and, in our opinion, fairly instructed upon all of the issues in the case. The objections advanced by the appellants against the instructions of the court, while clearly and forcibly presented, and in most instances supported by persuasive arguments, are not, in our opinion, of sufficient weight or substance to justify a reversal of the judgment.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

219 Cal. 608

In re PUTNAM'S ESTATE.

L. A. 13835.

Supreme Court of California.

Dec. 29, 1933.

Rehearing Denied Jan. 26, 1934.

1. Descent and distribution ⇐6.

Descent of property is governed by law in force at time of death of person whose property is to be distributed.

2. Partition ⇐116(1).

If title to land is acquired by descent, partition thereof among owners does not change status of property as respects distribution thereof (Probate Code, § 229).

3. Descent and distribution ⇐61.

Where title to stock purchased from proceeds of realty of wife's predeceased husband was taken by wife and present husband as joint tenants, present husband's conveyance thereof to wife on termination of joint tenancy gave wife new title not acquired from predeceased husband and hence did not pass to heirs of predeceased husband on wife's death without issue (Probate Code, § 229).

4. Appeal and error ⇐907(3).

Every intendment must be indulged to support trial court's finding of fact on appeal on judgment roll.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

In the matter of the estate of Elizabeth D. Putnam, also known as Mrs. L. Putnam, also known as Elizabeth D. Halstead, and also known as Elizabeth D. Denend, deceased. From a decree of distribution, Arzena Halstead appeals.

Affirmed.

Prior opinion, 20 P.(2d) 783.

Feemster, Perkins & McCormick, of Visalia, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent J. C. Fields, as administratrix, et al.

J. A. Chase, of Visalia, for respondent Joseph A. Potter.

James K. Abercrombie, of Visalia, for all respondents except Joseph A. Potter.

IRA F. THOMPSON, Justice.

The contest here is between the daughter of decedent's predeceased husband and the surviving husband and other heirs of deceased. It centers around the question of whether section 229 of the Probate Code, which provides: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, * * *" controls the distribution of a part of the estate. The appeal from the decree of distribution is before us upon the judgment roll alone. Hence we may set down the following facts found by the court below: Elizabeth D. Putnam died intestate on August 18, 1931, and left surviving her, her husband, two brothers, a sister, and several nephews and nieces, children of a predeceased sister, all of whom are the respondents herein. The decedent had previously been married to Timothy Halstead, who died intestate October 18, 1886, leaving as his heirs, his widow, their daughter, Lena May Halstead, and the appellant here, Arzena Halstead, his daughter by a former wife. His estate was distributed to the three in equal shares and subsequently partitioned among them by a decree of partition. On April 23, 1907, decedent married J. F. Putnam and they lived together to the time of her death. Prior to her death she sold certain parcels of the inherited property, her husband, J. F. Putnam, joining in the conveyance, and with practically all of the proceeds purchased 918 shares of the capital stock of the Southern California Edison Company. The purchase

agreement was signed by Elizabeth D. and J. F. Putnam, which agreement provided that the stock was to be issued to them as joint tenants with the right of survivorship. Three certificates of stock representing the 918 shares were issued in the name of Elizabeth D. Putnam and J. F. Putnam as joint tenants with full rights of survivorship on November 19, 1928. For two years and two months the stock stood in their joint names and quarterly dividends were paid by company checks drawn to both of them as joint tenants. However, on January 30, 1931, the certificates were assigned by Elizabeth D. Putnam and J. F. Putnam to Elizabeth D. Putnam, and on February 7, 1931, ten certificates of stock, totaling 918 shares, were issued to Elizabeth D. Putnam. It is these shares of stock which are involved in the present appeal, no question being raised with regard to any other property. The probate court distributed the shares of stock to the surviving husband, sister, brothers, and nephews and nieces of decedent.

[1] We have already indicated the principal contention. However, in support of the action of the probate court, respondents suggest that the law of succession in effect at the time of the death of Timothy Halstead must govern the distribution of the property of decedent; that inasmuch as there was not at the time, with respect to separate property, any provision of law comparable to that of section 229 of the Probate Code the decedent took her share of the estate of her former husband as her own property, not subject to a new enactment. There is no merit in the suggestion. The descent of property is governed by the law in force at the time of the death of the person whose property is to be distributed. McKay v. Lauriston, 204 Cal. 557, 567, 269 P. 519.

[2] Equally without merit is the assertion of respondents that the decree of partition intervened to vest in decedent a title to the property different from that received from her deceased husband. It is perfectly plain that, if title to land is acquired by descent, that partition thereof among the owners has no effect other than segregation of their interests. It does not alter or change the character or status of the property. Wade v. Deray, 50 Cal. 376; Rose v. Mesmer, 142 Cal. 322, 75 P. 905; Cunha v. Hughes, 122 Cal. 111, 54 P. 535, 68 Am. St. Rep. 27.

[3] The real question in the case has never been precisely decided in this state. We may for the purpose of focusing attention upon the controlling factors phrase it in this way. Did the creation of the joint tenancy and its subsequent termination by the conveyance of the entire estate therein to decedent operate to alter the status of the property or change the origin of the title by which Elizabeth D. Putnam owned the stock at the time of her death? The court below, after reciting the details of the transaction which we have heretofore summarized, found as follows: "That on January 30, 1931, each of said certificates was transferred and assigned on the back thereof by said Elizabeth D. Putnam and J. F. Putnam to Mrs. Elizabeth D. Putnam; that said J. F. Putnam signed and delivered the same by his voluntary act, and thereby transmuted and changed the character of said stock held in joint tenancy, with all the characteristics essential to joint tenancy, into stock no longer held in joint tenancy, but thereafter held in severalty by said Elizabeth D. Putnam; * * * That the said shares of stock are the same nine hundred and eighteen (918) shares of 6 per cent Preferred Stock of said company, which constituted a part of the residue of the estate of said Elizabeth D. Putnam, deceased, described in Finding IX hereof. That said shares of stock did not, nor did any portion thereof, come to said Elizabeth D. Putnam from her predeceased spouse Timothy Halstead by gift, descent, devise, or bequest, but all thereof came to said Elizabeth D. Putnam by the voluntary act of said J. F. Putnam." The reason and purpose of section 229 of the Probate Code is, in the absence of testamentary disposition, to turn the property back to the family from which it came, rather than to permit it to descend to the wife's family. In other words, the section was designed to benefit the natural objects of the bounty of the former owner. Estate of McArthur, 210 Cal. 439, 292 P. 469, 72 A. L. R. 1318. But the section never sought to limit the right of the wife to dispose of it by will or conveyance. For which reasons we find the authorities declaring that property so inherited does not lose its character or status as such by a mere change in form or identity, such, for example, as the exchange of inherited parcel A for parcel B. The latter property acquires the status of that formerly possessed by parcel A. Estate of Brady, 171 Cal. 1, 151 P. 275, and cases there cited. Thus it follows that, if when the stock was originally purchased and the joint tenancy created, J. F. Putnam conveyed to his wife property in exchange for his joint tenancy interest, the property so conveyed by him would be subject to distribution under section 229. Also, although the creation of the joint tenancy were without valuable consideration moving to Elizabeth D. Putnam, yet she had effectively removed the property from the status it had formerly held. Estate of Brady, supra. It is obvious that had the joint tenancy continued until her death, J. F. Putnam would, by reason of his right of survivorship, have owned the property outright. That which is the subject of this contest would have been his, as a matter of right. Hence the reason

and purpose of section 229 is not applicable. The equity of the situation warrants the statement that if, in fact, J. F. Putnam voluntarily and without consideration surrendered his joint tenancy interest to Elizabeth D. Putnam, he and his family are those who should benefit by his generosity. Sufficient has been said to demonstrate that the title which Elizabeth D. Putnam acquired upon the termination of the joint tenancy was a new title; that the property was not in fact acquired by her by descent from her predeceased spouse, unless in truth property so acquired by her was conveyed to J. F. Putnam in consideration of his surrender of his interest. But here the finding of the court intervenes to declare against any such contention of the appellant.

By analogy at least the conclusion to which we have come finds support in the following authorities: Gardner v. Collins, 2 Pet. 58, 7 L. Ed. 347; Nesbitt v. Trindle, 64 Ind. 183; Holme v. Shinn, 62 N. J. Eq. 1, 49 A. 151.

[4] A suggestion is advanced that perhaps the joint tenancy was not in fact terminated, that perhaps there was no contract or understanding between the parties to that effect. The findings of the court upon this question constitute a sufficient answer thereto. The court found that the joint tenancy was terminated and every intendment must be indulged to support it.

The decree of distribution is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

KALASH v. LOS ANGELES LADDER CO. (ASSOCIATED INDEMNITY CORPORATION, Intervener).*

L. A. 12725.

Supreme Court of California.

Dec. 29, 1933.

Rehearing Granted Jan. 25, 1934.

1. Negligence ⇐27.

Manufacturer of ladder owed duty of exercising due care to employee of purchaser to make ladder safe, notwithstanding lack of contractual relation, where ladder was made inherently dangerous by neglect of manufacturer with knowledge it would be used by others than purchaser.

2. Negligence ⇐134(4).

In action by painter against manufacturer of ladders, for injuries caused when defective rung of ladder broke, evidence justified finding that defect was caused by manufacturer's negligence.

IRA F. THOMPSON, J., WASTE, C. J., and SHENK, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by John Kalash against the Los Angeles Ladder Company, in which the Associated Indemnity Corporation intervened. From an adverse judgment, defendant appeals.

Affirmed.

For prior opinion, see 22 P.(2d) 727.

Dave F. Smith and Birney Donnell, both of Los Angeles, for appellant.

L. J. Styskal, of Los Angeles, for respondent Kalash.

Syril S. Tipton, of Los Angeles, for respondent Associated Indemnity Corporation

PER CURIAM.

This is an action for damages for personal injuries. Plaintiff was a painter employed by Hart Bros. Company. On April 8, 1929, while in the course of his employment, he was standing on a rung of a forty-foot extension ladder, hanging screens on the outside of an apartment house in Los Angeles. The ladder had been manufactured and sold by defendant corporation to plaintiff's employer on March 8, 1929. While plaintiff was working, the rung, which was defective, broke, and he fell about thirty feet to the ground, sustaining the injuries for which this action was brought. The jury brought in a verdict for plaintiff, and the court denied a motion for judgment notwithstanding the verdict. Defendant appeals.

[1] The first question to be considered is whether, assuming that defendant was negligent, a duty of care was owed to plaintiff, there being no contractual relationship between them. The subject of liability of a seller or manufacturer of goods to third persons, with whom no direct dealings are had, was recently given full consideration by us in the case of Dahms v. General Elevator Co., 214 Cal. 733, 7 P.(2d) 1013. We there pointed out that the general rule does not recognize tort liability in such cases, except where the article is *inherently dangerous* to human life, or becomes dangerous by reason of *negligence*. We there approved the following statement of the principle (214 Cal. 741, 7 P.(2d) 1013, 1016): "To state the proposition clearly and distinctly, it is that, although a machine may not be in its nature inherently dangerous, yet, if it is made so by

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 34 P.2d 481.

the neglect of a manufacturer having notice and knowledge that it is to be used by others than the purchaser, and injury results to others than the purchaser, directly traceable to that negligence, such manufacturer is liable to the person injured because of that negligence." See, also, Cliff v. California Spray Chemical Co., 83 Cal. App. 424, 257 P. 99.

We find no difficulty in bringing the instant case within this rule of liability. In the Dahms Case an elevator fell through negligent failure to repair, inspect, or discover defects in the machinery. The danger involved in the use of an elevator with a defective hoisting apparatus is no greater than that incurred in the use of a forty-foot ladder with a defective rung near the top.

[2] The existence of a duty of care being established, the important question is whether the jury were justified in finding a violation of such duty, that is, in finding that the dangerous condition of the ladder was a result of negligence on the part of defendant. The only defect was in the rung. It was made of oak, a wood generally approved for the use to which it was put, but the particular piece was described by experts as "brash" or brittle, and incapable of supporting any substantial weight. It had been purchased by defendant from a concern in Arkansas as part of a carload lot of over 100,000 rungs. After being received from the mill, it was defendant's practice to shape or "tenon" the ends, and then to fit them into the sides of the ladder. The evidence shows that less than a dozen rungs out of the carload had been taken out and specially examined for defects, and that the only other testing was by the observation of the workmen who assembled the ladders. If they felt, in handling a rung, that it was too light, a sign of brashness, they would discard it. The rungs of the assembled ladders were also struck with a hammer to ascertain defects through the sound.

It is the contention of defendant that the evidence of this practice conclusively demonstrates the exercise of due care, and that the jury's verdict is without support in the record.

As already stated, no scientific test was made of each rung, either prior to or after its insertion in the ladder, the matter being left to the ordinary observation of the workmen. Whether this constitutes negligence depends upon an answer to two questions: Could the workmen accurately determine brashness in wood through observation; and could an expert discover it by some reasonable and not impracticable test? In view of the settled rule limiting the power of an appellate court to reach a conclusion on the factual question of negligence different from that reached by the jury, we turn to the evidence to determine whether, coupled with all legitimate inferences, it makes out a case for plaintiff.

The witness Rigelsberger, who qualified as an expert, testified fully as to the quality, characteristics, and appearance of brash wood. Brash wood is brittle, and breaks easily. It comes from old growth wood, usually at the top of the tree. Its fibers are coarse and soft. It breaks cleanly and squarely without long projecting fibers. It may be used for furniture and other such purposes because it is easily cut and worked, but it cannot sustain substantial weight. His opinion was that brashness would be detected only by *expert observation:*

"Q. Can you tell from looking at a piece of wood, from the outside and not examining the ends, whether or not it is brash? A. Yes sir, it shows brash by looking at the face of the wood without the ends.

"Q. In looking upon the rung from the outside and presuming it to be clean and without the soil or other elements that have been put on it, would the average man without special knowledge of wood be able to say whether that was a strong or weak piece of wood? A. I do not consider that the ordinary person looking at it would be able to judge whether it was tough or a brash piece of wood by just looking at it.

"Q. * * * do you think that the ordinary workman around a mill would be able to make that distinction? A. No sir, I do not.

"Q. Do you think that the ordinary mechanic in a mill, in a lumber mill, or in a ladder manufacturing plant, would be able to detect it? A. No, sir, I do not think so.

"Q. What did you mean by saying that the ordinary mechanic or person ordinarily employed in a ladder manufacturing place would not be able to say from a casual observation whether a piece was brash or otherwise? A. Well, the ordinary workman or a man working around a factory would not notice whether it was a brash piece of wood or a tough piece of wood. They wouldn't consider anything about it. In order to determine the strength of it, it would have to be somebody that understood the texture of wood and somebody who knew how to make a thorough examination."

Another expert, Fred Wolham, testified to similar effect.

It is unnecessary to go into further detail, since it plainly appears from the foregoing that there was evidence before the jury from which it might conclude that the simple observations of workmen were not calculated to discover every defective rung, and that an examination by an expert would in all likelihood cause such discovery. In the construction of an article which, when used, may

if defective become highly dangerous to human life, we think the evidence shows far too low a degree of care. Conceding that the jury may not arbitrarily set a standard of care beyond that recognized in the community, it does not follow that the customary practice of the defendant, which indicates some degree of care, sufficiently meets the standard. The danger to human life involved in the use of a defective extension ladder was such as to require a higher degree, and the jury's verdict therefore finds support in the evidence. See 20 R. C. L., § 18; 19 Cal. Jur. 579.

The judgment is affirmed.

IRA F. THOMPSON, Justice (dissenting).

I dissent.

I cannot bring myself to agree with the opinion of the court in this case, for the reason that I think there was a failure on the part of plaintiff to prove negligence on the part of the defendant.

It appears without contradiction that the defendant corporation, which is manufacturing ladders at the rate of approximately 200,000 per annum and has been in the business for a period of 20 years, not only subjected a dozen pieces of wood taken from the carload lot to extreme tests for the purpose of determining whether they conformed to the samples by which purchase was made, but also that each rung of the ladder was tested at least three times by skilled mechanics, who had long been in the employ of defendant corporation.

1. When the rungs were cut into proper lengths, an inspection of the cut was made and the weight of the rung observed.

2. When the rungs were tenoned, each end of the rung was observed to see whether the cut was clean or whether it was rough (roughness being an indication of brashness), and the weight was particularly observed, lack of weight also being an indication of brashness.

3. When the rungs were pressed into the holes of the sides of the ladder, each rung was struck with a hammer for the purpose of detecting any rattle or hollowness indicating brashness.

Aside from highly impractical and unusable tests, there is nothing in the record to indicate a standard from which the slightest inference may be drawn that the defendant in the instant case failed to observe the prudence and care of the ordinarily reasonable man or concern engaged in the manufacture of similar articles. The holding in the present case is equivalent to saying that ladder manufacturers are insurers of their product.

We concur: WASTE, C. J.; SHENK, J.

136 Cal.App. 87

McLAUGHLIN v. GOUCHER et al.

Civ. 8018.

District Court of Appeal, Second District, Division 2, California.

Dec. 27, 1933.

1. Attorney and client ⇐148(2).

Attorney was not by reason of successfully making partition for and establishing title of client in community property, estopped from asserting interest in premises pursuant to employment contract providing for certain percentage of all property that might be declared community property.

2. Attorney and client ⇐143.

Double recovery for services of attorney in establishing title to community property did not result by awarding judgment for percentage thereof in accordance with contract and additional fee for securing partition of property thereafter becoming necessary after divorce proceeding.

3. Attorney and client ⇐162.

Attorney's failure to assert interest in property under contract of employment at time of obtaining judicial determination as to identity and severance of undivided property pursuant to previous decree of community status, did not prevent his subsequent recovery for services rendered under contract.

4. Estoppel ⇐58.

On claim of estoppel, it must be shown that one has been led to place himself in prejudicial position at least in part by ignorance of his rights, so that to permit of maintenance of disputed right would operate as legal fraud on him.

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Suit by William F. McLaughlin against Samuel Grant Goucher and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Charles W. Cradick, of Los Angeles (C. S. Wagner, of Los Angeles, of counsel), for appellant.

Wm. F. McLaughlin and J. Vincent Hannon, both of Los Angeles (T. G. Dalton, of Los Angeles, of counsel), for respondent.

CRAIG, Justice.

Suit having been filed praying an alternative judgment for partition or the sale of certain real property and division of the proceeds, an interlocutory judgment was granted in favor of the plaintiff, from which the instant appeal was taken.

From the pleadings and the evidence it appeared without contradiction that the respondent and his copartner, attorneys at law, had rendered services to the appellant in successfully pursuing certain community property and obtaining for the latter a judgment for his share thereof. They had previously been employed by a contract in writing to prosecute all necessary litigation in that behalf for "15% of any and all property that may be declared to be community property and going to the party of the first part from and out of the property * * *," or, "in the event of a compromise and settlement being had and effected * * * before suit is brought, then in that event the party of the first part agrees to pay to the parties of the second part the sum of five hundred dollars ($500.00) cash, at the time of the said settlement and compromise." In the instant case issue was joined, and by affirmative defenses it was alleged that the respondent and a codefendant, not a party herein, had filed and that there was pending for the same cause an action for $7,000 as reasonable value of services rendered; and that the instant suit was barred by sections 318, 319, 337, and 343 of the Code of Civil Procedure. Upon the trial it was also contended that the respondent having successfully sought a partition for, and established the title of, the appellant in the described premises, he was estopped to claim an interest therein, and that his demand herein amounted to a collateral attack upon the final judgment. Simultaneously it was and is asserted that by the present action the respondent sought to recover double compensation for the same services. The trial court found as true the allegations of the complaint, rejecting the appellant's said defenses.

We think the apparent conclusion of the claims and divergent theories can best be clarified by segregation of the several judicial proceedings involving the properties in controversy. The suit from which the instant case arose was instituted for the purpose of establishing as community the bulk holdings of the appellant and his then spouse. During its pendency, the latter filed a suit praying a decree of divorce and an adjudication thereof as her separate estate, to which the appellant herein interposed a cross-complaint alleging its community status and praying that the same be equally divided. Said actions were consolidated and tried together, judgment being rendered in favor of the appellant in each instance, but only awarding each party thereto an undivided one-half interest in the whole. Thereafter the appellant commenced and successfully prosecuted to conclusion a separate and independent suit for partition, by his complaint praying an allowance of reasonable attorneys' fees therein, in which he was also represented by said counsel. The respondent and associates represented him and conducted all of said litigation, but were in no instance compensated in any amount. Respondent has received neither the fees allowed to Goucher by the court for partition nor 15 per cent. of the latter's share for services rendered under his contract.

[1, 2] To hold that respondent was estopped to enforce his contract wherein it was agreed that he "establish the claim of the said party of the first part in and to the said property * * * and to have the said property declared community property," for which he should receive "fifteen per cent (15%) of any and all property that may be declared to be community property going to the party of the first part," would nullify the plain intentions of the parties and read into it the acquisition of 100 per cent. recovery for a gratuitous service. And, that a double recovery for the same service is not involved, seems clear. Having established the status of the properties as a whole under said contract, partition thereafter became necessary and the trial court allowed other and additional fees therefrom. Suit then was instituted to recover said 15 per cent. of the appellant's share as at first contemplated and agreed. It nowhere appeared in said contract that partition of the corpus of the community should be effected, nor did the court so decree. Following divorce proceedings and subsequent developments, a partition doubtless became imperative.

[3, 4] However, it is urgently insisted that in obtaining a judicial determination as to the identity and severance of the appellant's undivided properties pursuant to previous decree of their community status, it was the respondent's sole opportunity to have his "day in court" by appearing as a party thereto and claiming an interest. Such contention seems to refute itself by the basis furnished from quoted decisions to the effect that "if a coowner is not made a party plaintiff or defendant, and the nonjoinder appears by the record so that an appellate court may take cognizance of it, it will reverse the judgment, whether the attention of the trial court was called to the defect or not." It seems sufficient to observe that at the time of the partition suit the share from which said 15 per cent. should become due had not been determined, and that it does not appear that the decree therein was subsequently reversed. It cannot be said that assertion here of a defect of parties in previous controversies is timely, nor that under his contract the respondent could have been compelled to assert at his peril a claim for compensation against an undetermined interest. It must be shown upon a claim of estoppel that one has been led to place himself in a prejudicial position at least in part by ignorance of his rights, so that to permit of the maintenance of a disputed right would operate as a legal fraud upon him. It

is not even contended that such a case is presented. Farish v. Coon, 40 Cal. 33; Verdugo C. W. Co. v. Verdugo, 152 Cal. 655, 93 P. 1021; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154.

Other grounds mentioned are not seriously urged, and from what has been said it becomes unnecessary to further discuss them.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

SHEETS v. SOUTHERN PAC. CO. et al.*

Civ. 8868.

District Court of Appeal, First District, Division 2, California.

Dec. 15, 1933.

Rehearing Denied Jan. 13, 1934.

Hearing Granted by Supreme Court Feb. 13, 1934.

1. Railroads ⇐327(8).

One crossing railroad has duty to look for approaching cars at point and in manner and direction as would enable him to determine if he can proceed in safety.

2. Railroads ⇐327(1).

Statute requiring operator of vehicle carrying explosive or inflammable liquids to stop at railroad crossing and look and listen in both directions is for benefit of public, and may not be disregarded by individual (St. 1923, p. 561, § 135).

3. Railroads ⇐327(9).

Driver of gasoline truck merely glancing to right and left after engine crossed road before starting across track was guilty of negligence barring recovery for injuries when struck by freight car (St. 1923, p. 561, § 135).

4. Railroads ⇐327(1).

Legislature has power to enact statute requiring operator of truck carrying explosive or inflammable materials to stop and look and listen before crossing tracks, and court or jury cannot excuse admitted failure of operator to comply, when such failure is proximate cause of injury (St. 1923, p. 561, § 135).

Appeal from Superior Court, San Mateo County; Maurice T. Dooling, Jr., Judge.

Action by George L. Sheets against Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Dunne, Dunne & Cook, of San Francisco, for appellants.

J. Horton Beeman and George C. Hadley, both of San Francisco, and Norman S. Menifee, of Redwood City, for respondent.

NOURSE, Presiding Justice.

This appeal is from a verdict following the second trial of an action for damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant corporation. Following the verdict in the first trial a new trial was granted from which an appeal was taken. The order granting the new trial was affirmed (212 Cal. 509, 299 P. 71). At the time of the accident the plaintiff was operating a truck which was equipped for and was then being used for carrying and delivering gasoline.

The facts appearing upon the first trial are stated in the opinion of the Supreme Court as follows (page 511 of 212 Cal., 299 P. 71, 72): "The accident occurred shortly after 5 o'clock p. m. on November 30, 1928, at the intersection of the Middlefield road, a public highway, and the tracks of the defendant company in the outskirts of Redwood City. The plaintiff, who was familiar with the crossing, was driving a motor truck north along the highway, which runs approximately north and south. The railroad tracks cross the highway obliquely at an angle of about 35 per cent., and extend in a general northwesterly and southeasterly direction. The truck which plaintiff was operating was struck at the crossing by a single freight car, moving in a northwesterly direction under the momentum previously imparted to it by a locomotive in the course of making a flying switch. Previous to the approach of the locomotive, the truck arrived at the crossing and stopped on the southerly side thereof upon the signal of a brakeman stationed at the crossing to protect traffic. When some distance from the crossing the locomotive was detached from the freight car while both were in motion and continued on across the highway. After the locomotive had crossed the brakeman turned and left the crossing in the direction the locomotive was traveling, whereupon the plaintiff started to cross, and the truck was struck by the oncoming freight car, causing the injuries complained of."

Further facts stipulated to or appearing in evidence and found in the opinion of the Supreme Court follow with italics showing those facts which differ from the evidence produced on the second trial (page 512 of 212 Cal., 299 P. 71, 73): "It was stipulated that on the evening of the accident the sun set at 4:40 o'clock p. m., and, according to the testimony, the accident happened at about 5:15 o'clock p. m. At each end of the truck seat curtains were placed, through each of which an aperture 10 inches square had been cut

and covered with a transparent sheet of isinglass. Although it was dusk, the plaintiff testified that he could see ahead 300 feet and objects distinctly 50 feet, *but that objects were less visible through the isinglass. He further testified that before starting to cross he looked through the curtain in the direction of the approaching freight car, but did not see or hear it. He admitted that by leaning forward he might have looked around the curtain, but failed to do so.* He also admitted that on the opposite side of the crossing was placed a signal which gave warning by means of a bell and a moving arm, called a wigwag, *but that he did not notice whether this signal was operating at the time he attempted to cross.* As stated, the testimony also shows that, when the locomotive had passed, the brakeman or flagman who signaled plaintiff to stop left the crossing and walked in the direction of the locomotive, and it was then that the plaintiff moved his truck forward. *The latter in this connection testified, in substance, that he depended to a certain extent upon the flagman and would not have attempted to cross had the latter remained upon the crossing.* It was also testified that a brakeman with a lighted lantern was standing upon the forward end of the approaching freight car, *but according to the plaintiff he did not see either the brakeman or the lantern.* Other witnesses testified to the unsuccessful efforts of the trainman and others to direct plaintiff's attention to the approaching car."

The material respects in which the evidence differs are that upon the second trial there is no testimony that the respondent relied upon anything that the flagman at the crossing did as an invitation to cross or as an assurance of safety or that he was misled or thrown off his guard thereby. There is no evidence at this time that he looked through the isinglass of his curtain in the direction of the freight car or that his view thereof was obstructed by the curtain or the isinglass or by any object along the right of way. Though on the first trial he testified that he did not *notice* whether the wigwag was operating at the time he attempted to cross, on the second trial he testified that he saw it, but did not *pay any attention* to it. The undisputed evidence on the second trial was that this wigwag was operating continuously from the time plaintiff approached the crossing until after the collision, that a bell was ringing constantly at the same place, and that members of the train crew and others called to the plaintiff to warn him of his danger. On the second trial the respondent testified that his vision on the side from which the freight car came was unobstructed, and that he merely *glanced* to his right before starting his truck. It was conceded upon the second trial that the engine and freight car approached the crossing on a track intersecting the highway at an angle of about 35 degrees; that when the engine passed over the crossing the freight car followed at a distance estimated at between 40 and 90 feet; and that because of the angle of the track it was *behind* rather than to the right of the respondent as he sat in his truck at a point about 10 feet from the track. As the respondent described the situation in his testimony: "The nearer you get to the track the less your angle of vision is, if you are looking simply out to the right." Other motor vehicles were stopped on the north side of the track and all remained stationary when plaintiff started his truck. The occupants of these vehicles saw the approaching freight car with a brakeman riding on the front thereof waving a red lantern and calling to the respondent to warn him of his danger.

But more important than any of these differences in the evidence is the fact that it was shown on the second trial from respondent's own evidence that he disregarded the express provisions of section 135 of the California Vehicle Act (St. 1923, p. 561). This section provides that "the operator of any motor truck carrying explosive substances, or explosive or inflammable liquids of any specific gravity, as a cargo or part of a cargo, shall before crossing at grade any track or tracks of a steam railroad, * * * bring his vehicle, bus or truck to a full and complete stop within not less than ten feet nor more than fifty feet from the nearest rail of the track nearest to the front of such vehicle, bus or truck *and shall after such stop and while so stopped both look and listen in both directions, along such track or tracks for approaching steam or electric engines, trains, cars or vehicles using such rails.* * * *" At the time of the accident the respondent was operating a gasoline truck.

On the former appeal the Supreme Court said that the evidence addressed to respondent's contributory negligence was decidedly close and could well have been resolved either way by the jury. We interpret this statement as based upon the evidence which the court then had before it that the respondent depended to a certain extent upon the flagman, did not notice whether the wigwag was operating, and looked both to his right and left before attempting to make the crossing. Now we have a case where all these factors are absent. There is no testimony that he depended upon the flagman, or that he did not notice the wigwag; he himself distinguished between "notice" and "attention," testifying, "I do not say I did not notice it, I did not pay any attention to it"; and he also drew his own distinction between "looking" and "glancing" when he testified that he *looked* to his left and *glanced* to his right. Here the evidence is that the conditions of the crossing were well known to the respondent, he having crossed and recrossed it fre-

quently; that he knew that a wigwag was maintained at the crossing, and that it was not customary to station a flagman there; that he knew that the brakeman who was at the crossing at the time of the accident was a member of the train crew and not a regular flagman stationed at the crossing; and that he knew that he could not see a car approaching on the track from the rear by either looking or glancing to his right.

[1] The case is controlled by the well-settled rule relating to one attempting to pass over a railroad crossing that the railroad track is itself a sign of danger (Herbert v. S. P. Co., 121 Cal. 227, 230, 53 P. 651; Young v. Pac. Elec. Co., 208 Cal. 568, 577, 283 P. 61); that it is his duty to look for approaching cars at such a point and in such manner as would enable him to determine if he can proceed in safety (California Rendering Co. v. Pac. Elec. Ry. Co., 205 Cal. 73, 78, 269 P. 922); and that he must look at a place and in a direction from which danger might be expected and where his looking would be effective. Koster v. So. Pac. Co., 207 Cal. 753, 767, 279 P. 788; Pacheco v. S. P. Co., 129 Cal. App. 610, 19 P.(2d) 251. These rules were recently followed in Vilhauer v. Pac. Elec. Ry. Co., 118 Cal. App. 240, 4 P.(2d) 960, 962, and Christianson v. S. P. Co. (Cal. App.) 24 P.(2d) 536, 537. In both cases the driver of the vehicle disregarded the warning signal of the wigwag maintained by the railway at the crossing. In both cases the driver stopped at the crossing in obedience to the wigwag to let a train pass and then disregarded the warning signal, attempted to make a crossing, and was struck by a train approaching from the other direction. In the Vilhauer Case the court referred to the plaintiff's evidence that he paid no attention to the warning signal, evidence which is identical to that of respondent here. The court then said that the fact that the plaintiff "may have thought the operation of this signal was still caused by the car which had just passed, was no excuse. Griswold v. Pac. Elec. Ry. Co., 45 Cal. App. 81, 187 P. 65." Referring to the fact that the car must have been visible while the plaintiff was approaching the track, the court further said: "This fact, with the fact that the appellant did not look in that direction during that time, coupled with the fact that he was proceeding against the warning of the wigwag and the bell, conclusively shows that the care used, if any, was so disproportionate to the care called for by the circumstances that it must be held, as a matter of law, that the appellant was guilty of contributory negligence. * * *" In the Christianson Case the appeal came up on an order granting a nonsuit against the plaintiff. The facts were in close harmony with those of the present case. There the plaintiff approached the crossing and was stopped by a wigwag signaling the coming of a train from the north. Other cars were stopped on both sides of the crossing. After the northern train passed, a car started forward from the side of the track opposite the place where plaintiff was stopped. Though the wigwag still continued to operate, the plaintiff started over the crossing and was struck by a train approaching from the south. In sustaining the nonsuit the District Court of Appeal said: "The legal rules by which the conduct of a traveler about to cross a railroad track are to be governed are well established by a long line of decisions in this state, and it seems wholly unnecessary to restate or discuss them here. Most of the cases upon the subject are reviewed at length in the recent case of Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788; and a still later case involving a situation more closely resembling the present one in its facts is Vilhauer v. Pacific Electric Ry. Co., 118 Cal. App. 240, 4 P.(2d) 960; and when those rules are applied here it becomes manifest that the trial court did not err in holding as matter of law that the contributory negligence of appellant's wife bars recovery in both actions."

[2-4] But if there is any doubt as to respondent's negligence in the present case it is settled by the express provisions of the statute which imposes upon him the additional duty as the driver of a gasoline truck to come to a full stop, "and while so stopped both look and listen in both directions along such track or tracks for approaching * * * cars. * * *" This statute, like those governing the operation of public passenger and school busses, is designed for the benefit and protection of the public, and the regulation is not one which might be waived or disregarded by the individual. Because of this statute the respondent did not have the legal right to depend upon the presence or absence of the flagman. The statute imposes upon him the duty of stopping and looking in both directions along the track from which a train or car might be expected to approach. This duty was not performed by a mere glance to the right or left when the track ran to the right and rear of the respondent. The regulations which the Legislature has thus imposed upon the operators of motortrucks carrying explosive or inflammable materials are wholly within the power of the Legislature to enact, and it is not within the power of the court or jury to excuse the admitted failure of the operator to comply with these regulations when such failure is the proximate cause of the injury. To illustrate the point, if the truck had been struck in such a manner as to cause an explosion of the gasoline to the damage of the members of the train crew or passengers which might have been carried on the train and suit should be brought for such damage against the operator of the truck, evidence of his failure to look along the track from which the train

was approaching would establish a case of negligence per se, notwithstanding the actions of the flagman.

As the judgment must be reversed for the reasons given, it is not necessary to consider the criticism of instructions and proposed instructions given or refused at the trial.

Judgment reversed.

We concur: STURTEVANT, J.; SPENCE, J.

136 Cal.App. 149

PEOPLE v. WOODWARD.

Cr. 2430.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1934.

Rehearing Denied Jan. 16, 1934.

Hearing Denied by Supreme Court Feb. 1, 1934.

1. Bribery ⇐1(2).

That city councilmen did not authorize defendant to solicit bribe for them did not preclude defendant's conviction for soliciting offer of bribe to such councilmen for favorable vote on garbage disposal contract (Pen. Code, § 653f).

2. Bribery ⇐11.

Conviction for soliciting offer and acceptance of bribe *held* sustained by testimony of one witness and corroborating circumstances (Pen. Code, § 653f).

3. Criminal law ⇐811(6).

Refusal to give instruction singling out defendant and stating rules for weighing his testimony *held* not error.

4. Criminal law ⇐823(14).

In prosecution for soliciting offer and acceptance of bribe, instruction that law knows no distinction between circumstantial and direct evidence in degree of proof required for conviction *held* not error, in view of other instruction (Pen. Code, § 653f).

In other instruction, court gave jury specific instructions concerning evidence necessary to establish a violation of Pen. Code, § 653f, and included therein a direct quotation of the statement that "such offense must be proved by the testimony of two witnesses or of one witness and corroborating circumstances."

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Leonard M. Woodward was convicted of soliciting the offer and acceptance of a bribe, and he appeals.

Affirmed.

Arthur S. Guerin and Hal Hughes, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

CONREY, Presiding Justice.

By verdict of the jury in the trial of this action, the defendant was found guilty of violation of section 653f of the Penal Code, as charged in the indictment. By the indictment the defendant was accused of said crime, described as "soliciting the commission of a crime, to-wit, the offer and acceptance of a bribe," as follows, to wit: That the defendant did "solicit Bonner Adams, S. M. Haskins and A. B. Miller to offer and join in an offer of a bribe to one J. S. McKnight, and one Roy L. Donley," then duly elected, etc., councilmen of the city of Los Angeles, and other then duly elected, etc., members of the city council of said city, "for the purpose and with the intent to corruptly influence each and all of said City Councilmen, in his and their action in a matter and subject then and there pending before them as such City Councilmen," and then and there pending before said city council, to vote in favor of the approval of a contract described in the indictment, the nature of which contract may be more briefly indicated by calling it the garbage disposal contract. The appeal is from the judgment of conviction and from an order denying defendant's motion for a new trial.

The first ground of appeal is that defendant was "not properly convicted" of said crime. In relation to this point, appellant directs attention to the fact that several of the members of the council each for himself testified that he did not at any time request or authorize the defendant to solicit money for him for the purpose of influencing his vote in the matter of said garbage disposal contract; and that it was stipulated that all the other city councilmen of that period of time, if called as witnesses, would answer the question in the same form as those who did testify. In other words, it may be conceded that there is no direct statement by any witness to the effect that appellant was authorized by any councilman to solicit a bribe for him. From this the argument is made that, as to appellant, "the worst construction that might be put on his act under the People's evidence was that he sought to obtain from the said A. B. Miller, a sum of money which he intended to convert to his own use and profit." In other words, it is claimed that defendant's conviction of seeking to induce another to accept a bribe is against the evidence, since the

prosecution by its own witnesses has shown that no councilman had authorized appellant to solicit a bribe.

[1] "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity." Pen. Code, § 7, subd. 6. When any person solicits another to offer or join in the offer of a bribe, the solicitor has thereby committed one of the offenses described in section 653f of the Penal Code. A preliminary authorization by the person to whom it is proposed to give the bribe is not an element of the crime of soliciting a person to offer, or join in the offer, of a bribe. Therefore it must be concluded that the mere absence of such authorization furnishes no reason for holding that the evidence fails to sustain the verdict in this case.

[2] Following the terms of description of the crime in section 653f of the Penal Code, it is provided: "Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances." It is contended by appellant that the evidence in this case does not conform to either one of said requirements. We are of the opinion that, even if it should be conceded that the offense was not proved by the testimony of two witnesses, it must be held that it was proved by the testimony of one witness and corroborating circumstances. The proposed garbage disposal contract was to be a contract with a corporation called Fontana Farms Company, of which the witness A. B. Miller was the president. It cannot be questioned that Mr. Miller's testimony concerning appellant's conversations with him constitutes direct evidence of the commission of the offense. He testified that, at the close of the interview in which the bribe was suggested to him by appellant, he said to appellant, "If there is any more conversation I want you to talk to my attorney, Sam Haskins." Following that interview, appellant sought and obtained an interview with Mr. Haskins. Mr. Haskins testified to the conversation between appellant and himself in that interview. Among other things, we find the following: "And then he said, 'Now, about this garbage disposal contract, don't you think the easiest way is the best way?' I said 'What is the easiest way?' He replied, 'Well, you know what I have told your client, Miller?' I said 'Yes,' and I said that I had been practicing law in Los Angeles for many years and that I did not do business that way." There is also to be considered the testimony of Bonner Adams and of Charles Burnell concerning a conversation between Adams and appellant, some of which was heard by Burnell. It is contended by appellant that these conversations are without corroborative value because they contain no direct statement showing what conversation had occurred between appellant and Miller. But a reading of the testimony of these three witnesses, Haskins, Adams, and Miller, leaves no doubt that they were discussing the same matter which appellant had discussed with Mr. Miller, and that they all related to appellant's suggestion or proposal that money be expended among some of the councilmen in order to obtain approval of the proposed contract. We think that the evidence is entirely sufficient to constitute proof of defendant's guilt, in accordance with the conditions defined by the statute.

[3] Appellant's next point is that the court erred in failing to give his requested instruction No. 40. It has been held time and again that it is not error to refuse to give an instruction which singles out the defendant and states rules for weighing his testimony. People v. Oliver, 7 Cal. App. 601, 605, 95 P. 172; People v. Khan, 92 Cal. App. 534, 268 P. 701.

[4] The next point suggested is that the court erred in giving the instruction defining the two classes of evidence known as direct evidence and circumstantial evidence. It is claimed that the instruction is incompatible with the language of the Penal Code, § 653f, because the jury were told that the law knows no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, "but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both." We think that there was no error, and certainly there was no prejudicial error, in the giving of this instruction. The case was being submitted to the jury at the close of a trial which included two indictments—the one which has been discussed herein, and another which included a charge of attempted grand theft, of which defendant was found not guilty, and a charge of bribery, of which defendant was found not guilty. It further appears that the court gave to the jury specific instructions concerning the evidence necessary to establish a violation of said section 653f, and included therein a direct quotation of the statement therein that "such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

136 Cal.App. 3

ESSEY v. PHILLIPS.

Civ. 7919.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1933.

Rehearing Denied Jan. 16, 1934.

Hearing Denied by Supreme Court Feb. 15, 1934.

1. Mortgages ⇐283(1).

Purchaser of premises assuming mortgage indebtedness thereon became principal debtor on note and vendor was merely surety thereon.

2. Appeal and error ⇐1176(2).

Appellate court was authorized to direct that findings of fact be amended to show that purchaser of premises assumed indebtedness as unquestionably shown by evidence, notwithstanding fact that no direct issue was presented by pleading to such effect (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould and Douglas L. Edmonds, Judges.

Action by M. Essey against Maud P. Phillips. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Fred E. Peterson and Berge Lion, both of Los Angeles, for appellant.

James E. Mahon, of Los Angeles, for respondent.

HOUSER, Justice.

The pertinent facts adduced by the evidence introduced on the trial of the action in the trial court appear to be as follows:

One Herman was the owner of certain real property subject to the lien of a mortgage thereon in the sum of $11,000, which real property he sold to Maud P. Phillips, appellant herein, for the sum of $18,000; in payment of which Mrs. Phillips gave to Herman $3,000 in cash, a promissory note executed by her in favor of Herman for the sum of $4,000 secured by a deed of trust (or second lien) on the property, and assumed the existing indebtedness of $11,000 thereon. Thereafter Mrs. Phillips sold the property to Babdaty, who assumed not only the payment of the original indebtedness of $11,000 against the property, but as well the payment of the balance then due on the $4,000 promissory note secured by the deed of trust. After making several payments on account of the $4,000 promissory note, Babdaty defaulted. Thereupon in due course a "foreclosure" of the deed of trust was had, which resulted in the sale of the property for the sum of $1,000, which sum, after deducting therefrom the expenses incident to the sale, was credited as a payment on the $4,000 promissory note. Shortly after such sale had taken place, Babdaty again purchased the property from Herman. In doing so, and as a part of the transaction, Herman sold and assigned the $4,000 promissory note executed by Mrs. Phillips to one Essey (respondent herein), who paid no consideration therefor, but who at all times was the agent of Babdaty. Essey then commenced an action in the superior court against Mrs. Phillips to recover a judgment for the balance then due and unpaid on the original $4,000 promissory note.

By the answer to the complaint, in substance the defendant in the action set up three several alleged defenses thereto, as follows:

"(1) That the note had been paid in full;

"(2) that the amount bid for the property at the foreclosure sale under trust deed was inadequate;

"(3) that there was a failure of consideration."

The findings of fact by the trial court were in accordance with the allegations of the complaint, and against the ultimate facts upon which the several defenses of the defendant were predicated. From the ensuing judgment in favor of the plaintiff, the defendant has appealed to this court.

[1] Although by the allegations contained in the answer to the complaint no direct issue was presented regarding the fact that at the time when he purchased the property from Mrs. Phillips, Babdaty *assumed and agreed to pay* the $4,000 promissory note, or the amount then remaining unpaid thereon, the evidence with reference thereto, which was introduced without objection on the part of the plaintiff in the action, is without conflict to that effect. Indeed, the direct statements in the testimony given by Babdaty himself again and again admitted that such was the fact. In such circumstances, the rule of law in this state is that he became "the principal debtor" on the $4,000 promissory note, and that Mrs. Phillips was the surety. Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Hopkins v. Warner, 109 Cal. 133, 41 P. 868; Roberts v. Fitzallen, 120 Cal. 482, 52 P. 818; Robson v. O'Toole, 45 Cal. App. 63, 187 P. 110; Williams v. Coleman, 70 Cal. App. 400, 233 P. 397; and authorities therein respectively cited.

[2] It is therefore evident that it would be most inequitable to permit Babdaty, through his agent Essey (the plaintiff in the action), to compel Mrs. Phillips to pay a debt for which Babdaty was primarily liable. Notwithstanding the fact that no direct issue was presented by the pleadings to the effect that Babdaty had assumed and agreed to pay the indebtedness represented by the unpaid bal-

ance on the promissory note of $4,000, and consequently that no finding of fact in that regard was made by the trial court—since it unquestionably appears by the evidence adduced on the trial of the action that Babdaty had assumed and agreed to pay the former obligation of Mrs. Phillips—by the provisions of section 956a of the Code of Civil Procedure (which statute is based upon section 4¾ of article 6 of the Constitution), as well as by judicial interpretation of such statute (Tupman v. Haberkern, 208 Cal. 256, 280 P. 970), this court is authorized to direct that the findings of fact be so amended.

Accordingly, it is ordered that the judgment be, and it is, reversed; furthermore, that the trial court be and it is directed to amend its findings of fact as hereinbefore indicated, and thereupon to render its judgment in favor of the defendant in the action.

We concur: CONREY, P. J.; YORK, J.

136 Cal.App. 127

JAMISON v. COTTON.

Civ. 1463.

District Court of Appeal, Fourth District, California.

Dec. 30, 1933.

1. Tenancy in common ⇐30.

Tenant in common, upon payment of taxes and interest on mortgage against common property, *held* entitled to recover from cotenant his proportionate share.

2. Tenancy in common ⇐30.

That tenant in common paid taxes and interest on mortgage against common property over objection of cotenant *held* not to defeat former's right to recover from latter proportionate share, in absence of agreement to contrary.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by A. C. Jamison against H. H. Cotton. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Hickcox, Thomson & O'Connor, of Los Angeles, for appellant.

Chandler, Wright & Ward, of Los Angeles, for respondent.

WARMER, Justice pro tem.

The plaintiff, defendant, and one Ole Hanson were the owners of a certain tract of land in Los Angeles county. Jamison, the plaintiff, owned a one-half interest, Cotton, the defendant, one-fourth, and Ole Hanson one-fourth thereof. There was a mortgage against said real property in the sum of $65,000, dated March 1, 1928, with interest at the rate of 7 per cent. per annum payable quarterly. It was understood and agreed between the owners thereof that they and each of them would individually be responsible for their proportionate shares of the taxes on said property and the interest accruing under and by virtue of the terms of said mortgage. On the 16th day of April, 1931, plaintiff, A. C. Jamison, paid to the tax collector of the county of Los Angeles the sum of $776.17. One hundred and ninety-four dollars and four cents of such sum so paid was the share of said taxes due and payable by the defendant, H. H. Cotton, and such sum was paid by the plaintiff for and on behalf of defendant, Cotton. On the 1st day of June, 1931, plaintiff paid the holder of said mortgage the sum of $1,056.25, representing the interest due on account of said mortgage. Two hundred and sixty-four dollars and six cents of said sum of $1,056.25 was the share of interest due and payable by the defendant, Cotton, and was paid by plaintiff for and on behalf of said defendant. The payments and each of them were made by the plaintiff, Jamison, without the consent of the defendant, and over his objection. The trial court gave judgment for the plaintiff for the amount so paid, and defendant appeals.

The sole question presented on this appeal is whether or not a cotenant can escape or avoid the liability for interest and taxes due from him and constituting a lien against the entire property by objecting to the payment thereof by another cotenant.

[1, 2] In the case of Willmon v. Koyer, 168 Cal. 369, 143 P. 694, 696, L. R. A. 1915B, 931, the court said: "The rule is that when one tenant in common has paid a debt or obligation for the benefit of the joint property, or has discharged a lien or assessment imposed upon it as a common burden, he is entitled as a matter of right to have his cotenant, who has received the benefit of it, refund to him his proportionate share of the amount paid. As a matter of fact this property was joint property when these taxes and other charges against it were paid by plaintiff. In proportion to their interests all tenants in common are in duty bound to pay taxes, which in this state are a lien upon real property and their nonpayment subjects the land to sale in satisfaction of them. Either of the cotenants may pay the taxes assessed against the whole estate, and such payment discharges the lien imposed upon the common interest, and no matter whether one tenant paying it intended the payment to be for his own benefit or not, such payment in fact and in law

essentially inures to the benefit of the other cotenants. It discharges the lien against the common estate for the common benefit, independent of any intention of the cotenant paying it, and as all other cotenants are entitled to the benefit of such payment, it is only right that they should refund to the one making it their proportion of the amount he has paid. Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149. This rule equally applies to expenditures other than taxes made for the common benefit."

In this case recovery was sought by one cotenant against another because of the payment of certain taxes for and on behalf of the other cotenant.

In Rich v. Smith, 26 Cal. App. 775, 784, 148 P. 545, the decision makes the aforesaid rule applicable to a payment of interest accruing under and by virtue of the terms of a mortgage and reaffirms the rule stated above in the case of Willmon v. Koyer, supra.

In Starks v. Kirchgraber, supra, the court says: "It is generally true that, where one of several tenants in common of land relieves a burden resting upon the joint estate, he is entitled to a just contribution from the others, to the end that the burden may be equal. The doctrine rests upon a broad principle of natural justice to the effect that where one has discharged a debt or obligation which others were equally bound with him to discharge, and has thus removed a common burden, the others who have received the benefit ought, in conscience, to refund to him a ratable proportion of the amount expended. [Citing Cases.] All tenants in common are under obligation to the extent of their respective interest to pay taxes on the common property, and it is the privilege at least of any one of them to pay the taxes assessed against the entire estate; and when the taxes are an incumbrance upon the land, as in this state, such payment by one of the co-tenants essentially inures to the benefit of the remaining co-tenants, whether the tenant paying the taxes intended such or not. A payment of the taxes discharges the lien of the state, and renders the property secure from foreclosure and sale thereunder. In such circumstances contribution is always allowed. [Citing cases.]"

The right or privilege of one cotenant to pay taxes and liens chargeable upon the whole estate seems to be well settled as a rule of law, and the right to recover the amount thereof which was in fact for the benefit of his cotenant seems equally well established. The right to a ratable contribution from his cotenant is thus established. In none of the cases cited do the courts pass upon what the effect is on such right when the payment is made without the consent and against the will of the other cotenant. We fail to see how the conduct or declaration of a cotenant could affect a right established by the imposition of the lien and the payment thereof under legal right, in the absence of any agreement to that effect between the cotenants at least. No such agreement is here claimed. To hold that a cotenant, who did not wish to pay his taxes and accruing payments of interest on a mortgage, a lien upon the premises, could avoid the right of his cotenant for a ratable contribution, would in effect place his cotenant in the position of subjecting his interest in the property affected by the lien to sale if he failed to pay the taxes or accruing payments under the terms of the said mortgage or become a mere volunteer in the payment of his cotenant's taxes and accruing interest. Hence, without a right of recovery in any manner, such a rule, if established, would become an effectual means for one cotenant to legally compel the other to bear the burdens justly cast upon the defaulting cotenant, and deprive the one who made the payment, according to the tenure of the lien, of a right or privilege arising out of their relationship. With such contention we cannot agree. The right arises out of the legal relationship, coupled with the fact that there is a lien upon the premises belonging to the cotenants, and the payment by one of them of the whole or a portion of said lien thereby discharges the same just as effectually for his cotenant whether he agrees or fails to agree to the payments made. The defaulting defendant has received the benefit of the discharge of the lien, irrespective of what gave rise to the payment by his cotenant. The payment of the tax or lien against the premises gives rise to the corresponding right of recovery ratably as against the defaulting cotenant, which right cannot be taken away from the cotenant who makes the payment and discharges the lien of the tax or payments accruing under the mortgage, by any act or declaration of the defaulting defendant in the absence, at least, of an agreement to the contrary. Willmon v. Koyer, supra.

The case of Switzer v. Switzer, 57 N. J. Eq. 421, 41 A. 486, relied upon by appellants, is not in point.

For the foregoing reasons the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 62

GIGY v. SCHAUB.

Civ. 7915.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1933.

Dismissal and nonsuit ⇐81(2).

Overruling motion to vacate dismissal on plaintiff's failure to produce evidence after motion for continuance was denied *held* not abuse of discretion.

Denial of motion to vacate judgment of dismissal did not constitute abuse of discretion, where motion was not made until lapse of nearly six months after entry of judgment of dismissal and supporting affidavits and evidence tended to show that the plaintiff's long delay in presenting motion was prejudicial to the defendant.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Mabel Gigy against A. R. Schaub. From an order denying her motion to vacate a judgment of dismissal, the plaintiff appeals.

Order affirmed.

E. A. Kline, of Los Angeles, for appellant.

Weber & Kidder, of Santa Monica, for respondent.

PER CURIAM.

Plaintiff appeals from an order denying her motion to vacate a judgment of dismissal entered in the superior court, which judgment was entered by reason of the failure of the plaintiff to produce any evidence at the trial of the action, after denial by the court of her motion for a continuance.

From the record it appears that this case was regularly set for trial for August 28, 1930, that plaintiff's then counsel and plaintiff both knew that said cause was to be tried that day, and that neither plaintiff nor her witnesses were present. Nearly six months thereafter a motion was made by appellant for the purpose of setting aside said judgment, on the ground of mistake, inadvertence, surprise, and excusable neglect. The motion was heard upon an affidavit of plaintiff and counter affidavit of defendant's attorney.

It is not necessary to extend this opinion by making a detailed statement of the facts. After reading the affidavits, we are satisfied that there was no abuse of discretion by the court in its consideration of said motion and denial thereof. Moreover, there is evidence tending to show that the plaintiff's long delay in presenting the motion was prejudicial to the defendant. It appears by uncontradicted affidavit that one of defendant's material witnesses, who was present to testify at the trial, has now returned to her home in an Eastern state, and that her personal presence could not now be obtained at a trial of the action.

The order is affirmed.

LEAVITT et al. v. GIBSON et al.*

Civ. 7595.

District Court of Appeal, Second District, Division 1, California.

Dec. 13, 1933.

Hearing Granted by Supreme Court Feb. 9, 1934.

1. Conspiracy ⇐14.

Misrepresentation by one conspirator is chargeable against other conspirators.

2. Fraud ⇐58(1).

Court's fact findings in action for fraud, inducing plaintiff to accept worthless note and trust deed securing it as part consideration for transfer of realty, *held* sustained by evidence and sufficient to support judgment for plaintiff.

3. Fraud ⇐58(1).

Evidence in action for fraud, inducing plaintiffs to accept worthless note and second trust deed securing it as part consideration for transfer of realty, *held* sufficient to show that defendants were parties to conspiracy to deprive plaintiffs of property by misrepresentations.

4. Appeal and error ⇐1052(8).

Error, if any, in admitting evidence as to transactions after transfer of plaintiffs' property in action for fraud inducing it *held* not prejudicial to defendants, in view of other convincing evidence of conspiracy to deprive plaintiffs of property by misrepresentations.

5. Abatement and revival ⇐67.

Trial court had power to submit cause and decide case after death of one defendant, though plaintiffs' final reply brief had not been served on date of such defendant's death, where cause was otherwise ready for submission.

6. Trial ⇐403.

Trial court had right to file findings on main issues, tried during lifetime of defendant dying before actual submission of cause, nunc pro tunc as of date before his death, but findings covering supplemental proceed-

*For subsequent opinion see 43 P.2d 1091.

ings after his death must be considered as of actual date of findings.

7. Abatement and revival ⇐64.

Action for fraud, inducing plaintiffs to accept worthless note and trust deed as part consideration for transfer of their property, survived death of one defendant, though case was not action ex delicto in complete sense.

8. Judgment ⇐273(5).

Trial court had right to file decision for plaintiffs in action for fraud nunc pro tunc as of date before death of one defendant, though cause was not actually submitted before such date, where all evidence had been received and plaintiffs' brief and defendants' reply served and delivered to judge and time allowed for plaintiffs' reply had expired and no extension of time was granted.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by F. A. Leavitt and others against John W. Gibson and others, in which Grace Ina Gibson and another, executrices of the last will and testament of defendant Gibson, were substituted for him as defendants after his death. From a judgment for plaintiffs, defendants appeal, and from an order denying defendant executrices' motion to vacate and set aside a judgment against decedent, they appeal.

Judgment and order affirmed.

Frederick M. Kincaid and Anderson, Anderson & Sheahan, all of Los Angeles, for appellants.

R. M. Wiley, of Silver City, N. M., for respondents.

CONREY, Presiding Justice.

In March, 1927, and for a long time prior thereto, the plaintiffs were the owners of a parcel of real property on Fair Oaks avenue in the city of Pasadena; said property being of the fair and reasonable market value of $42,000. The transaction out of which the controversy herein arose, consisted of a conveyance of said Fair Oaks property by the plaintiffs to one Phil D. Rice, the consideration therefor being the sum of $10,000, together with assignment and transfer to plaintiffs of a note of $32,000 made to Rice by one John L. Hittson, secured by a second trust deed on certain property situate in Riverside county, and known in this record as the Granite Hill ranch. Soon after the above-mentioned transaction was closed, the property was sold to defendant Frederick M. Kincaid, by the trustee of the first trust deed, to pay the note secured thereby, which was a note of $40,000 made by Rice together with the said first trust deed, before the Granite Hill ranch was conveyed by Rice to Hittson. Prior to the sale by the trustee, Gibson had transferred the $40,000 note to Kincaid. In this action the court found, upon sufficient evidence, that the value of said ranch property was less than the sum of $40,000. This fact, together with the fact that Hittson was financially irresponsible, made the $32,000 note worthless. The net result was that the plaintiffs, for their Fair Oaks property, worth $42,000, received nothing of value except the sum of $7,000 which remained of the said $10,000 after payment of about $3,000 in expenses of the sale, incurred by the plaintiffs, which expenses included a commission of $2,000 paid to the defendant George Burnham.

On or about the 31st day of March, 1927, the deed of conveyance of the Fair Oaks property by plaintiffs to Rice was delivered out of escrow, and the other elements of the transaction were completed. On April 17, 1928, the plaintiffs commenced this action, as an action to recover damages for "fraud and deceit," alleged to have been practiced upon them by the defendants, whereby the plaintiffs were induced to accept said $32,000 note and second trust deed as part of the consideration for the transfer of their property. Upon issues presented by the pleadings, the case went to trial, beginning on December 12, 1928. On January 21, 1929, the parties had rested after presenting their evidence. Thereupon an agreement was made for argument by means of briefs, and the following order was made by the court and entered in the minutes: "Cause to stand submitted on presentation of closing brief, fifteen, ten and fifteen days allowed. Plaintiffs to open." Concerning orders of this kind, see Franks v. Cesena, 192 Cal. 1, at page 3, 218 P. 437. These time limits were exceeded, in fact, on both sides. On May 1, 1929, a time when the reply brief of plaintiffs had not yet been served or filed, defendant John W. Gibson died. Thereafter, prior to July 17, 1929, his will was admitted to probate. Grace Ina Gibson and Thelma Gibson were appointed executrices of the will. In due course the plaintiffs herein filed as a claim against the estate their demand, covering the subject of this action. Said claim failing of approval, the plaintiffs then gave notice of motion, in this action, for an order substituting the executrices as defendants in place of John W. Gibson, and for leave to proceed by "amended and supplemental complaint," etc. On July 24, 1929, said motion was presented, and was granted. An "amended and supplemental complaint" was filed. In this pleading the plaintiffs, by reference, realleged the matters contained in their former pleadings, and set forth supplementally the fact of Mr. Gibson's death and the subsequent proceedings in relation thereto. An answer having been filed, the case was again brought on for trial, on the 30th

day of July, 1929, pursuant to notice duly given. The defendants, however, did not then appear. The court in its order of July 24th had provided that on July 30th "the said cause shall be reopened for the sole purpose" of receiving evidence concerning the death of Gibson and the said supplemental proceedings. At the hearing on July 30th that evidence was received, and no evidence was offered or received as to any of the issues made by the original pleadings. On July 24, 1929, the attorneys for the plaintiff delivered to the court a brief, which (says the bill of exceptions), "was and is the closing brief referred to in that portion of said order of January 21, 1929, which reads as follows: 'Cause to stand submitted on presentation of closing brief.'"

On November 8, 1929, the court filed its findings of fact and conclusions of law, directing judgment in favor of the plaintiffs. Paragraph 4 of the conclusions of law states: "In view of the circumstances of this particular case, justice requires that this decision, these findings of fact and conclusions be filed nunc pro tunc as of date January 22, 1929, the day following the time the taking of evidence was concluded." Accordingly the decision was filed "nunc pro tunc as of January 22, 1929." Nevertheless, the findings themselves do include the proceedings to which we have referred, arising out of the death of defendant Gibson. Pursuant to the findings thus made and the court's conclusions thereon, judgment was entered in favor of the plaintiffs and against defendants John W. Gibson, Frederick M. Kincaid, and Zeddy B. Barker, as well as against other defendants who have not appealed, for damages in the sum of $35,000, together with the sum of $25,000 as exemplary damages. The said total sum of $60,000 was "established and allowed" against the estate of Gibson in accordance with the supplemental complaint. Judgment was entered November 9, 1929.

There are two notices of appeal, one being by the executrices of the will of Gibson and by Kincaid and Barker, and being an appeal from the judgment, and the other is an appeal by said executrices from an order entered by the court on January 7, 1930, denying a motion of the defendant executrices whereby they asked the court to vacate and set aside the judgment rendered in said action against the said John W. Gibson, deceased.

In order to understand the situation existing at the time when plaintiffs parted with their Fair Oaks property for the considerations hereinabove stated, it is necessary to have in mind certain recent earlier history of the Granite Hill ranch. In September, 1925, that property was owned by E. Van Wickle; subject, however, to an $18,400 mortgage in favor of the First Trust & Savings Bank of Pasadena and F. H. Gilcrist, and also subject to a trust deed (junior to the mortgage) securing $31,500 in notes payable to the order of Herbert A. Stokes and wife. The $31,500 note was sold and transferred to defendant Gibson. Default having been made on this note, the property was sold to defendant Barker for $1,200. It is admitted that in this purchase and in the subsequent transfer by Barker to Rice, defendant Barker was acting as agent for Gibson. The record thus shows that in March, 1927, the record title to the Granite Hill ranch stood in the name of Barker (the real owner being Gibson), and was subject to the $18,400 mortgage. The subsequent transfers and incumbrances were completed through several concurrent and interlocking escrows. By escrow No. 6893 at First Trust & Savings Bank of Pasadena, on or about February 3, 1927, the Van Wickle notes and mortgage were deposited in the bank, together with satisfactions thereof to be used on payment of the two notes, amounting to the principal sum of $18,400. Under the same escrow number, Gibson deposited with the bank on February 1, 1927, his "seller's escrow instructions" offering to sell the ranch to Phil D. Rice, upon stated conditions which provided for the deposit by Rice of the sum of $19,600 to be used in payment of the mortgage and for payment of stated expenses; and further provided for a note of $40,000 to be executed by Rice in favor of Gibson and secured by trust deed on the ranch. Gibson also agreed to deposit for use in the transaction a deed by Barker and wife to Phil D. Rice, a single man. Instructions concurrent with those of Gibson were signed by the Barkers. On the same day an acceptance of the Gibson offer was signed by Rice, wherein he stated that he would hand to the bank a check for $19,600 together with expense funds and the $40,000 note and trust deed. Subsequently the Barker conveyance to Rice and the said notes and trust deed were in fact deposited with the escrow holder.

In escrow No. 6921 at the same bank, on February 8, 1927, instructions were deposited by Phil D. Rice as purchaser, and Hittson as vendor, for the sale of a one-half section of land in Culberson county, Tex., conveyance to be made concurrently with a conveyance of the Granite Hill ranch by Rice to Hittson; it being further agreed as part of the consideration from Hittson to Rice that Hittson would execute and deliver his note for $32,000 secured by trust deed on said Granite Hill ranch. Stating the matter another way, it may be said that by virtue of these escrow instructions Rice was agreeing to convey to Hittson the Granite Hill ranch subject to the $40,000 note and trust deed in favor of Gibson, on receiving from Hittson a deed to the Texas land and the $32,000 note and trust deed.

Through escrow 52-998 (Pacific Southwest Trust & Savings Bank) the deed from the plaintiffs to Rice was delivered when the escrow agent received for the plaintiffs the sum

of $10,000 and the said second trust deed and $32,000 note, assigned to the plaintiffs. It will be noted that in the completion of these transfers, trust deeds, mortgage release, assignments of notes, etc., Rice was to pay off the $18,400 mortgage, and was to pay $10,000 to the plaintiffs. In fact, he paid nothing. According to the testimony of Newby and Gibson, Rice was a tourist, from an eastern state, and he left this state before the escrows herein mentioned were closed. The record does not show anything definite about the financial status of Rice. The court was justified in concluding, from all the circumstances, that Rice loaned the use of his name in these transactions, to accommodate Newby, or Newby and Gibson, and for no other purpose. Gibson, acting through Barker, paid into escrow 6893 the $19,600 which under the terms of that escrow would have been paid by Rice. In contemplation of this arrangement, Rice, by his attorney in fact Newby, executed to Barker a deed conveying the Fair Oaks property. This deed, bearing date March 18, 1927, was recorded on March 31, 1927, following the recording of the deed of same date by the plaintiffs to Rice. Concurrently, a $10,000 first mortgage loan was obtained from the First Trust & Savings Bank of Pasadena, secured on the Fair Oaks property. This mortgage, executed by Barker and wife on March 23, 1927, was recorded March 31st, when the prior deeds had placed the record title in Barker's name. By these several steps Gibson, in the name of Barker, became the owner of the property of the plaintiffs, and the plaintiffs were paid $10,000 raised by mortgage on their own property (less $3,000 commissions, etc.), and received nothing else except the $32,000 note and second trust deed on the Granite Hill ranch, subject to Gibson's $40,000 first trust deed against that property. The close of these escrows left Hittson as the record owner of the ranch, for which he paid nothing except that he conveyed to Rice the Texas land and executed to Rice the $32,000 note and second trust deed on the Granite Hill ranch. Hittson testified that the Texas land at that time was worth "approximately a dollar an acre"; and that the total value of his assets at that time was less than $1,000.

In general effect the fraud and deceit which the plaintiffs claim was practiced upon them by the defendants may be described as follows: That defendant Gibson first acquired the Stokes notes which were secured by trust deed on the Granite Hill ranch, subject to the prior mortgage securing an indebtedness of $18,400; that thereafter by a series of conveyances and trust deeds and manipulations thereof, a fictitious valuation of $120,000 was built up on said ranch, whereby the $32,000 note might be made to appear well secured, whereas, in fact, it was without value; and that all of this was done through irresponsible persons acting as "dummies" for Gibson. It is the claim of the plaintiffs that the defendants having first laid this false foundation for a successful fraud, thereafter made the false representations upon which the plaintiffs relied and whereby they lost the Fair Oaks property. The alleged false representations are numerous and may be found in the record. Among the salient statements of fact contained in the alleged false representations made to the plaintiffs are these: That the Granite Hill ranch had recently been sold for $120,000, that is for $48,000 in cash, together with a first mortgage for $40,000 and said trust deed for $32,000, whereas, in fact, neither said sum of $48,000 nor any part thereof had been paid by any purchaser of said property and said $40,000 trust deed and note had been delivered without consideration; also, that it was represented to the plaintiffs that Hittson, the purchaser and present owner of the ranch, was a millionaire, personally well able to pay all of said indebtedness, whereas in fact, Hittson was financially irresponsible.

[1] The complaint alleges the existence of a conspiracy entered into among the defendants, pursuant to which the various misrepresentations and other wrongful acts by the defendants were accomplished whereby the plaintiffs were deprived of their property. The proof of conspiracy in which the appellants were co-operating parties was especially important because the direct evidence of misrepresentations made by either one of appellants is of slight weight as compared with the similar direct testimony concerning representations made by defendants Burnham and Newby. Under such circumstances it is only by establishing a conspiracy between these parties that the plaintiff could obtain the benefit of the rule whereby misrepresentation made by one conspirator is chargeable against the other conspirators although not made directly by them. Thus, for example, the testimony of the plaintiffs concerning false representations made to them by the defendants Newby and Burnham is very much more definite in its particulars than is any of their testimony involving Gibson in the making of such misrepresentations. It is only by proof of circumstances tending to show that these several defendants had conspired, and were acting together as alleged in the complaint, that appellants could be held responsible for the wrongful acts of their said codefendants.

[2] Defendant Burnham was a real estate agent in Pasadena. Frederick A. Leavitt, one of the plaintiffs, testified that in January, 1927, he met Burnham and told Burnham that he and his brother owned said Fair Oaks property and wanted to sell it at the price of $45,000. Early in February Burnham told this witness that Mr. Newby had a trust deed of $32,000, secured by the Granite Hill ranch; that the ranch had recently been sold for $120,000, cash $48,000, and there was a $40,-

000 mortgage on it, and that this $32,000 trust deed he considered just as good as money or even better. At a later conversation Burnham repeated these statements about a sale of the ranch for $120,000, and stated that two bank appraisals on the ranch had been made, one giving a valuation of $97,000 and the other $95,000. Thereafter this witness, together with Newby and Burnham, made a trip to Riverside county, where they visited the Granite Hill ranch. The three men drove together in an automobile from Pasadena. In their conversation Newby claimed that he and a partner had owned the ranch for two years, and that they had sold it to Hittson for $120,000, $48,000 cash, $40,000 mortgage, and this $32,000 trust deed. He repeated the above-mentioned statement about bank appraisals; and there were various other statements concerning water supply, pumping plant, a granite hill of great value for quarrying purposes and for which a $35,000 offer had been made. Concerning Mr. Hittson, Newby said that Hittson was a millionaire and well able to take care of all his paper; that Hittson had just bought the ranch and was coming there to subdivide it to pass away the time.

Concerning defendant Gibson this witness, F. A. Leavitt, testified that he met Gibson the next afternoon after the trip to the ranch. Mr. Burnham took the witness to Gibson's home. "Mr. Burnham introduced me to Mr. Gibson and said I wanted to see him in regard to a trust deed that we were thinking of trading for secured by the Granite Hill ranch in Riverside, that he understood he held the first mortgage on the ranch. Mr. Gibson said he held the first mortgage and that he had put in the greater part of two or three days down to the ranch investigating before he took the mortgage. He found there was two bank appraisals on the ranch by the Riverside Bank, one for $95,000 and one for $97,000. He says there is practically 60 acres of lemon orchard in good condition. He spoke of the water supply and their own pumping plant that cost $20,000, about the subdivision, and that Granite Hill ranch, and he had satisfied himself that the lemon orchard would take care of his mortgage, and that left the balance of the ranch free. I asked him if he was acquainted with this Hittson that had bought the ranch, and he said that when he took the mortgage he loaned him the money, and Mr. Hittson asked the privilege of paying it on that mortgage as he wanted to subdivide some of it and sell it out in chicken ranches and wanted it released and Mr. Gibson granted him that privilege. Mr. Gibson stated at that time he understood there was a second trust deed, but he had never seen it and could not say for certainty about it, but if there was it made the first all the more secure. Burnham, he says, 'This looks awfully good to me. It looks as if this paper is awfully good.' And Gibson, he said it was well secured and the ranch was well worth the property and he considered the paper perfectly safe."

Without going into further details of the evidence, and without any special description of the later transactions in the course of which the defendants disposed of the Fair Oaks property, suffice it to say that we conclude therefrom that the findings are sustained by the evidence. The findings themselves unnecessarily include many evidentiary items which might better have been omitted, but these may be disregarded without affecting the merits of the case. And the findings support the judgment.

[3, 4] It is claimed by appellants that the court erred in admitting evidence of the above-mentioned transactions which were subsequent to those which ended with the closing of the escrows on March 31, 1927, not only because they occurred after the transfer of plaintiffs' property had been completed, but also because there is no evidence of any conspiracy in which appellants were connected as coconspirators. But we think that the evidence is sufficient to prove that appellants were parties to the conspiracy. And as to the fact that the evidence related to transactions subsequent to March 31, 1927, appellants have failed to support their contention by reference to any authorities pertinent to that subject. There are decisions referred to by respondents, which have some persuasive force. Exchange Bank v. Moss, 149 F. 340, opinion by Circuit Court of Appeals, 8th Circuit. But without deciding this question, at all events we are convinced that even if this merely cumulative evidence should have been excluded, the other evidence is so convincing that the error, if any, was not prejudicial, and did not contribute to any miscarriage of justice.

[5] In our statement of the case we have referred to the death of Mr. Gibson, and the subsequent proceedings which culminated in the entry of judgment. In support of their appeal from the judgment, as well as from the order denying their motion to vacate the judgment, appellants contend that by reason of the death of Gibson at a time when the plaintiffs had not yet served or presented to the court the final brief provided for in the order of January 21, 1929, the trial court was without any "right, power, authority or jurisdiction" to render at the date of the rendition of said judgment, any judgment whatever, nunc pro tunc or otherwise, against the said John W. Gibson, deceased. It was upon this ground that appellants made their motion, which the court denied.

On May 1, 1929, the date of Gibson's death, the reply brief of the plaintiffs had not yet been served on the defendants or delivered to the judge, and the cause had not been submitted to the court for decision. In all other respects it was ready for submission. On

July 24, 1929, pursuant to notice given, the plaintiffs presented a motion in which they requested, among other things, that "the order heretofore made submitting said cause for decision" be set aside and the case reopened for the sole purpose of making the specified supplemental proof. On the same day they served, and gave to the judge, their final brief.

This motion was granted, and the case set for further trial on July 30, 1929, and the "amended and supplemental complaint" was filed, to which the executrices and Kincaid filed their answer on July 25th. The "amended and supplemental complaint" consisted wholly of supplemental matters except that it did "here repeat and reallege" the former pleadings of the plaintiff, without in fact setting them forth other than by this reference thereto. At the hearing on July 30th the additional evidence contemplated by the prior order was received, and the minutes of the hearing close with this statement: "Cause re-submitted."

Since there had been no prior submission, this order of July 30th could not be a resubmission. But it did constitute a submission of the cause, unless it can be successfully maintained that on the record thus made the court was without power to submit and under such submission thereafter to decide the case. We think that the court did have that power.

[6] But appellants particularly contend that the court did not have the right to file its decision nunc pro tunc as of a date prior to the death of Gibson. In support of this contention they emphasize the fact that at the time of Gibson's death the cause was not actually under submission. So far as the supplemental proceedings are concerned, covering the death of Gibson and the completion of the record in connection with that fact, it is plain that nunc pro tunc findings dated back to January would be an absurdity. But in this we find no insuperable objection. For if in fact justice required it, the findings upon the main issues, which were tried during the lifetime of Gibson, might be considered as entitled to be filed nunc pro tunc as of the January date, although the findings covering the supplemental proceedings must be considered as of the actual date in November, 1929.

[7, 8] In support of their contention that in this case an order for the entry of the decision nunc pro tunc could not legally be made, appellants refer to 14 California Jurisprudence, pp. 931–933; 15 Ruling Case Law, pp. 626, 627; and 34 Corpus Juris, p. 74, and to a number of the decisions therein cited. Some of these decisions directly declare that to entitle a party to have its judgment entered nunc pro tunc on account of the death of one of the parties the action at the time of such death must have been ready for the rendition of final judgment. The rule is traced back to the practice in very ancient English cases and early American cases.

It appears, however, that the more modern practice, including that of California, has resulted in some modification of the rule. In Re Estate of Pillsbury, 175 Cal. 454, 462, 166 P. 11, 15, 3 A. L. R. 1396, in the course of an extended discussion of the subject of entry of judgments nunc pro tunc, the Supreme Court said: "So it will be found without citing specific instances that the trend of legislation is to broaden even the common-law rule, and to provide that the right of action shall survive in cases ex delicto if the defendant has appeared or has been served with process while a brief consideration of the adjudged cases will show that nowhere is the principle enunciated denied application because the action is in tort." We do not lose sight of the fact that the case at bar is not in the complete sense an action ex delicto, such as an action to recover damages for personal injury. This is an action to recover damages for a wrong committed by fraudulent means in the course of a business transaction. The right of action in this case would survive the death of the defendant Gibson; but perhaps it would not survive to an extent which would justify that part of the judgment which granted exemplary damages. We have not examined into this question so as to form an opinion and it does not seem necessary so to do at this time. The case in its circumstances is quite sufficient to justify the broadening of the rule as mentioned by the Supreme Court in the foregoing quotation. The court in that case refers with apparent approval to the case of Fox v. Hale & Norcross S. M. Co., 108 Cal. 478, 41 P. 328, 329, where the subject received careful attention. In that case at the date of the death of one of the defendants the case was under submission, and the judge had announced his conclusions and directed the preparation of findings and decree, but they had not yet been prepared at the date of the death of said defendant. Thereafter executors of his will were made parties defendant, and subsequent proceedings followed as in the present case, and findings and judgment were entered nunc pro tunc as of a date prior to the death of said defendant. Discussing the subject of nunc pro tunc judgments the court said: "The authority of a court to order its judgment to be entered nunc pro tunc is inherent in the court, and is to be exercised for the purpose of doing justice between the parties. A court will always exercise this authority when it is apparent that the delay in rendering the judgment, or a failure to enter it after its rendition, is the result of some act or delay of the court, and is not owing to any fault of the party making the application. One class of the cases in which this authority may be exercised, says Mr. Freeman, comprises those 'actions in which no judgments have ever been rendered, but which are, so far as the suitors can make them, in condition for the

rendition of final judgments.' Freem. Judgm. § 57. 'The rule established by the general concurrence of the American and English courts is that, where the delay in rendering a judgment or a decree arises from the act of the court,—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, through the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties,—the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim, "actus curiæ neminem gravabit,"—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice,—it is the duty of the court to see that the party shall not suffer by the delay. A nunc pro tunc order should be granted or refused as justice may require, in view of the circumstances of the particular case.' Mitchell v. Overman, 103 U. S. 62 [26 L. Ed. 369]. See, also, Blaisdell v. Harris, 52 N. H. 191. Whether the decision of the court is to be expressed in the form of findings of fact, or in the form of a judgment, or both, is immaterial. The principle upon which its action is to be sustained is that justice may be done between the parties. If the cause has been tried and finally submitted to the court for its judgment, the rights of the parties are to be determined as they existed at the time of such submission, and neither party is to be prejudiced by the delay of the court in rendering its judgment. In Campbell v. Mesier, 4 Johns. Ch. [N. Y.] 342 [8 Am. Dec. 570], the cause had been submitted to the chancellor upon proofs taken before the master, and after argument but, before decision one of the defendants died. The chancellor ordered the decree to have relation back, and to be entered as of the date when the cause was finally heard. If, as is provided by sections 632 and 633, Code Civ. Proc., the making and filing of findings of fact is essential to its decision, the court has the same authority to order these findings to be filed nunc pro tunc as it has to order the judgment thereon to be so entered. These various acts—the making, as well as the filing of findings, and the entry of judgment—are only parts of the decision which the court has been invoked to make upon the submission of the cause, and together constitute the final determination of the rights of the parties. The decision which the parties have invoked the court to make is not necessarily the statutory and technical 'decision' referred to in section 633, Code Civ. Proc., but is the final determination of the rights of the parties, and includes every step or act of the court which is requisite to a final judgment upon their rights. The rights of the parties are not to be prejudiced by the delay of the court in respect to any of these acts or proceedings, and the court is authorized to direct the making or filing of its findings of fact and conclusions of law, as well as the entry of a judgment thereon, nunc pro tunc as of such date as will preserve these rights." The Supreme Court then referred to the provisions of section 669 of the Code of Civil Procedure under which the judgment entered after the death of a defendant is not a lien upon his real property, but is payable in the course of administration of his estate, and suggested that although it was appropriate to file the findings of fact and conclusions of law as of a date prior to the death of the defendant, it was not necessary to so enter the judgment. The decision having been filed as of date prior to the death, the judgment could be entered after the death. In the case at bar the practice thus suggested was followed, and the nunc pro tunc order was made with respect to the findings only and not the judgment.

It must be conceded that the present case differs from the Fox Case, supra, in that here the cause was not actually under submission at the date of the death of defendant Gibson. But he had been fully heard. All of the evidence had been received and both sides had rested. Both the brief for the plaintiffs and the reply of the defendants had been served and were in the hands of the judge. No reply had been presented by the plaintiffs, and the time allowed therefor had expired. On the day of Gibson's death the court was in a position to have ordered the case submitted although it had not actually made such order. The bill of exceptions does not show that any stipulation or order for extending time for such reply brief had been made. Trans. pp 716, 717. In view of the facts thus shown by the record we have reached the conclusion that there is no substantial difference between the situation presented by this case with respect to the question now under consideration and that presented in the two California decisions to which we have referred. The delay which had occurred (at the time of Gibson's death), may well have been caused by "the intricacy of the questions involved," as by any cause attributable to the laches of the parties. So, in relation to the right of the trial court to have its decision filed as of January 22, 1929, we think that such right should be upheld, and that "the principle upon which its action is to be sustained is that justice may be done between the parties."

The judgment, and the order, are and each of them hereby is affirmed.

We concur: HOUSER, J.; YORK, J.

85 Cal.App. 755

PEOPLE v. SHAYER.

Cr. 1706.

District Court of Appeal, First District, Division 1, California.

Dec. 15, 1933.

Hearing Denied by Supreme Court Jan. 12, 1934.

1. Robbery ⇐6.

Evidence that money was taken by force *held* to establish crime of robbery in second degree rather than grand theft.

2. Criminal law ⇐598(5).

Refusal of continuance on account of absence of witness *held* not abuse of discretion, where counsel knew about witness but made no effort to locate him, nor was it shown that there was probability of ever locating witness, or, if so, that he could be found within reasonable time.

3. Criminal law ⇐828.

Counsel desiring complete and correct instruction on certain subject must submit same in writing (Pen. Code, § 1127).

4. Criminal law ⇐1202(4).

Issue as to whether defendant has been previously convicted of felony, as charged in information, is one of fact for jury.

5. Criminal law ⇐1202(3).

Certified copy of prior judgment of conviction *held* sufficient evidentiary support of finding by jury of prior conviction (Pen. Code, § 1207, and § 969b as added by St. 1931, p. 995).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Edward Shayer was convicted of second-degree robbery, and he appeals.

Affirmed.

Edward Shayer, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The jury found appellant guilty of second-degree robbery; also, that a prior conviction of robbery with which he was charged was true. He was sentenced to imprisonment in the penitentiary, and this appeal was taken from the judgment of conviction and the order denying a motion for a new trial.

As to the degree of crime involved, the jury was instructed that if appellant were found guilty "the only verdict would be a verdict of second degree, because no deadly weapons were used." Appellant contends that the offense established by the evidence, if any there was, was grand theft and not robbery; that therefore the above instruction was erroneous and the verdict rendered in conformity therewith is contrary to the evidence. The question of variance was not raised at the trial, nor were any instructions proposed by appellant relating to the crime of grand theft. Assuming, however, that the point may be raised for the first time on appeal, it finds no support in the evidence.

According to the testimony given by the complaining witness, named Rudden, appellant and another man unknown to him accosted him on the street in San Francisco shortly after the noon hour as he alighted from a delivery truck he was driving, and under the pretext that they were officers and that he "was wanted" for something, forced him into an automobile, told him he was wanted "for cheating some poor kid out in the Potrero out of some money," took $190 in currency from his pocket, saying they would "hold it as evidence," and after driving him to the vicinity of the railroad freight sheds near Fourth street, forced him out of the automobile and drove away. Appellant, testifying in his own behalf, admitted that he accosted Rudden on the street and compelled him to enter an automobile, and that thereafter he took from him $76 in currency, but he denied having done so under the circumstances stated by Rudden. He claimed that during the noon hour on the day in question Rudden won $76 from him in a dice game in which a number of others played, immediately following which Rudden quit the game and drove away in his truck under the pretense that he had some deliveries to make at 1 o'clock; that as Rudden drove away appellant was told by a friend that Rudden used "crooked" dice in winning the money; that soon afterwards appellant and his friend overtook Rudden on the street, charged him with using "crooked" dice, and asked to see them; that Rudden denied having any dice at all and was thereupon told to get in the automobile and "they would see whether or not he had any dice"; that as they drove away appellant searched Rudden and found the "crooked" dice in his pocket; that appellant then took the roll of currency Rudden was carrying in his pocket, counted out $76, saying, "This is mine," and handing the rest back to him, said, "The rest is yours," following which they let Rudden out of the automobile. Rudden admitted playing in the dice game referred to by appellant, which it appears was carried on nearly every day by a number of men during the lunch hour, in a vacant lot on Beale street between Howard and Folsom, and in which Rudden frequently participated; but he claimed that on this occasion he won only $5; and he denied using "crooked" dice, or that dice of any kind were found in his possession; moreover, he denied

that appellant at any time participated in the game, claiming that he had never seen appellant before and that he had been robbed of $190 under the circumstances stated by him.

[1] The specific point made by appellant is that accepting Rudden's testimony as true it shows that the money was obtained by trick and device, which constitutes theft, and not by means of force or fear, which is essential to robbery. As will be noted, however, it appears from the evidence that although appellant and his companion compelled Rudden to enter their automobile by the use of the false pretense that they were officers, it was established beyond question that after he so entered, the money was taken from him by means of force and fear. Therefore the crime committed was robbery and not grand theft, and since no deadly weapon was used in its commission, it amounted only to robbery in the second degree. It follows, therefore, that the instruction complained of was proper and that the verdict conforms to the evidence.

[2] At the conclusion of the evidence counsel then representing appellant asked for a continuance so that he might try to locate and have subpœnaed a man named Carmody. In support of the request counsel testified that he had been informed that Rudden told Carmody that appellant took from him only $76 of the money and returned the balance. It also appears from counsel's testimony, however, that he knew for some time about said witness but made no effort to locate him or to have him subpœnaed until the trial was nearly finished; furthermore, it appears from counsel's testimony that even though a continuance were granted there was no probability of ever locating the witness, or if so that he could be found within a reasonable time. Therefore, the refusal of the court to grant a continuance under such circumstances, at the close of the evidence, cannot be said to have amounted to an abuse of discretion.

Complaint is made also of the action of the trial court in limiting the arguments to the jury to twenty minutes on each side. It does not appear, however, that such limitation deprived appellant of any substantial right. The evidence was brief, the taking of the testimony having consumed less than five hours. Counsel for appellant made no protest as to the time allotted when the order was made, and by thus limiting the arguments to forty minutes the court was able to place the case in the hands of the jury a few minutes before the arrival of the noon hour on a Saturday. The decisions hold that it is within the discretion of a trial court to place reasonable restrictions on the arguments (People v. Morrell, 28 Cal. App. 729, 153 P. 977), and in the light of the circumstances above stated there is no ground for holding here that the trial court abused its discretion. People v. Mendosa, 178 Cal. 509, 173 P. 998.

[3] After the district attorney finished his closing argument, counsel for appellant asked: "Will your Honor give this instruction; and that is, that if the money was his [appellant's] he had a right to take it?" The court was justified in refusing so to do: First, because obviously an instruction in the words suggested by counsel would not have been a correct statement of law; and, secondly, if counsel desired to have a complete and correct instruction upon the subject given he should have submitted the same in writing. Pen. Code, § 1127.

Appellant further contends that the evidence is legally insufficient to sustain the finding of the jury that the charge of a previous conviction of robbery was true, and that therefore the district attorney was guilty of misconduct in assuming in his argument to the jury that appellant had been so previously convicted. Among the new sections added to the Penal Code in 1931 was section 969b (St. 1931, p. 995), which provides that the records or copies of records of the penitentiary, when officially certified, are prima facie evidence of previous conviction and imprisonment. But in the present case, for some reason not shown by the record, the district attorney did not invoke the provisions of said section. Instead he introduced in evidence the judgment roll of the superior court in the criminal action in which it was claimed the previous conviction was obtained, saying: "I offer in evidence the judgment roll in the case of the People of the State of California against Edward Shayer, number 18153, showing that on the 4th day of September, 1928, Edward Shayer was convicted of the crime of felony, to-wit: Robbery, and was thereupon sentenced to San Quentin in the Superior Court of the State of California, in and for the City and County of San Francisco, Department Number 6 thereof." And in this connection appellant argues that the judgment roll itself is legally insufficient to establish that he is the Edward Shayer named therein.

[4, 5] As pointed out in State v. West, 175 Minn. 516, 221 N. W. 903, and Jacobs v. United States, 58 App. D. C. 62, 24 F.(2d) 890, it is held in a number of jurisdictions that for the purpose of establishing prior convictions, the introduction in evidence of a certified copy of the judgment of conviction, showing identity of names, will in itself be accepted as prima facie proof of identity of persons. But regardless of the rule followed in other jurisdictions, the record here shows that no objection was made to the introduction in evidence of the judgment roll upon the ground that appellant was not the person named therein, nor upon any other ground; nor was any motion made at any time to strike it out. Fur-

thermore, neither a copy of the judgment roll itself nor the substance thereof is set forth in the record on appeal; consequently, aside from the legal requirements of the statute (Pen. Code, § 1207) enumerating the records that shall constitute a judgment roll, we are not informed as to what particular facts were disclosed by the one here introduced. Admittedly the issue as to whether a defendant has been previously convicted of felony, as charged in the information, is one of fact to be determined by the jury the same as the issue of guilt, and in the present case, although appellant testified fully as a witness in his own behalf, he did not intimate then nor does he now that he is not the Edward Shayer named in said judgment roll. In the foregoing state of the record we are not prepared to hold that the finding of the jury on this issue is lacking in evidentiary support.

The remaining assignment of error, relating to the impanelment of the jury, is expressly abandoned in appellant's closing brief.

Therefore, since no ground for reversal has been found as to the other points urged, the judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

136 Cal.App. 38

KELLY-SPRINGFIELD TIRE CO. v. SISCHO.

Civ. 4751.

District Court of Appeal, Third District, California.

Dec. 22, 1933.

1. Appeal and error ⇐110.

No appeal lies from order denying new trial.

2. Appeal and error ⇐204(4), 237(2).

Error, if any, in admission of invoices and order blanks as exhibits in action on account, *held* immaterial, in absence of objection or motion to strike out testimony of plaintiff's general manager as to his possession thereof.

3. Evidence ⇐353(8).

Original freight bills, kept by railroad company delivering merchandise, *held* admissible in seller's action on account (Civ. Code, § 353).

4. Evidence ⇐220(7).

Court could consider defendant's silence for several months after receiving statement of account sued on in weighing his testimony as to nondelivery of merchandise.

5. Sales ⇐181(11).

Evidence *held* to sustain judgment on account for merchandise sold by plaintiff to defendant denying delivery thereof.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by the Kelly-Springfield Tire Company against L. A. Sischo. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

R. R. Sischo, of Merced, for appellant.

G. P. Ross and F. M. Ostrander, both of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

[1] The plaintiff had judgment in this action for the sum of $2,296.68, on account of merchandise sold and delivered by the plaintiff to the defendant. From this judgment and the order of the court denying a new trial, the defendant appeals. As no appeal lies from an order denying a new trial, the attempted appeal from such order is hereby dismissed.

The only question presented upon this appeal concerns four items of merchandise of the aggregate value of $518.24, alleged by the defendant never to have been received from the plaintiff; and the sufficiency of the testimony to support the plaintiff's claim in relation thereto; this latter being based upon alleged errors of the court in the admission of certain exhibits, over the objections of the defendant.

The transcript shows that at the opening of the trial, the auditor and bookkeeper for the plaintiff not being present, it was stipulated by the parties that, if the auditor or bookkeeper were present, such person would testify that the open book account was a true and correct account kept by the plaintiff of all the transactions between the plaintiff and defendant, and that it was kept in the ordinary course of business by such officer; that the book account and ledger showed a balance due in favor of the plaintiff in the sum of $2,536.68.

The manager of the plaintiff, being on the witness stand, was then exhibited the open book account and ledger between the plaintiff and defendant, and testified as follows: "This is the ledger of the Kelly-Springfield Tire Company showing an open account and a correct account of all transactions between L. A. Sischo and the Kelly-Springfield Tire

Company, from 1926, to and including the month of December, 1930; that the books, after having been balanced, and Sischo given credit for all that he was entitled to, showed a balance in favor of Kelly-Springfield Tire Company in the amount of $2,536.68; that demand had been made for payment on many occasions, but no payment had been made."

Thereupon the defendant called a witness by the name of E. F. Crumrine, who testified that in the month of November, 1930, he audited the books belonging to the defendant, Sischo, but found no record of four shipments aggregating in value the sum of $514.84, as follows, to wit: "January 7, 1930, charge $196.76; March 25, 1930, charge $36.44; March 27, 1930, charge $63.60; June 13, 1930, charge $221.44."

The defendant, Sischo, called as a witness, testified that he had had three or four different bookkeepers; did a business of about $200,000 a year; that the business was divided into many departments, and he had to depend upon his bookkeepers; that he could find no invoices or any records showing that the shipments had been received at his garage; that he did not believe he had received the same. Upon cross-examination, the defendant testified that he did not write to the plaintiff concerning his discovery that he thought he had not received the shipments mentioned. Questioned as to why he did not, the defendant testified that he owed the plaintiff a considerable sum of money, and he thought that, if he wrote to them about these charges, they might proceed to bring suit against him, and that he was in no position to pay; that he did not discover anything concerning the missing shipments because of the failure of the bookkeepers to call such matters to his attention. He further testified that he doubted if the bookkeepers checked their invoices with the shipments; that he did not have time to look after the business himself, and had to depend upon his bookkeepers.

[2] James R. Bennyhof, general manager of the plaintiff, being recalled, testified that he had in his possession the original invoices which cover all the shipments disputed by the defendant, and which bore corresponding dates of the charges denied by him. These invoices were admitted in evidence over the objection of the defendant. No objection appears in the record as to the testimony of the witness, that he had the original invoices in his possession, nor was there any motion made to strike out such testimony. Such being the case, the admission of the invoices as exhibits, even though erroneous, was wholly immaterial.

It appears that the trial was thereupon continued until a later date. Upon its resumption the witness just mentioned testified further: "Since the date of the last trial I obtained from the office of the Kelly-Springfield Tire Company these memorandum order blanks (giving the numbers). These memorandum order blanks are the same shipments covered by the invoices, * * * the receipt of which are disputed by Sischo. I have here Uniform Bill of Lading bearing date of January 7, 1930, which was delivery in San Francisco by our Company to the Southern Pacific Company of certain tires and tubes mentioned in our memorandum order blanks. It was here admitted by counsel for defendant that one of these two invoices was missing from Mr. Sischo's files, to-wit: No. 4496, but that No. 4497 was in his possession."

The witness also further testified: "I also have here memorandum order blanks No. 5318, made out by the shipping clerk in our office March 24, 1930, showing certain tires shipped to Sischo's garage on that date, and shipping receipt showing that on March 25, 1930, certain tires and tubes were delivered by the Springfield Tire Company to the Southern Pacific Company in San Francisco, consisting of two bales of tires and one carton of tubes, which, I believe, is one of the shipments that we sent in March which is disputed by Mr. Sischo. I also have here memorandum order blank No. 5449, bearing date March 29, 1930, made out by the same clerk, which shows said tires and tubes made out to Sischo garage at Los Banos, I believe by parcels post, and I believe this is one of the shipments in March that Sischo says he did not receive. I also have memorandum order blank No. 7008, dated June 10, 1930, and memorandum order blank No. 7030, dated June 11, 1930, with corresponding shipment receipts covering the same. I also have invoices corresponding to all of the above order blanks, covering tires and tubes bearing the date that they were shipped, and the numbers on the invoices were identical with the numbers on the orders which were claimed missing by Mr. Sischo." These exhibits were then admitted in evidence over the objection of the defendant. Here again the record shows that no objection was made to the testimony of the witness, nor was any motion made to strike out any portion of the witness' testimony, from which it follows that, if the court erred in the admission of the exhibits, the error is immaterial.

[3] Following this witness, the plaintiff then called the station agent of the Southern Pacific Company located at Los Banos, who testified as follows: "I have here the original freight bills bearing the following dates: January 8, 1930, showing delivery to C. L. Fought of Sischo's Garage of 4 bales of pneumatic rubber auto tires and 14 boxes of auto tire tubes; and another freight bill bearing date of March 28, 1930, showing delivery by our company to Oscar Tonolla of Sischo's Garage on April 2, 1930, of 2 bales of pneumatic tires wrapped and one carton rubber

tires; and another freight bill bearing date of June 11, 1930, showing delivery by our company to Oscar Tonolla of Sischo's Garage on June 12, 1930, of one bale pneumatic rubber auto tires wrapped and one box auto tire tubes rubber; and also another freight bill bearing date of June 12, 1930, showing delivery by our company to Oscar Tonolla of Sischo's Garage, of 5 bales pneumatic auto tires, wrapped." That such records were the original records kept by the Southern Pacific Company and were all on file at the Los Banos station.

The plaintiff thereupon offered all of the freight bills referred to by the witness, and the same were admitted in evidence over the objection of the defendant. No objection was made to the testimony of the witness, and no motion to strike out any portion of his testimony appears in the record. In view of this fact, the admission of the original records as exhibits could not affect the case in any particular. However, considering section 353 of the Civil Code, we think the exhibits referred to being original records required to be kept under the section were admissible in evidence. These records do not stand on the same footing as private records, but are records of third parties showing transactions between the plaintiff and the defendant, which, by the section, we think became admissible. This question was presented to the court and considered in the case of Hurwitz v. Gross, 5 Cal. App. 614, 91 P. 109, 111, where it was said: "We think, however, that a different rule should be applied to the books here under consideration from that which is applied to the books of a party to the litigation producing them to serve his own purposes and aid his own claim. The exhibits here admitted are the records of the business transactions of a corporation required by law to be kept by all corporations for profit. Civ. Code, § 377 [which section is now numbered 353]. They constitute the 'memory' of the transactions of the corporation. Having been produced as the regularly kept and original books of the corporation, identified as such by their proper custodians, they are admissible in evidence."

The case of San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 P. 999, relied upon by the appellant, is readily distinguishable from the case at bar. That case involved memorandum made up by one of the parties on oral statements of a teamster, and not, as here, original records required kept by law, showing transactions between parties having dealings with a public corporation.

[4] Again, the transcript shows that the defendant, after receiving a statement of his account with the plaintiff, from the plaintiff, remained silent for a number of months. This fact constituted a circumstance which the court was entitled to take into consideration in weighing the testimony of the defendant and the excuse offered by him.

In the case of Crane v. Stansbury, 173 Cal. 631, 161 P. 7, a case where the defendant had remained silent after receiving a statement of an account, for a number of months, the court instructed the jury that, unless satisfactorily explained, a failure to object within a period of six months constituted such unreasonable delay as would justify the jury in concluding that the account presented had become a stated account. This instruction was upheld upon appeal.

To the same effect is the text in 1 C. J. p. 691, § 276.

[5] Irrespective of whether the court considered the defendant's delay and his explanation thereof such as to constitute the account a stated account, what we have set forth shows that the judgment should be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

135 Cal.App. 563

ROSS et al. v. REAL ESTATE INV. CO. et al.

Civ. 8064.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1933.

1. Evidence ⇐53.

Presumption that private transactions have been fair and regular is "evidence" (Code Civ. Proc. § 1963, subd. 19).

[Ed. Note.—For other definitions of "Evidence," see Words & Phrases.]

2. Appeal and error ⇐1008(1).

Whether purchaser, who rescinded and sought to recover money paid under contract for misrepresentation of location of lots, decided to buy specific lots at his office or on tract, and whether he knew numbers of lots he actually bought, *held* for trial court.

3. Vendor and purchaser ⇐44.

Evidence supported finding that sales agent did not misrepresent location of lots to purchaser, who rescinded and sought to recover money paid under contract (Code Civ. Proc. § 1963, subd. 19).

4. Vendor and purchaser ⇐341(1).

Proceeding to recover money paid under contract by purchaser who rescinded being an "action at law" and not "suit in equity," finding whether purchaser was guilty of laches barring action *held* immaterial.

[Ed. Note.—For other definitions of "Action; Action at Law" and "Suit in Equity," see Words & Phrases.]

5. Vendor and purchaser ⊂⇒44.

In action to recover money paid under contract by purchaser who rescinded because of alleged misrepresentations of sales agent inducing purchase, evidence *held* not to show that agent falsely represented that contract was let for immediate construction of houses in vicinity of lots purchased.

6. Vendor and purchaser ⊂⇒44.

Evidence supported finding that purchaser confirmed contract after knowledge of falsity of sales agent's alleged representations of location of lots and of construction of houses in vicinity thereof, precluding recovery of money paid under contract by purchaser who rescinded.

7. Vendor and purchaser ⊂⇒303.

Tender of deed by vendor, not required by contract to tender performance before exercising right to accelerate deferred payments on default in payment of any installment, *held* not condition precedent to suit for deferred payments after purchaser defaulted.

8. Vendor and purchaser ⊂⇒77.

Purchaser who gave notice of rescission, thereafter defaulting in monthly payments, and sued for amount paid on contract for fraud of vendor, whom court found not guilty, *held* in default for which vendor could accelerate deferred payments as provided in contract.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by K. F. Ross and another against the Real Estate Investment Company and the Security-First National Bank of Los Angeles, an association, which filed a cross-complaint. From a judgment for cross-complainant, plaintiffs appeal.

Affirmed.

For prior opinion, see 26 P.(2d) 30.

George Acret, of Los Angeles, for appellants.

C. E. McDowell, of Los Angeles, for respondent Real Estate Inv. Co.

Howard F. Shepherd, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

ARCHBALD, Justice pro tem.

September 30, 1929, plaintiffs filed their second amended complaint against defendants, alleging in substance that, on February 8, 1927, the latter represented to plaintiff Ross that two certain lots in tract 9761, in Los Angeles county, belonging to them, were located at the corner of Avon street and Burbank boulevard, and that, believing such representation to be true, he agreed to purchase them; that on February 28, 1927, Ross executed a writing agreeing so to do, "believing and intending that the same covered and described" the two lots referred to; that he paid $4,594.80 on the agreed purchase price before discovering that said lots were not so located, but were in fact located at the corner of Lima street and Burbank boulevard; that such discovery was made on or about May 15, 1929, and that on June 14, 1929, he rescinded said agreement; that on March 12, 1929, he assigned such agreement to his daughter, the plaintiff Matilda E. Bach, as security for a loan. An amendment was filed to such amended complaint setting up as a second cause of action, not only the alleged representation relative to the location of said lots, but also alleged representations of defendants to the effect that contracts had been let for the immediate construction of one hundred homes in the vicinity thereof; that said houses were going to be constructed immediately; that a schoolhouse was to be built within a year a few blocks from said lots and would be ready for the following fall term, and other representations; that such representations were believed and the property purchased by said plaintiff in reliance upon them. The statements were alleged to have been false and to have been recklessly made, and allegedly known to defendants to have been false and untrue and recklessly made at the time they were made. The prayer of the amended complaint was for the return of the money alleged to have been paid on such purchase price. Both defendants filed answers denying the making of such representations, as well as denying the other material allegations of the complaint not admitted. The answer of defendant Security-First National Bank of Los Angeles also set up as a separate defense that plaintiffs were guilty of laches, and that of defendant Real Estate Investment Company that both causes of action were barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. Said Security-First National Bank also filed its cross-complaint against both plaintiffs for the balance due on said contract. The court made findings and entered judgment that plaintiffs take nothing by their complaint, and that the cross-complainant Security-First National Bank recover of and from cross-defendants the sum of $4,511.30. Plaintiffs and cross-defendants have appealed from such judgment.

Appellants contend that the court erred in making certain findings claimed to be not supported by the evidence, and in awarding a money judgment against them.

Respondent Real Estate Investment Com-

pany in 1926 and for several years thereafter was engaged in selling, among other properties, the lots in said tract 9761. Respondent Security-First National Bank held the legal title to said tract in trust for the various interested parties. One R. H. Strosnider was an agent employed by the Investment company to sell the lots. The latter met appellant Ross in December of 1926 at Ross' office, and endeavored to interest him in buying lots in the tract. It is Ross' contention that he looked at the lots at the southeast corner of Avon street and Burbank boulevard; that he did not know anything about their legal description; that he became interested because they were only one block from an important thoroughfare; and that he finally agreed to buy them. The lots said appellant claims to have agreed to purchase are numbered 107 and 108, the first being on the southeast corner of Avon street facing Burbank boulevard and the second just east and alongside of it. To the east of lot 108 and parallel therewith are six lots each 25 feet in width, and parallel with and adjoining these to the east are lots 115 and 116, being on the opposite corner of the block from 107 and 108. Lots 115 and 116 are the ones described in the purchase agreement signed by Ross. On January 17, 1927, Ross and Strosnider executed a combination receipt and agreement to purchase lots 104 and 105 of tract 9761. It does not appear that the parties ever discussed such lots. The so-called receipt fixes the price of the lots at $8,100, but the blanks providing for payments to be made are not filled in. Written in one of them, however, is the acknowledgment of the receipt of two pieces of jewelry which Strosnider was to try to sell. The sale price, if satisfactory, was apparently to be applied as the first payment. Strosnider's explanation is that it was a temporary receipt for the jewelry rather than an agreement, and it is not satisfactorily explained by any one how or why lot numbers were inserted therein.

On February 8, 1927, a receipt was executed by Ross and Strosnider acknowledging the deposit of $1.00 by Ross and "accepting one diamond ring and one diamond and opal pennant [sic] in lavalier as the full down payment of $2025.00." The total purchase price agreed to be paid by appellant Ross was $8,100, and the balance was to be paid in monthly instalments of $105, with interest on deferred payments at 7 per cent. per annum. The agreement was conditioned on acceptance by the owner. Lots 115 and 116 were described therein. The evidence shows that the jewelry was not sold but was finally pledged by Ross and $700 in cash obtained, which was paid to Strosnider, and that Ross gave his note for $800, which he paid on May 28, 1927. The court found that $1,575 was paid in cash, and that the agent waived $450 of his commission, which made the first payment of $2,025. February 28, 1927, Ross entered into a final contract for the purchase of said lots 115 and 116, with the Security Trust & Savings Bank, respondent bank's predecessor. On November 10, 1927, the trust department of the Security Trust & Savings Bank sent a notice to Ross reading in part as follows: "Payment will be due No. 15 on your contract—Note covering Lots 115 & 116, Tract 9761, as follows: Taxes for fiscal year 1927–1928, amounting to $48.63." This notice was stamped, "Received Payment No. 21, 1927," and was signed by the bank. It was introduced in evidence by plaintiffs as Exhibit 11. Plaintiffs also introduced in evidence a receipt signed by appellant Ross dated July 14, 1927, reading as follows: "Received of Guaranty Office, Security Trust & Savings Bank, contract for Lots 115 & 116, Tract 9761."

The court found in effect that defendants did not represent that the lots which Ross agreed to purchase were located at the corner of Avon street and Burbank boulevard, but did represent that such lots were located at the corner of Lima street and said boulevard, "at which point said lots were in fact actually located."

[1-3] Appellants urge that there is no evidence conflicting with that of Ross to the effect that he picked out and agreed to buy the lots at the corner of Avon street and Burbank boulevard, and that he knew nothing about the numbers of such lots until more than two years after he had agreed in writing to buy the two lots actually located at the corner of Lima street. The evidence does not show any inadvertent insertion of lots 115 and 116 in such contract, and is only consistent with the fraudulent insertion of such numbered lots in the contract after respondent's agents discovered that the lots agreed to be bought by Ross had in fact been sold to some one else before the deal with Ross reached the closing stage. That was plaintiffs' theory at the trial, and is the only theory consistent with the evidence, if appellants' position is correct. Opposed to the evidence of appellants as to the manner in which the lots were selected and Ross' lack of knowledge as to the lot numbers are the writings signed by the latter and which were in his possession during the period of two years and more, as well as the presumption that private transactions have been fair and regular (section 1963, subd. 19, Code Civ. Proc.), which presumption is itself in effect evidence, and which the court had a right to find was not dispelled by the evidence in this case. In addition is the evidence of agent Strosnider to the effect that the school site was "directly" across the street from the lots selected by Dr. Ross, and the evidence that it is directly across from lots 115 and 116, and not so from the Avon corner lots; his denial that he stood with Dr. Ross on the corner of Avon

and Burbank, and told the latter "that was the corner"; that "all of the lot numbers indicated on these receipts [with the exception of the first one] were dealt with in his [appellant Ross'] office and on the tract," and that he "left a map, to the best of my knowledge, with him * * * the first time I talked to him," which showed the "lots and blocks." That Strosnider actually had such map at the time of his visit to the office is clear from appellant Ross' testimony. During the latter's examination, the following occurred:

"Q. You mean to say that he [Strosnider] brought a map in and you wouldn't look at it because you were too busy? A. Absolutely. * * *

"Q. He had a map that showed the tract, but you were too busy to look at the lots he was selling? A. Why should I bother with a map? I didn't know whether I wanted to buy the property unless I saw it."

The question of the weight to be given to the testimony of the various witnesses was for the trial court, as was the question of whether or not appellant Ross arrived at the decision to buy specific lots at his office or on the tract, and whether or not he knew the numbers of the lots he actually bought; and in view of the record we cannot say that there is no substantial evidence to support the finding made.

The first writing, relative to the actual purchase of specific lots, was dated February 8, 1927; the final agreement was dated February 28, 1927. The date Ross claims to have first discovered the real location of the lots described in his contract is the latter part of May, 1929, the notice of rescission is dated June 14, 1929, and the original complaint herein was filed July 15, 1929. Over twenty-seven months intervened between the date of the contract and the attempted rescission, and over twenty-eight months before complaint was filed. The evidence shows without conflict that appellant Ross made frequent trips past the tract during such time, and he must have known that no buildings, or school buildings, were built or construction thereon started, either immediately or at all, complying with the alleged misrepresentation; and, as we have said, in our opinion the evidence supports the finding that no misrepresentation was made as to location of the lots purchased. The receipts and contracts executed were at all times kept in Dr. Ross' desk in his office, and the court might well conclude that he had a map of the tract. No allegations are contained in the complaint in any way attempting to excuse the failure to discover the alleged fraud before said late date. Under such evidence the court found that appellants were guilty of laches.

"It is well settled that where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so." Bancroft v. Woodward, 183 Cal. 99, 108, 190 P. 445, 449.

Appellant, respondent Security-First National Bank, and the trial court, evidently considered this to be an equitable action. There is evidence from which the court might well have concluded that sales in the locality kept up until 1929 and that appellant did not rescind until the demand for lots had lessened, and that respondents were prejudiced by his delay in rescinding. If this is an equitable action, in our opinion the evidence amply supports the finding of laches.

[4] The amended complaint, however, is based on an executed extrajudicial rescission alleged to have been made by plaintiff Ross. No demand is made for the exercise of any of the equitable powers of the court, but only for the recovery of the money paid under the contract alleged to have been already rescinded. In our opinion it is not a suit in equity, but an action at law, and such finding is on an immaterial point.

[5] Appellant urges that the representation was "that a contract was actually let for the immediate construction of one hundred houses," and not "that one hundred houses were immediately going to be built." We see little practical difference so far as affording notice to plaintiff, who, the evidence shows, passed by there frequently during the entire time after the contract was made. Respondents' answers admit that no such contract was let, although they deny that the representation was made. It is contended that Mr. Strosnider admits such statement. The only question he was asked was whether he recalled "saying anything about the houses being constructed there on the tract," to which he replied: "That may have been brought up that there were going to be houses built there, which there were three built, * * * I think in the spring or summer of 1927." It appears, however, from plaintiff's own testimony, that such conversation occurred after the final agreement of February 28, 1927, was executed, so we fail to see how it could have been any inducement to the contract. Plaintiff did testify that he went out alone to the tract in December, 1926, and heard a lecturer for a few minutes, and heard the same lecturer again with Strosnider, after signing the contract, and the court might well have concluded that he heard no such statement in December 1926, or at any time prior to the signing of the contract, and in our opinion,

even assuming that such a statement was made after the contract was signed, the finding made by the court referred to the statement alleged in the complaint, which was an inducement to the execution of the agreement, and in our opinion the evidence supports the finding that no such statement was made.

[6] In view of the evidence showing the frequent passing of the lots by plaintiff during all the time and of his continued payments on the contracts, even though no houses or school houses were built, in our opinion there is ample evidence to support the finding that appellant confirmed the contract after knowledge of the falsity of the alleged representations.

[7] Appellant Bach, at the time of the assignment of the contract to her, in writing agreed "to fully perform said agreement according to its terms." Under and by virtue of such written promise the court gave judgment for the unpaid balance of said contract against both appellants. No tender of a deed was necessary before bringing suit for such unpaid installments, under an express term of the agreement itself which provides "that no tender or offer of performance by said seller shall be necessary as a condition precedent to its right to exercise any privilege, option or right hereunder, and that the same may be exercised upon any default of the buyer without such or any tender or offer of performance and without notice of any kind to said buyer." One of such rights is to accelerate the deferred payment in default of payment of any installment. The evidence shows that at the time the cross-complaint was filed appellants had defaulted on two monthly payments, viz., those of June 15 and July 15, 1929, and the court found that the respondent bank elected to and did declare the unpaid purchase price immediately due and payable, which was its right under said agreement.

[8] Appellants urge that they were not in default, having rescinded and brought an action to recover the amount paid on the contract, and cite the case of Roome v. Real Estate Inv. Co. (Cal. App.) 21 P.(2d) 599. We fail to see that such case is in point here. In that case it was contended by defendants that plaintiffs had waived their right to damages by reason of their failure to make payments under the contracts, which provided that time of such payments was of their essence, and that the vendors had elected to declare the principal due and payable. This court there said [page 600 of 21 P.(2d)]: "Under a claim of fraud in such a case the buyer will be permitted to withhold payment of the purchase price pending a suit for alleged damage, but must be willing and able to pay if and when liable therefor." In other words, there was no waiver of their right to claim damages by reason of such failure to pay pending suit, and, if the plaintiffs were successful and fraud were established, defendant was not in a position to claim forfeiture, and plaintiff was justified, if fraud existed, "in withholding the payments to recoup the damages she would be entitled to recover." Pembrook v. Houston, 41 Cal. App. 54, 181 P. 828, 829. The same is true here. If the court had found respondents guilty of fraud, then no right of acceleration or any rights under the contract would have existed; but, a contrary finding having been made, appellants became liable to pay the amount which the court determined to be due under the contract.

All of the briefs were filed before the adoption of section 2, rule VIII of the Rules of the Supreme and District Courts of Appeal, relative to statements of the questions involved on appeal being set forth in the briefs. Appellant inserted seven such questions in his opening brief. Some of them are very complicated and cannot be answered "yes" or "no," and we think they are fully covered in this opinion.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

135 Cal.App. 500

ALLEN v. McCOY, Sheriff, et al.

Civ. 4991.

District Court of Appeal, Third District, California.

Dec. 29, 1933.

False Imprisonment ⇐31.

In false imprisonment action by one arrested because of mistaken identity, evidence established that plaintiff knew or should have known that sheriff and others who made arrest were peace officers when he ran into cabin in apparent attempt to escape.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

On motion for rehearing.

Motion denied and original opinion modified.

For original opinion, see 27 P.(2d) 423.

Ray Manwell and Rich, Weis & Carlin, all of Marysville, for appellants.

W. E. Duncan, Jr., and George F. Jones, both of Oroville, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

PER CURIAM.

Upon motion for rehearing, it is ordered that the following modifications of the opinion be made: Strike out the language "both sheriffs, their" on page 424 of 27 P.(2d) line 14 from the bottom thereof, and substitute in lieu thereof the following, to wit: "The Sheriff McCoy, his"; on page 424, line 25, of the same volume change the words "two sheriffs" to "the sheriff"; on page 426, line 20 from the bottom, substitute the word "present" for the word "visible"; on page 424, line 44, strike out the figures "6 by 8" and insert the word "seven" in lieu thereof. With these modifications, the petition for rehearing should be denied.

The petitioner contends that the recitation of facts is inaccurate and unfair. We think not. In view of the criticism, we deem it advisable to cite the record in support of the particular challenged statements of facts. Petitioner denies that the door of the cabin opens toward the gate as alleged in the opinion. The plaintiff himself testified in that regard: "I was engaged in writing a letter, * * * I heard two or three automobiles, and it seemed as though they had stopped out on the road. * * * I stepped to the door with my pen in hand and looked out and I seen three cars * * * at the gate, and a man opening the cattle gate." This is material, only, to show that the plaintiff was aware of the approach of the officers. He admits that he saw them coming through the gate from the open doorway.

The size of the front porch was inaccurately estimated. Unfortunately the diagram of the cabin which was used at the trial was not brought to this court on appeal. The discrepancy is, however, slight. We called it an 8-foot porch. It is conceded the cabin is 12 by 16 feet in size. The plaintiff testified that "the porch landing is possibly 2½ feet from each corner of the cabin." This leaves at least a 7-foot porch. The record has been changed to conform to that estimate.

Petitioner challenges the statement that the plaintiff's car was parked near the cabin under a tree. Sheriff McCoy testified in that regard, "The machine was further over to the right; there is a tree there, and the machine was under the tree." The forest ranger, Mr. Ruth, said it was parked "fifty or sixty feet below the cabin." Its exact location is not of great importance.

It is asserted the court was not warranted in saying that the sheriff and his deputies, with their official badges plainly displayed, and armed with weapons, approached the cabin. Several witnesses substantially so stated. The sheriff testified in that regard: "Q. Did any of your officers have badges on that day? A. Yes, Mr. Wilcoxon had a badge in sight, and the Deputy Sheriff, Richardson, had a tan shirt and star on it,—a deputy sheriff badge, and John Couch, the Traffic Officer, was dressed in full uniform with a badge on, and also his six shooter strapped to his side, * * * and Clarence Ruth, of the Forest Service, I think had on a pair of regulation forestry pants and shirt. * * * I had a badge on myself, and it was on my vest." He further testified in regard to their uniform: "John Couch, Harvey Richardson, Paul Barrett, Phil Wilcoxon, Lawrence Ruth, Merle Reams, and a man named Tom Hunt (were there). * * * There were eleven without Boras * * * including four of our deputies." This statement was followed by the evidence of the respective officers showing that Couch was a traffic officer in uniform; Richardson was a highway patrolman and deputy sheriff; Barrett was a deputy sheriff who wore his badge; Wilcoxon was also a deputy sheriff who wore his badge; and Ruth was a forest ranger, but it does not appear whether he was in uniform or not. The evidence is very convincing to the effect that a formidable posse of armed and uniformed officers approached the cabin. It seems improbable that any reasonable person should fail to recognize them as a group of peace officers.

The statement in the opinion that the officers did not fire to hit the inmates of the cabin, but rather to induce them to surrender, is challenged as untrue. The sheriff fired two charges of buckshot into the building after the plaintiff "ducked into the cabin." One charge took effect in the boards over the window 5 feet from the ground. The other charge took effect 4½ feet from the ground. Standing on the ground near by, the course of the charge would be upward. The third charge was fired into the ground at the base of the building. Two rifle shots were fired into the gable or roof of the building. The plaintiff was not hit. Regarding his purpose in firing into the building, the sheriff said, "When he dove in (the cabin) I fired a shot at the window; I naturally thought he was going after a rifle. * * * I didn't want to kill him; I could have killed him right there on the porch. * * * I never shot at Allen or at the door; * * * the first shot was against the window, and the second shot was lower down, and the third shot did not strike the cabin. * * * I was satisfied in my own mind that the Weston gang were in that cabin. * * * I didn't intend to shoot the man. * * * I was going to keep him away from the window. * * * I wanted him to come out of the cabin."

It would have been unfortunate if the plaintiff had been hit. The only material question to be determined in this case is whether the sheriff in good faith handcuffed the plaintiff with reasonable cause to believe that he was one of the kidnappers whom he sought to arrest. If he had shot to kill

the inmate of the cabin, it might have been stronger evidence corroborating his claim that he thought he was a member of the desperate Weston gang. The evidence is satisfactory to the effect that the sheriff did not shoot intending to kill or injure the plaintiff.

The petitioner says: "There isn't a bit of testimony in the record * * * that the tracks led from the gate to the cabin, nor that the sheriff followed the tracks to the cabin." The opinion does not so state. It merely states: "These tracks were * * * followed for a distance of more than a mile to a gate leading into the Simpson ranch. * * * Sheriff McCoy said he just assumed the fugitives were staying in the cabin and that he did not attempt to trace the tracks beyond the gate." This is an accurate statement of the undisputed record, most favorable to the plaintiff.

It is insisted the record does not support the statement that a loaded rifle was found in the wrecked car of the kidnappers. This charge seems trifling. Sheriff McCoy testified in that regard, "When (we reached) the car that turned over I told Mr. Wilcoxon to get in the car and search it, * * * and in the car he found a gun loaded and cocked, and also a box of rifle (shells) were found in the car." Mr. Wilcoxon testified, "I found a lot of masks, a 44 or 45 * * * single action gun and cocked and some whiskey." On cross-examination by the plaintiff's attorney, of Mr. Le Boeuf, the kidnapped officer, this colloquy occurred, "Q. Were you * * * covered with a rifle all the way there? A. Yes sir. * * * One of the fellows wanted to 'give it to me' a couple of times." It is immaterial whether the kidnappers were possessed of a rifle or a revolver. The importance of this evidence is to show that the sheriff had reason to believe he was in pursuit of desperate criminals. Very likely the wreck of the automobile is all that saved the kidnapped officer from being shot.

It may be true that the uniformed highway officers were not in sight of the plaintiff at the time he was handcuffed. We have therefore modified the opinion to state that they were merely present. But the plaintiff did admit seeing the entire group coming through the gate. The only point is that as a reasonable man he should have recognized the group as peace officers and he should have surrendered without disappearing in the cabin. His conduct tended to confirm the officers in their belief that he was one of the kidnappers. In support of the statement that the highway officers were present, Mr. Couch testified he was present near the sheriff when Mr. Allen came out of the cabin and was handcuffed. He said he was dressed "in the state uniform,—the state traffic officer's uniform. * * * I had everything on except the coat we wear in hot weather. Q. Did you have your badge on? A. Yes sir. Q. Did you approach the cabin with the other officers? A. We did. Q. Did you see the sheriff at the time he approached the cabin? A. Yes sir. * * * Q. Did you see the plaintiff Allen there? A. Yes sir. * * * He was to the right of me."

It does appear that Sheriff Toland of Butte county and his deputies were not with Sheriff McCoy when the arrest was made. That was an inadvertence which has been corrected. It is, however, of little importance.

Finally the petitioner challenges the statement that he shook hands good-naturedly with the sheriff and told him he was not harmed. Mr. McCoy testified in that regard, "The last word he said was 'Sheriff don't worry, I'm all right,' and he shook hands with me and bid me good bye." This seems like an assurance of good will. But it is insisted we should not accept the statement of defendant McCoy in that regard. The plaintiff was not called to rebut this statement. Moreover, Mr. Kennedy of the state forestry department, and Mr. Curran, deputy sheriff of Butte county, testified to facts which tend to impeach and challenge the good faith of the plaintiff in prosecuting this action. They both said that he afterwards declared in the sheriff's office at Marysville, "I am not hurt but will bring an action to see what I can get." Although he at first declared he had been hit by a stray shot, several witnesses testified they examined him and his shirt at the place where he claimed to have been hit, and that there was no evidence of the presence of an injury on his person, and no hole penetrating the shirt.

We are satisfied the opinion as modified contains a fair and accurate statement of the facts of the case. The record is convincing of the fact that the sheriff in good faith, with reasonable cause to believe that he was arresting a member of the kidnapping gang of criminals, placed handcuffs upon the plaintiff, where they remained for only a few moments and were then removed with an apology. The record does not support the judgment. To permit a judgment to stand under such circumstances would result in a miscarriage of justice and would discourage peace officers from performing their duty.

The petition for a rehearing is therefore denied.

136 Cal.App. 172

WILLIAMS v. CALIFORNIA MILK PRODUCERS' ASS'N et al.

Civ. 1459.

District Court of Appeal, Fourth District, California.

Jan. 5, 1934.

Hearing Denied by Supreme Court March 5, 1934.

1. Criminal law ⇐980(1).

Where plea of guilty has never been made, but has been entered either by mistake or wrongfully, plea is void and cannot be made basis for valid judgment.

2. Criminal law ⇐252(5).

Police court has inherent power to set aside entry of plea of guilty when it appears that same should not have been entered, and that, in fact, defendant has not made such plea.

3. Malicious prosecution ⇐35(1).

Criminal proceeding *held*, as respected right to sue for malicious prosecution, to have terminated successfully for defendant therein, where plea of guilty wrongfully entered by police judge was thereafter set aside and case subsequently dismissed for failure to prosecute.

4. Malicious prosecution ⇐64(2).

Evidence in action for malicious prosecution *held* to sufficiently establish arrest and prosecution without probable cause.

5. Malicious prosecution ⇐32.

Lack of probable cause for prosecution sufficiently supports inference of malice.

6. Malicious prosecution ⇐64(2).

Evidence in action to recover damages for malicious prosecution *held* to sufficiently support finding as to malice.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Roy J. Williams against the California Milk Producers' Association and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

O'Connor & Findlay, of Colton, for appellants.

Ralph W. Eckhardt, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for malicious prosecution. The defendant corporation was engaged in the business of retailing milk in the city of San Bernardino, and defendant Schnepp was its route foreman. About four months prior to March 3, 1932, the plaintiff entered the milk business in San Bernardino and by personal solicitation obtained some one hundred and forty customers, taking from 30 per cent. to 40 per cent. of them from the defendants. Shortly before 4 o'clock on the morning of March 3, 1932, plaintiff delivered a bottle of milk to one of his customers, picking up five empty milk bottles from the customer's porch. As he returned to his loaded milk truck the defendant Schnepp, who had been appointed a special deputy sheriff, appeared and arrested him, although the plaintiff told him that he was delivering milk there and had a right to take the bottles. It conclusively appears that it had long been the custom in San Bernardino for all milk dealers to pick up all empty milk bottles as they delivered milk to their customers, regardless of the ownership of the bottles, turning the same in to a bottle exchange where they were sorted and returned to their respective owners. It further appears that the defendants knew of this custom, that they were themselves conforming to this practice, and that they had been in the habit of doing this very thing at the house where the plaintiff had just delivered this milk. Schnepp compelled the plaintiff to leave his truck load of milk standing in the street and took him to the police station, where he had him booked on a charge of stealing the bottles. He told the desk sergeant to hold the plaintiff for an hour and then release him.

The plaintiff was ordered to return at 10 o'clock the same morning and, at that time, the acting police judge asked him whether he was guilty or not guilty. The plaintiff replied: "I was the fellow that got the bottles but I didn't have no intention of stealing them." The acting police judge was not called as a witness in this case, but his records were introduced, which show that he entered a plea of guilty and fined this plaintiff $10, suspending the sentence for one year. As to what occurred in the police court one of the appellant's delivery men testified as follows: "Well, as I recall it, he admitted taking the bottles and came right back by saying he was allowed to take them, didn't say he stole them, but said he took the bottles, but was supposed to take them, didn't make a direct answer, guilty or not guilty." The respondent did not know that a plea of guilty had been entered until he read it in a newspaper the next morning. He immediately consulted an attorney, who filed a motion, supported by affidavits, to cancel and set aside the plea of guilty on the ground that no such plea had been made. The motion was granted on stipulation of the city attorney, a plea of not guilty was entered, and the case set down for a jury trial. After a couple of continuances the case was dismissed for failure

to prosecute, and this action followed. The court found in all respects in favor of the plaintiff, giving him judgment for $500, from which judgment this appeal is taken.

The first point raised is that the evidence conclusively shows that the prosecution for theft did not terminate favorably to the respondent. This is based upon the contention that the police judge was without power to set aside the plea of guilty which had been entered, and that all subsequent proceedings in the police court were therefore void. The appellant relies on the case of Plum v. Becket, 120 Cal. App. 507, 7 P.(2d) 1111. While it was held in that case that the setting aside of the judgment and sentence did not have the effect of setting aside the conviction which had been had on the merits, the remedies of a motion for a new trial and a motion for arrest of judgment not having been used, we see in that case nothing to support the proposition that, where the basic proceedings are void, they may not be set aside by a proper procedure. In that case, when the judgment and sentence were set aside, a conviction on the merits still remained. In the case now before us, when the judgment was set aside, nothing remained but the entry of a plea of guilty when all of the evidence shows that such a plea had not, in fact, been made. It appears that the ordinary remedies of a motion for a new trial and a motion for arrest of judgment were not available to the respondent, since these motions are purely statutory and the statutory grounds did not here exist. Under such circumstances the statutory remedies have no application, and a procedure based upon the common law has developed to meet the lack of a statutory remedy. This procedure has taken the form of a motion properly supported. People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Perez, 9 Cal. App. 265, 98 P. 870. In the last-named case the court said: "It is claimed by respondent that no such proceeding is known to our practice as an application for the writ of 'error coram nobis'; but we need not discuss this technical phase of the question, as we consider the proceeding here equivalent to a motion that the court set aside the judgment and permit the defendant to withdraw his plea of guilty upon the ground that it was extorted from him by fear of violence. That such a motion is proper we entertain no doubt. A confession of guilt obtained by duress is void and cannot be the basis for a valid judgment. The statute does not expressly provide how the action of the trial court shall be invoked for the avoidance of such a judgment, but under the authorities it is clear that the proper procedure is by motion supported by documentary or oral evidence, or both."

[1-3] Where a plea of guilty has never been made, but has been entered either by mistake or wrongfully, the plea is void and cannot be made the basis for a valid judgment. In our opinion, a police court has the inherent power to set aside the entry of a plea of guilty when it is made to appear that the same should not have been entered and that, in fact, the defendant has not made such a plea. Wildenhayn v. Justice's Court, 34 Cal. App. 306, 167 P. 305; In re Glavich, 74 Cal. App. 144, 239 P. 707. After all, this is merely correcting the record to make it speak the truth. The respondent was not represented by an attorney in the original proceeding in the police court, and, as soon as he obtained knowledge that a plea of guilty had been entered, he consulted an attorney and immediate steps were taken to make the proper correction. That the contentions of the respondent with respect to the plea entered were meretorious is indicated, not only by the evidence in this case, but by the action taken by the city attorney and the police judge. For the purposes of this action it must be held that the criminal proceeding, upon which it is based, terminated successfully for the respondent.

[4] It is next contended that it appears from the evidence that the appellants had probable cause to prosecute the respondent on the criminal charge of stealing milk bottles. From the evidence it appears that appellant Schnepp knew for some time before the 3rd of March that the respondent was active in soliciting customers and in building up a new milk route, and that, on the occasion in question, he secreted himself on private property and waited until the respondent came along with his truck. The truck was fully loaded with milk and bottles, was lighted, and the respondent at the time had just completed a delivery of milk to a customer. Schnepp knew that all milk dealers collected all bottles left out by the customers and turned them in to the bottle exchange for proper sorting and delivery. His own company had always followed the same practice. At the time of the arrest he was told by the respondent that he was delivering milk to a customer and that he had the right to take the bottles. He compelled the respondent to leave his loaded truck standing in the street and took him to the police station where he ordered him held for an hour and then released. It also appears that he arrested the respondent before he looked at the bottles to see whose property they were. The evidence, with the reasonable inferences therefrom, not only supports the court's findings, but tends to show a rather flagrant case of arrest without probable cause. It is impossible to read the record without coming to the conclusion that this arrest was made solely in an attempt to further the business interests of the appellants.

[5, 6] The further argument is made that no malice appears. The lack of probable cause sufficiently supports an inference of

malice. Shaffer v. Arnaelsteen, 54 Cal. App. 719, 202 P. 946. The further facts that a well-known competitor of the arresting officer, who had an established business and was available at all times, was forced to leave his loaded truck standing in the street, that his detention was ordered for a time just sufficient to seriously interfere with a proper service to his customers, and that the charge of theft was based upon an act customarily and universally done under an arrangement to which all deliverers of milk were and had to be parties, are, in themselves, sufficient to support the court's finding as to malice. The fact that the arresting officer testified that he bore no malice toward the respondent merely presents a conflict with which we are not concerned.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 738

BEKINS VAN & STORAGE CO. v. STATE.

Civ. 4985.

District Court of Appeal, Third District, California.

Dec. 14, 1933.

As Modified Jan. 6, 1934.

1. Taxation ⇐543(2).

Statutory requirement of first presenting claim to state board of control for taxes illegally collected is condition precedent with which taxpayer must comply before court acquires jurisdiction to entertain suit therefor against state (Pol. Code, § 667, as amended by St. 1927, p. 452; Const. art. 20, § 6).

2. Taxation ⇐543(2).

Attorney General could not confer jurisdiction upon trial court by filing answer to complaint against state to recover taxes levied and paid under protest by taxpayer who had not first presented claim to state board of control (Pol. Code, § 3669a, and § 667, as amended by St. 1927, p. 452; Const. art. 20, § 6).

3. Courts ⇐24.

Consent of respective litigants may not confer upon court jurisdiction of subject-matter not otherwise existing.

4. Appeal and error ⇐78(3).

No appeal lies from order sustaining demurrer to complaint without leave to amend when no judgment has been rendered or entered pursuant thereto (Code Civ. Proc. § 963).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by the Bekins Van & Storage Company against the State. From an order sustaining a demurrer to an amended complaint without leave to amend, plaintiff appeals.

Appeal dismissed.

Harry A. Encell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for the State.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a suit to recover taxes levied and paid under protest. On the theory that plaintiff is a common carrier of freight, taxes were levied against it by the state of California under the provisions of article 13, section 15, of the Constitution. August 10, 1929, the plaintiff paid under protest the first installment of those taxes amounting to the sum of $4,126.20. November 13, 1931, this suit was commenced against Charles G. Johnson, as treasurer of the state of California, to recover the taxes alleged to have been wrongfully levied and collected since the plaintiff does not constitute a common carrier engaged in hauling freight over the public highways of California "between fixed termini." No claim for the payment of the taxes was first presented pursuant to section 667 of the Political Code as amended. The Attorney General filed an answer to the complaint denying all the material allegations thereof. March 31, 1932, by stipulation, this case was consolidated with two other similar actions for trial. The causes were tried and submitted for determination. October 28, 1932, a minute order was entered by the court directing judgment for the plaintiff. A motion for new trial was subsequently made and denied. January 3, 1933, by stipulation, the state of California was substituted as the party defendant, in the place of Charles G. Johnson, as treasurer of the state of California. The Attorney General then filed a demurrer in behalf of the state of California, on the ground, among others, that the complaint fails to state facts sufficient to constitute a cause of action, chiefly because it did not appear the plaintiff had first presented its claim for payment of taxes pursuant to the provisions of section 667 of the Political Code (as amended by St. 1927, p. 452). The demurrer was sustained with leave granted to amend the pleading. January 28, 1933, the claim was for the first time filed with the board and disallowed. February 27, 1933, an amended complaint was filed in this action setting up the presentation and disallowance of the claim. March 9, 1933, the Attorney General filed a demurrer to the amended complaint setting up the bar of the action by virtue of the statute of limitations. April 6, 1933, this

demurrer was sustained without leave to amend. No judgment was rendered or entered upon this minute order. Notice of appeal was served by the plaintiff "from the order, made, filed and entered in the above entitled court in the above entitled action on the 6th day of April, 1933, wherein and whereby the demurrer of defendant to plaintiff's amended complaint on file therein was sustained without leave to amend."

The appellant contends that the tax money which is involved in this suit was levied and paid under mutual mistake, and that the presenting of a claim pursuant to section 667 of the Political Code is not a prerequisite to the maintaining of a suit to recover money under such circumstances, that the original complaint was filed within three years after the payment of the money under protest, and that, regardless of the subsequent running of the statute of limitations, the Attorney General conferred jurisdiction upon the trial court by first filing an answer containing a general denial of all material allegations of the original complaint.

Suits against the state of California may be maintained only "in such manner and in such courts as shall be directed by law." Const., art. 20, § 6. Section 3669a of the Political Code specifically authorizes the maintenance of a suit to recover taxes which are illegally levied and collected when the same are paid under protest. That section provides in part: "1. Any company, person or association claiming and protesting as herein provided that the assessment made against him or it by the state board of equalization is void in whole or in part may bring an action against the state treasurer for the recovery of the whole or any part of such tax, penalties or costs paid on such assessment upon the grounds stated in such protest, but no such action may be brought later than the third Monday in February next following the day on which the taxes were due, nor unless such company, person or association shall have filed with the state controller at the time of payment of such taxes a written protest stating whether the whole assessment is claimed to be void, or if a part only, what part, and the grounds upon which such claim is founded; and when so paid under protest the payment shall in no case be regarded as voluntary."

Assuming, without so deciding, that section 3669a and section 688 of the Political Code provide alternative methods of procedure, the plaintiff abandoned his claim against Charles G. Johnson, treasurer of the state of California, under the provisions of section 3669a of the Political Code, when he filed an amended complaint against the state of California on February 27, 1933, based solely upon the provisions of sections 667 and 688 of the Political Code. These sections authorize, as a necessary prerequisite to the maintenance of a suit thereon, the presenting of a claim therefor to the board of control within a specified limited time. The amended complaint affirmatively shows that this claim was not presented to the board within the time allowed by law and that the cause was therefore barred.

[1] Since a suit may be maintained against the state only under conditions specified and in such manner as the statute authorizes it to be done, we are of the opinion the statutory requirement of first presenting a claim to the state board of control, pursuant to section 667 of the Political Code, for taxes illegally levied and collected is a condition precedent with which it is necessary to comply before a court acquires jurisdiction to entertain the cause for trial. That section provides in part:

"Any person who has, or shall hereafter have, a claim on contract or for negligence against the state must present the claim to the state board of control in accordance with the provisions of section 688 of this code. Should the claim not be allowed by the state board of control, the person having the claim is hereby authorized, subject to the conditions contained in this section, to bring suit against the state on such claim and to prosecute such suit to final judgment.

"Except as otherwise provided in this section, the rules of practice in civil suits shall apply to all suits brought under this section. No suit shall be maintained under this section unless such claim be presented to the state board of control in accordance with the provisions of section 667 of this code within two years after such claim shall have first arisen or accrued, and unless such a suit be brought within six months after such claim is rejected or not allowed in whole or in part by the state board of control as provided in section 667 of this code."

[2, 3] It necessarily follows that, if the presenting of a claim for the refunding of taxes illegally levied and collected is necessary as a prerequisite to authorize the maintenance of a suit, then, in the absence of that procedure, the court is without jurisdiction to entertain the cause, and the Attorney General had no authority or power to confer jurisdiction by filing an answer to the original complaint. It is a well-established rule that consent of respective litigants may not confer jurisdiction of the subject-matter upon a court, where the jurisdiction does not otherwise exist. Marin Municipal Water Dist. v. North Coast Water Co., 178 Cal. 324, 173 P. 473; 7 Cal. Jur. 597, § 17; 7 R. C. L. 1042, § 75.

It will be observed that no judgment was actually rendered or entered upon the original complaint. After the minute order directing judgment to be prepared had been entered, a motion for new trial was prematurely made and denied. By stipulation, the state of California was then for the first time substituted as a party defendant. Then, on January 28,

1933, after the statute of limitations had already run upon the cause of action, the claim was first presented to the board for allowance, and, based upon the disallowance of that claim, the amended complaint was filed February 27, 1933. We are therefore satisfied the plaintiff's cause of action was barred by the statute of limitations, and that the court properly sustained the demurrer to the amended complaint refusing to permit the filing of another amendment thereto.

[4] Moreover, the effort to appeal from the order sustaining the demurrer without leave to amend is ineffectual, since no judgment was rendered or entered thereon. It has been uniformly held that no appeal lies from an order sustaining a demurrer without leave to amend, when no judgment has been rendered or entered pursuant thereto. Section 963, Code Civ. Proc.; Braren v. Reliable Carpet Works, Inc., 125 Cal. App. 489, 13 P.(2d) 972; 2 Cal. Jur. p. 155, § 26. Since there is no valid appeal in the present case, and this court is without jurisdiction to pass upon the points sought to be raised on appeal, the appeal should be dismissed. Sahakian v. City of Los Angeles, 91 Cal. App. 737, 267 P. 571.

The appeal is dismissed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 693

LA MAR v. LA MAR.

Civ. 1402.

District Court of Appeal, Fourth District, California.

Dec. 11, 1933.

1. Trial ⇐419.

Error in denying motion for nonsuit is cured if at close of trial there is evidence before court supplying defects in plaintiff's proofs.

2. Appeal and error ⇐1170(7).

Order of proof and extent of permissible cross-examination are procedural, and unless miscarriage of justice has resulted in judgment rendered, such errors are not reversible (Const. art. 6, § 4½).

3. Appeal and error ⇐1170(7).
Trial ⇐59(2).

Trial court has wide discretion in regulating order of proof, and absent clear abuse of such discretion, and prejudice to adverse party, admission of evidence out of regular order will furnish no ground for reversal on appeal (Const. art. 6, § 4½).

4. Trial ⇐63(1).

In quiet title action where defendant on direct examination did not testify concerning execution of deed to plaintiff, cross-examination on that subject *held* properly permitted notwithstanding evidence was received out of order (Code Civ. Proc. § 2055).

5. Appeal and error ⇐989.

On appeal from judgment for plaintiff, reviewing court is required to set out only such portions of record as are most favorable to plaintiff and which support judgment disregarding conflicts.

6. Deeds ⇐15, 77.

Consideration is unnecessary to support deed if it is executed by grantor voluntarily with knowledge of its contents and with intent to convey title to grantee, and can only be attacked by person having superior equity which grantor had no right to cut off (Civ. Code, § 1040).

7. Quieting title ⇐44(3).

Facts *held* to show sufficient identification of property to support judgment for wife in her quiet title action against husband.

8. Appeal and error ⇐1011(1).

Judgment for wife in quiet title action would not be reversed because of conflicting evidence as to whether husband's deed to her was obtained by duress when he was aged and feeble.

9. Appeal and error ⇐1170(7).

Judgment will not be reversed because of technical errors in rulings on objections to admission of evidence and in order of proof, where there is no miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by M. A. Bennette La Mar against J. C. La Mar. Judgment for plaintiff, and defendant appeals.

Affirmed.

John A. Hadaller and Charles Bagg, both of San Bernardino, for appellant.

Boyd C. Barrington, of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff recovered a judgment quieting her title to property in the city of San Bernardino. In attacking this judgment the defendant assigns the following errors: (1) Error of the trial court in denying his motion for nonsuit. (2) Error in permitting, over objection, the cross-examination of defendant in a matter about which he had not testified

in his direct examination. (3) Error in permitting plaintiff to make out a new case by way of rebuttal. (4) That the judgment is contrary to law. (5) That a deed dated October 21, 1929, from defendant to plaintiff was void and does not support the judgment for the following reasons: (a) It was without consideration. (b) The contents were neither alleged nor proved. (c) It was obtained by duress, force and undue influence amounting to extortion. (d) It was obtained by the plaintiff wife from her husband while he was aged and very feeble and without his having independent advice.

[1] It has long been the rule in California that any error of a trial court in denying a motion for nonsuit is cured, if, at the close of the trial, there is evidence before the court supplying the defects in the plaintiff's proofs. 9 Cal. Jur. 564; 2 Cal. Jur. 1025, and cases cited. Under this rule the error, if any, in denying the motion for nonsuit was cured by evidence subsequently introduced.

[2] The question of order of proof and the extent of permissible cross-examination are entirely procedural, and, unless a miscarriage of justice has resulted in the judgment rendered, such errors furnish no grounds for a reversal since the adoption of section 4½, article 6, of the Constitution.

[3] The trial court is given a wide discretion in regulating the order of proof in the trial of cases. In the absence of a clear abuse of this discretion, and prejudice to the adverse party, the admission of evidence out of the regular order will furnish no ground for a reversal on appeal. 24 Cal. Jur. 764–766, and cases cited. In the instant case the evidence finally before the trial court, while admitted out of order, was competent and supported the findings and judgment. Under such circumstances we should not reverse a judgment for the sole reason that evidence was admitted out of order in rebuttal without express leave of the court to the plaintiff to reopen her case.

[4] The defendant in his direct examination did not testify concerning the execution of his deed to the plaintiff on October 21, 1929. The plaintiff attempted to cross-examine him on this subject. An objection that this was not proper cross-examination was overruled with the announcement by the trial judge that, if he should later conclude that the evidence was not proper, he would order it stricken from the record. The plaintiff then announced that she called the defendant for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. The defendant objected to this cross-examination upon the ground that the evidence should have been offered as a part of the plaintiff's case in chief. The court did not rule upon this objection, but permitted the examination to proceed. Of course, it would have been more orderly procedure for the plaintiff to have asked for, and the court to have granted, formal permission to reopen her case and to have received the evidence as a part of her case in chief. This was not done, but the action of the court in receiving the evidence out of order had the same effect, and as the evidence was competent and material and supports the findings and the judgment this highly technical objection of the defendant cannot furnish a ground for a reversal here.

[5] In detailing the record we are only required to set out such portions of it as are most favorable to the plaintiff and which support the judgment, disregarding conflicts.

The plaintiff and the defendant married late in life. Plaintiff had owned the property in question for many years. She had occupied it as her home, and after marriage had shared it with her husband. She owned no other real estate. She had signed a promissory note as accommodation maker and was threatened with suit. Upon the solicitation of her husband, and upon his promise to reconvey the property to her, she deeded it to him upon his representation that he would protect her and she would not have to pay the debt. He gave her no consideration for the property, and he recorded the deed without her knowledge. Judgment was obtained against her on the note, which she subsequently paid. She then requested him to carry out his promise to reconvey the property to her. He made numerous promises to do so, but did not perform them until October 21, 1929, when he signed, acknowledged, and delivered to her a deed to the property. She placed the deed in her desk at their home. He subsequently took it from the desk and destroyed it without her knowledge or consent.

Defendant urges that the deed from his wife to himself was executed for the purpose of defrauding her creditors; that she does not come into a court of equity with clean hands, but in pari delicto with her husband; that she cannot be relieved from the results of her own fraudulent act in a court of equity.

It is not necessary under the facts of this case to consider the many interesting legal problems which these contentions present. The trial court found that the deed of October 21, 1929, from the husband to the wife, was made in consideration of his promise to reconvey the property to her and was a good and sufficient deed, properly executed in all respects, and that it transferred and vested title in the plaintiff. If this deed was a good and sufficient conveyance of the property to the plaintiff and vested title in her, it is sufficient to support the judgment even though she be not permitted to attack her earlier deed to her husband.

[6] Defendant urges that this deed is void for lack of consideration. The evidence supports the conclusion that he had discussed this reconveyance to his wife on numerous occasions and without exception expressed an intention to execute the deed; that it was prepared by a reputable attorney of San Bernardino; that the defendant read it over, signed and acknowledged it, and delivered it to plaintiff freely and voluntarily. A consideration is not necessary to support a deed transferring real property if it is executed by the grantor voluntarily, with knowledge of its contents, and with intent to convey title to the grantee (section 1040, Civ. Code), and can only be attacked by a person having a superior equity which the grantor had no right to cut off. Huntoon v. Southern Trust & Commerce Bank, 107 Cal. App. 121, 290 P. 86; McDonnell v. McDonnell, 10 Cal. App. 63, 101 P. 40; Lieman v. Golly, 178 Cal. 544, 174 P. 33.

[7] Appellant urges that the contents of the deed of October 21, 1929, were not proved. By this he evidently means that there is no evidence showing that the property described in the deed was the same as that of the property in question here. It is true that the legal description of the property as set forth in the deed was not reproduced in evidence. Plaintiff did testify that she owned only one parcel of real estate, which was her home on D street, in the city of San Bernardino and which she had owned for many years. The original deed to her was introduced in evidence and contained a full legal description of the property. She also testified that she deeded this property to the defendant and that he reconveyed it to her by the deed in question. We think this sufficient identification of the property to support the judgment.

[8] An examination of the record shows that the evidence is conflicting on the questions presented by subdivisions "c" and "d" of defendant's last specification of error. There is material and competent evidence in the record supporting the findings, which are contrary to these contentions of defendant. We cannot reverse a judgment merely because of conflicts in the evidence.

[9] There is ample evidence to support the findings and the judgment which is a just and equitable determination of the controversy between the parties. There being no miscarriage of justice we cannot reverse the judgment because of technical errors in rulings on objections to the admission of evidence and in the order of proof.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 111

BAILEY v. YOSEMITE PORTLAND CEMENT CORPORATION.

Civ. 8084.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1933.

Rehearing Denied Jan. 26, 1934.

1. Fraud ⇐58(2).

In action for fraud inducing purchase of stock, evidence sustained finding that corporation's agents falsely represented to buyer that corporation was earning 8 per cent. dividends and its stock was selling for $10 per share on market.

2. Fraud ⇐49.

Proof of first two of three allegations in complaint for fraud inducing purchase of stock, that corporation's agents falsely represented to buyer that corporation was earning 8 per cent. dividends, and that its stock was selling for $10 per share on market and would be listed on stock exchange *held* to justify award of damages to buyer (Code Civ. Proc. § 469).

Appeal from Superior Court, Los Angeles County; Robert E. Lambert, Judge.

Action by Mary E. Bailey against the Yosemite Portland Cement Corporation. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

F. H. Pearson, of Fresno, for appellant.

Adolph B. Rosenfield, of Long Beach, for respondent.

CRAIG, Justice.

From a judgment rendered in favor of the plaintiff, the defendant appealed, assigning certain findings of fact as unsupported and erroneous.

[1] The plaintiff alleged that the defendant and its agents intending to deceive and defraud her represented that said company was earning dividends of 8 per cent.; that its stock was worth and was selling generally on the market for $10 per share; that its stock would be listed by it upon the stock exchanges and would for said reasons be worth on a stated date $15 per share. The trial court found that said defendant did by and through its agents represent that said stock "was selling on the market at $10.00 a share and that the said corporation was actually earning 8% dividends" at said times. It is contended that the evidence was insufficient to justify a finding of representations that said stock "was selling on the market for $10.00 per share," and that the further

finding of a representation "that the said corporation was actually earning 8% dividends on said stock at said times" was outside the issues.

[2] The latter finding would seem to amount to no more than an interchanging of words used in the complaint to express the same representation and intent. By a deposition of the plaintiff taken on behalf of the defendant pursuant to stipulation, in response to questions propounded by the defendant's counsel, she testified, among other things, that when representatives of the corporation importuned her to purchase said stock she was informed that "my 8% would commence from the date of the issue of the stock. He told me I had better make a reservation for more shares, as the stock was selling fast and would soon be sold out"; "he told me I would receive my interest from the date of the issue of the stock, that it was actually sold on the market for $10 per share"; "that the stock, the present stock at $10 per share was nearly all sold; that they had only a small share of it left and the first of August it would be listed and put on the market and sold at $15 per share at the regular price"; "yes, I am sure, because I had them explain fully what they meant, and he said it is not listed now. * * * It would not be listed until the 1st of August, and stock would be sold out by the last of the month, meaning August"; "Q. He said he thought by the 1st of August they would have sold all the stock? A. He said he knew." In other jurisdictions it has been held that the plaintiff may treat allegations of misrepresentations as divisible and may succeed if he can prove any one of them which of itself makes a cause of action, but that "it is also true that the plaintiff might recover although he did not prove the misrepresentations precisely as laid (Ladd v. Pigott, 114 Ill. 647, 2 N. E. 503), nor in all the different forms as laid; but, it was required of him to prove substantially the material allegations." Endsley v. Johns, 120 Ill. 469, 12 N. E. 247, 249, 60 Am. Rep. 572. In Gray v. Sanborn, 178 Iowa, 456, 159 N. W. 1004, 1005, the question of variance was presented upon appeal from a judgment based upon an alleged misrepresentation of real property. The rule was there stated as follows: "Plaintiff properly pleaded the representations and statements claimed to have been made to him regarding the lands; but he was not required to prove them verbatim et literatim. He was required to prove representations which were substantially the same as those alleged; that is, statements having the same general meaning and effect. Endsley v. Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572; Fisher v. Mellen, 103 Mass. 503. The law does not require that one prove the representations precisely as alleged. All that he need do is to prove the substance and material parts of such representations. The proof was, we think, within these rules. Aside from this, however, it is not a case of failure of proof of a cause of action, but merely a variance between the allegations and the proof. A failure of proof exists only where no cause of action is proved, while a variance exists when a cause of action is proved which is not alleged." The statute upon which the foregoing decision was founded was similar to section 469 of the California Code of Civil Procedure, which reads as follows: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." It cannot be said that there was a complete failure of proof of a cause of action, nor that there was a proof of a cause of action which was not alleged. In such case it has been held in this state that: "All the arguments advanced by appellant would be pertinent if addressed to the trial court, but they are of no force here because in each instance the record discloses that there is some substantial evidence in support of the finding made. This point is emphasized when we bear in mind that it is not necessary for the plaintiff to prove every item of false representations alleged but that he can recover upon proof of one." Ness v. Timm, 125 Cal. App. 135, 13 P.(2d) 844.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

136 Cal.App. 103

EDDY v. HICKMAN.

Civ. 4978.

District Court of Appeal, Third District, California.

Dec. 27, 1933.

1. Brokers ⇐82(1).

In action for commissions for selling realty under contract whereby commissions were to come from certain fund, complaint which did not allege that fund from which commissions were to be paid materialized *held* insufficient.

2. Pleading ⇐59.

Performance of condition precedent upon which recovery depends must be alleged.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by A. J. Eddy against Louis M. Hickman. Judgment for plaintiff, and defendant appeals.

Reversed.

James F. Peck, of San Francisco, for appellant.

L. J. Maddux, of Modesto, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

[1, 2] Plaintiff brought this action for commissions as real estate agent, for his services in selling three tracts of land owned by defendant.

He recovered judgment for his commissions, and from this judgment defendant has appealed. It is alleged in the complaint that on September 10, 1926, three separate contracts were entered into between appellant, by and through its secretary, and the Westfall Land Company for the sale of three separate tracts owned by appellant. That each of these contracts stated that certain lands therein described had been sold to a purchaser for a sum therein named, and that for its services in selling same the Westfall Land Company was to be paid a commission of 5 per cent. of the amount of the sales, and each of said contracts further provided that the payment of said commissions to the Westfall Land Company should be made in the following manner: By the terms of the contracts entered into with the said purchasers, the purchasers agreed to procure loans as soon as the improvement terms of the said purchasers' contracts were complied with, and the moneys received from said loans were to be paid to appellant, and when so received by it then payment of the said commissions would be made, and, in the event that the purchase price of any of said contracts should be made from crop shares, then appellant would pay to Westfall Land Company 5 per cent. of the money received from such crop shares until Westfall Land Company received the full amount of its commissions. These contracts were duly assigned by the Westfall Land Company to respondent.

Appellant contends that the complaint does not state facts sufficient to constitute a cause of action. At the beginning of the trial of this action he objected to the plaintiff producing evidence upon this ground, and later during the course of the trial he made the same objection. To this objection the trial court said: "I am afraid it does not, I have some grave doubts whether the complaint states a cause of action in any of these cases because the contract provides the money that is to be paid was to come out of a certain fund and if there was money in that fund I think it should be so alleged so that the money if due at all would be due under the terms of the contract. If there were no moneys then there is nothing coming from the source provided by the contract. The ruling will be reserved, I think I shall hear the testimony." Thereafter the court failed to pass upon this objection; presumptively, as the court's decision was in favor of respondent, this objection was overruled.

There is no averment in the complaint that the funds from which respondent's commissions were to be paid at any time materialized, and therefore no sufficient cause of action is alleged in the complaint. Mitchell v. Green, 110 Cal. App. 259, 293 P. 879, Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932.

The performance of a condition precedent upon which the recovery depends must be alleged. McNulty v. New Richmond Land Co., 44 Cal. App. 744, 187 P. 97.

Therefore, respondent having failed to allege the existence of the fund out of which he was to be paid, or a lawful reason for its nonexistence, he failed to state a cause of action. Mitchell v. Green, supra.

As this action must be reversed because the complaint fails to state sufficient facts to constitute a cause of action, we deem it unnecessary to pass upon other points raised by appellant.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 588

BERNESEN et ux. v. FISH et al.

Civ. 682.

District Court of Appeal, Fourth District, California.

Dec. 6, 1933.

Hearing Denied by Supreme Court Feb. 1, 1934.

1. Joint-stock companies and business trusts ⇨1.

Syndicate organized for subdivision and sale of realty *held* not "Massachusetts trust" or "business trust," and liability of beneficiaries was that of partners, where beneficiaries reserved control over the business.

Under the declaration of trust, the beneficiary bound himself to pay taxes, claims, liens, and insurance on property, to keep property in good condition, and make improvements. The property was to be subdivided as agreed by trustee and beneficiary, and beneficiary's consent was to be obtained to grant of easements, construction of improvements, and conveyance of water rights. The lots were to

be sold at agreed price, as indicated in schedule, and plans for distribution of proceeds were outlined. The declaration of trust further provided for revocation of authority of business manager by 65 per cent. in interest of beneficiaries, and for trustee's acting upon written request of beneficiaries where beneficial interests were held by eight or more persons.

[Ed. Note.—For other definitions of "Business Trust" and "Massachusetts Trust," see Words & Phrases.]

2. Joint-stock companies and business trusts ⇐1.

Retention or nonretention of ultimate control by shareholders determines whether trust organization is business trust or partnership.

3. Licenses ⇐39.

Not every sale of security or beneficial interest in trust is prohibited in absence of permit.

4. Licenses ⇐39.

Issuance without permit of certificates of trust to members of syndicate furnishing money with which trust real estate was purchased merely evidences interest already created.

5. Licenses ⇐39.

Holders of certificates under trust had burden, in suit by purchaser of land from trust's agent, to establish defense that failure to obtain permit for sale of trust certificates prevented their acquiring beneficial interest in trust property (Code Civ. Proc. § 1869).

6. Evidence ⇐92.

Generally defendant has burden to prove new matter alleged as defense, though new matter requires proof of negative (Code Civ. Proc. § 1869).

7. Licenses ⇐39.

That commissioner of corporations had failed to issue licenses for sale of certificates in trust *held* under evidence not to relieve beneficiaries of personal liability.

8. Principal and agent ⇐171(7).

Beneficiaries who received benefit of moneys paid trust by purchaser of lots could not, in action by purchaser to recover back payments, question authority of trust's agent to sell property.

9. Principal and agent ⇐177(1).

Notice to agent received within scope of authority is notice to principal.

10. Vendor and purchaser ⇐351(7).

Purchasers, on vendor's breach of contract to convey, could not, on proving bad faith, recover reasonable market value of trees which purchasers grew to be transplanted upon property purchased (Civ. Code, § 3306).

11. Appeal and error ⇐13.

Attempted appeal to District Court of Appeal after giving notice of appeal to Supreme Court *held* ineffectual (Const. art. 6, § 4a; Rules of Supreme Court and District Courts of Appeal, rule 32).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by R. R. Bernesen and wife against Eugene B. Fish and others. Judgment for plaintiffs, and defendant named and others, except defendants Wooster, Roof, and Metropolitan Trust Company of California, appeal.

Affirmed in part, and reversed in part, with directions, and appeal of Charles H. Jonas dismissed.

Walter F. Haas, H. C. Johnston, and G. E. Kerrin, all of Los Angeles, for appellant I. W. Fuqua.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for appellants D. A. Beck, S. E. Beck, W. F. Beck, and Eugene B. Fish.

Grant Holcomb, of San Bernardino, for appellant Charles H. Jonas.

O'Connor & Findlay, of Colton, for respondents.

MARKS, Justice.

Plaintiffs instituted this action to recover money which they had paid upon the purchase price of land in San Bernardino county, together with expenses properly incurred in preparing to enter upon the land, possession or title to which they never received. They recovered judgment for $2,272.83, the amount paid on the purchase price, $528.76 accrued interest, and $1,125 expended in preparing to move onto the land.

The complaint is in three counts. In the first count it is alleged: (1) That the defendants are copartners or joint adventurers; (2) that J. B. Roof, Inc., was the duly appointed and authorized agent of the defendants in the sale of the property in San Bernardino county; (3) that through this agent the plaintiffs entered into a written contract for the purchase of a portion of this property and paid $1,657.73 on the purchase price in cash and made subsequent installment payments in the total sum of $616.05; (4) that the purported sale to them by the agent was never approved, and that they demanded the return of their money, which was not returned, but converted to the use of the defendants. The second count repeated all the allegations of the first with the

exception of the last allegation, and added the further allegations that plaintiffs demanded either the return of their money or that a formal contract of sale and purchase of the real property be executed, which defendants refused to do; that defendants by their representations and actions led plaintiffs to believe that the contract of sale would be executed and performed by defendants and thus deceived plaintiffs; that plaintiffs believed and relied upon the representations of defendants and their agents and spent money in preparing to move onto the land, particularly in growing avocado trees, to plaintiffs' damage in the sum of $4,500. The third count stated a cause of action for money had and received in the sum of $2,273.78.

It will only be necessary to consider the answer of the defendants who are active in the prosecution of their appeals, as the other answers are of no particular interest here.

The defendants Eugene B. Fish, D. A. Beck, S. E. Beck, and W. F. Beck joined in an answer in which the material allegations of the complaint, upon which their liabilities rested, were denied either directly or for lack of information and belief. In a separate affirmative defense it is alleged that these defendants are holders of a beneficial interest "in Metropolitan Trust No. 108 sometimes designated as Muscoy Syndicate," and that no permit for the sale of these beneficial interests had been issued by the corporation commissioner of this state. The separate answer of I. W. Fuqua also denied the allegations of the complaint, but did not plead any affirmative defense. He did not raise the issue of the lack of a permit of the commissioner of corporations for the issuance of certificates of beneficial interests in Metropolitan Trust No. 108.

The trial court found that some time prior to September 15, 1926, the defendants J. B. Roof and Charles H. Jonas secured an option to purchase a large tract of land of about 8,600 acres in San Bernardino county, which included the parcels involved in this controversy; that thereafter Roof and Jonas organized a syndicate consisting of themselves and about eighty others, four of whom were the defendants Eugene B. Fish, D. A. Beck, S. E. Beck, and W. F. Beck. This syndicate furnished the money with which the initial payment on the purchase price of the 8,600 acres was made and to do the work in connection with a plan to subdivide and sell the property; that title to the real estate was conveyed to Roof and Jonas, and by them and their wives conveyed to the Metropolitan Trust Company in trust; that the trust was designated as No. 108.

The findings set forth the declaration of trust in hæc verba and as its legal effect is in sharp dispute between the parties it will be necessary to summarize its terms in considerable detail. It is dated December 27, 1926. It does not appear to have been recorded.

The declaration of trust designates Charles H. Jonas and wife, and J. B. Roof and wife, as trustors, the Metropolitan Trust Company of California, trustee, and Charles H. Jonas, beneficiary. It recites that the trustee had received a deed dated September 15, 1926, recorded September 30, 1926, by which the trustors conveyed to it the particularly described real property in San Bernardino county; that the real property was represented free of incumbrances except taxes for the fiscal year 1926–1927, conditions, restrictions, reservations, easements, and rights of way, and a deed of trust dated September 15, 1926, executed by the trustors to secure payment of their five promissory notes in the total principal sum of $450,000. After particularly describing the terms of the deed of trust the declaration of trust proceeds: "Now therefore, said Metropolitan Trust Company of California, trustee hereunder, as aforesaid, hereby certifies and declares that it holds and will hold title to the hereinbefore described property in trust, with power of sale for the benefit of Charles H. Jonas as the beneficiary hereunder under the terms and conditions set forth in this declaration of trust, and for the following uses and purposes namely."

The beneficiary bound himself to perform the following: To pay all taxes before delinquency; to pay, when due, all other claims and liens affecting title to the property; to provide insurance upon all buildings on the property; to defend any action affecting title to the property or the rights of the trustee therein; "to protect, preserve and defend the property covered hereby and the title thereto, and to keep said property in good condition, by proper care, inspection, repair, cultivation, irrigation, fertilization or otherwise, and to permit no waste or deterioration thereof;" to commence and continuously prosecute and complete the installation of improvements in each subdivision of the property within six months from the date of the first sale of a lot or lots; to protect and save the trustee and land harmless by reason of any improvements or promises to prospective purchasers relative thereto; to repay to the trustee within sixty days all sums advanced by it. It is further provided that, if the beneficiary failed to make any of the payments or perform any of the acts just enumerated, the trustee might "enter and take possession of the trust property," make the payments, or perform the acts, but that it should not be obligated so to do.

The declaration of trust provided that "it is agreed that the real property hereinbefore described consisting of approximately eighty-

six hundred (8600) acres, may be subdivided and/or resubdivided and improved by the beneficiary hereunder in such manner as hereafter shall be agreed upon by said trustee and said beneficiary, all costs, and expenses incident thereto to be borne solely by said beneficiary." Limitations on successive subdivisions are detailed which it is not necessary to particularly describe.

The trustee is empowered to grant easements and rights of way which may be considered necessary, desirable, or proper, by the trustee and beneficiary. It is also given power, "if requested by the beneficiary," to grant portions of the trust estate for parks, public buildings, schools, and other purposes. The improvements "may include the construction of a hall or halls, an auditorium, offices or other structures of such number, character and cost as the beneficiary and trustee may determine upon" which may be sold by the trustee at the price and upon the terms agreed upon by the trustee and beneficiary.

The declaration of trust contains elaborate provisions concerning the reservation to the trustee of all water rights in all deeds, and the organization of mutual water companies. The conveyance of these water rights shall be made "from time to time, as the beneficiary shall, in writing direct."

The declaration of trust contains the following: "Said lands conveyed to said trustee as aforesaid, are and will be held for the following uses and purposes: First: to sell and convey any of the hereinabove described lots, any lot in any future subdivision or resubdivision of any portion of the trust property, or unsubdivided parcels of the trust property of any dimension whatsoever; the sales prices of property to be not less than those agreed upon by said trustee and said beneficiary as indicated on a schedule of sales prices for each unit or unsubdivided parcel, to be furnished said trustee prior to the time that each unit or part thereof, or unsubdivided parcel, is offered for sale." It is not necessary to detail the terms upon which sales are to be made except to note that it appears that there is to be a "selling agent" for the sale of the property.

The plan of distribution of the proceeds received from the sale or lease of the trust property is set forth in detail. From the receipts from the sale or lease of the property, as a whole, or from unsubdivided parcels, the trustee is authorized without other authority to pay the following: Costs, fees, and expenses; 5 per cent. of the sales price, or lease returns, to the selling agent; taxes and assessments; interest on the trust deed indebtedness; certain bills for services or materials to satisfy and discharge the obligations of the beneficiary; a portion of the trust deed indebtedness and certain other liens and incumbrances; the unexpended portion to the beneficiary or beneficiaries. When authorized by the beneficiary it may pay costs, fees, expenses, or commissions, to other than the selling agent; bills for improvement and subdivision of the trust property.

Proceeds from sales of subdivided portions of the property shall be distributed as follows: Payment of the costs, fees, and expenses of the trustee; 35 per cent. commission to the agent making the sale. This is intended to net the agent 5 per cent. after he pays his costs and expenses of sale. This percentage may be increased or decreased upon recommendation of the "business manager" after detailed investigation shows that the selling agent is not receiving 5 per cent. commission net. Other payments are to be made in much the same manner as those from gross sales or rentals, except that the authority of the "business manager" is required in some instances.

The declaration of trust contains the following: "The Trustee hereunder is hereby authorized to act upon the written order and direction of Charles H. Jonas, who shall be known as the Business Manager, in all matters concerning this Trust requiring the consent, authorization, or direction of the Beneficiary hereunder, and any person or persons who hereafter become a Beneficiary or Beneficiaries hereunder by acceptance of the beneficial interest herein agrees to take such beneficial interest subject to the right of Charles H. Jonas to act on behalf of and in the place and stead of each and every one of the Beneficiaries hereafter acquiring any interest hereunder and irrevocably consents to any act that the Trustee shall do upon the written instructions of Charles H. Jonas: Provided, however, that the authority of said Charles H. Jonas to so act may be revoked at any time by the filing with the Trustee of a written notice executed by sixty-five per cent (65%) in interest of the Beneficiaries or by an individual or individuals designated by the said Sixty-five per cent (65%) of Beneficiaries in interest."

It is provided that no sale or transfer of any interest under the trust shall be binding until evidence of the sale or transfer has been filed with the trustee. The declaration of trust recognizes the obligation of the beneficiaries for unpaid bills of the trust, and provides an elaborate plan for the sale of the beneficial interests of those not paying the portions of such bills after they become due.

It is provided as follows:

"It is understood and agreed that provided and when the beneficial interests under this trust are held by eight (8) or more persons—said trustee, during such period or periods, will act in all matters in connection with the trust, requiring the consent of the beneficiaries hereunder upon the written request and direction of beneficiaries representing at least

sixty-five per cent (65%) of the beneficial interests under this trust (as shown by the records of said trustee). Provided said sixty-five per cent (65%) of the beneficial interests be held by three (3) or more beneficiaries; which written request and direction shall be considered—so far as said trustee is concerned—the written request and direction of all beneficiaries under this trust;

"And the present beneficiary—for himself and his successors and assigns hereunder—does constitute and appoint said sixty-five per cent (65%) in interest, but in no event less than three (3) of said beneficiaries, the agents irrevocable of the beneficiaries hereinabove mentioned and for the uses and purposes in this section mentioned and it is understood that the acceptance by each future beneficiary of a beneficial interest under this trust shall constitute a ratification and approval of this trust, and particularly of the provisions of this Article XI, and the appointment of agents irrevocable herein set forth. * * * Said trustee, at its sole discretion, may appoint an agent or agents at any time and from time to time (with full power to revoke any such agency, also at its sole discretion), to render and the property covered hereby as said trust and the property covered thereby as said trustee may deem advisable; each such agency appointment to be in such form and to contain such conditions and limitations as said trustee shall elect.

"It is hereby agreed that J. B. Roof, Inc., shall receive the first agency appointment, as selling agent hereunder. Said trustee, however, in no event, to be liable to any person for any act, omission, default, defalcation or wrong-doing of any such agent."

The trust may be terminated at any time upon demand of 80 per cent. of the beneficial interests. In many other respects the consent of the beneficiary or business manager is made necessary for action by the trustee in administering its office.

The trial court further found that, before the transactions with the plaintiffs, Charles H. Jonas caused to be issued beneficial interests to all of the served defendants, except the Metropolitan Trust Company and J. B. Roof, Inc., and that no permit of the commissioner of corporations authorized the issuance of certificates of beneficial interest; that tracts No. 2243, No. 2258, and No. 2324 were subdivided, and subdivision maps were recorded in the office of the county recorder of San Bernardino county; that J. B. Roof, Inc., acted as selling agent of the property and sold many lots to various persons between the execution of the declaration of trust and September 3, 1929; that the policies and sales of the selling agent were known to and acquiesced in by Charles H. Jonas as manager; that by such policy of the selling agent there "would issue to a buyer of any portion of said premises, a receipt or contract in accordance with the form hereinafter set forth and would accept from said buyer whatever payment it was agreed said buyer should make thereon. If said down payment was less than 25% of the agreed purchase price said money was paid to the said defendant J. B. Roof, Inc., until such time as the total amount thereof equalled 25% of the full purchase price of the premises agreed to be purchased by said buyer. After said 25% had been paid, then said purchaser would be given a new contract executed by the defendant Metropolitan Trust Company of California and would thereafter, in accordance with the general custom, make his payments direct to the said defendant Metropolitan Trust Company of California. It was the custom and procedure that the payments so made to the defendant J. B. Roof, Inc., were by it paid to the defendant Metropolitan Trust Company of California or an accounting given thereof;" that J. B. Roof, Inc., as agent for the defendants, induced the plaintiffs to purchase a portion of the trust property located at the corner of Duffy street and Highland avenue and represented to them that water, domestic and for irrigation, and other public utilities would be installed within a short time, and that the property was suited and adapted for the raising of avocadoes and garden produce; that plaintiffs paid $1,656.78 before December 2, 1928, on account of the purchase price; that on that date J. B. Roof, Inc., as agent for the defendants, informed plaintiffs that water and other public utilities could not be placed on the property they were purchasing and induced them to substitute other property which J. B. Roof, Inc., promised would have water on it within a short time; that on December 2, 1928, the substitution of the properties was agreed to, and the plaintiffs and J. B. Roof, Inc., signed a receipt setting forth the terms of sale; that credit was given for the $1,656.78 already paid by the plaintiffs on their first purchase as the down payment on the second purchase; that plaintiffs paid the further sum of $616.05 on account of the purchase price; that water was not placed on the second tract and Metropolitan Trust Company of California refused to execute a contract of sale for the premises; that plaintiffs were never given possession of, nor title to, the premises, nor received any consideration for the money they had paid which was never returned to them; that the trustee and trust estate received the benefit of their payments; that all the representations to plaintiffs were made with the knowledge and consent of Charles H. Jonas who knew of the payments made by the plaintiffs and who promised that their money would be returned to them; that preparatory to moving onto the first property plaintiffs planted 900 avocado seeds, and on December 2, 1928, had 900 avocado trees growing in gallon cans to be transplanted up-

on the property, and which trees were of the reasonable value of $1,125; that, because of the failure of the defendants to permit plaintiffs to purchase the property and have possession of it, the trees became root-bound and of no value, to plaintiffs' damage in the sum of $1,125.

If all the facts found by the trial court were supported by the evidence, our task would be immeasurably easier. If it had been proven, as found, that prior to the execution of the declaration of trust the appealing defendants (except I. W. Fuqua) and others not before this court had furnished the money with which to purchase the property described in the declaration of trust, which we will hereafter refer to as the "Muscoy Ranch," and that title had been taken in Roof and Jonas, a resulting trust would have been created by operation of law with a beneficial interest vested in each person furnishing a part of the purchase price. Zeller v. Knapp (Cal. App.) 26 P.(2d) 704. The evidence does not support this finding in its entirety.

The evidence discloses that, prior to the creation of trust No. 108, a syndicate composed of about eighty-five persons was organized and a writing was signed which is not in evidence; that an escrow was established "at the guarantee office of the Security Trust & Savings"; that money was paid into this escrow; that the Muscoy ranch was purchased; that title was taken in the name of Roof and Jonas; that I. W. Fuqua was not a member of this original syndicate. There is no direct evidence that any other appealing defendant was a member of this syndicate.

A list of owners of beneficial interests as of December 1, 1928, containing the names of all appealing defendants, was introduced in evidence under the following stipulation: "The Court: The stipulation is that the list as offered by Mr. Libbey, and compiled by the Metropolitan Trust Company, either by Mr. Libbey personally or under his direction, is a true copy of the records of the Metropolitan Trust Company, as evidenced by the assignments and other papers necessary to transfer beneficial interests according to the terms of the trust, excepting that particular item in the list, known as and shown as certificate held by the Metropolitan Trust Company, which is in fact held by the Metropolitan Trust Company, as trustee for the benefit of another trust."

Appellants strenuously urge that the complaint does not state facts sufficient to constitute a cause of action against any of them. Without going into an analysis of the pleading it is sufficient to say that the allegations of the third count are sufficient to support the judgment for the recovery of the money paid by the plaintiffs on account of the purchase price of the land they were trying to buy, together with interest. While the allegations of the second count might be held sufficient to support a judgment for the expenses properly incurred by the plaintiffs in preparing to move onto the land had one been rendered, the allegations of this portion of the pleadings are not satisfactory. As the judgment on this phase of the case must be reversed, it is suggested that this portion of the pleading be amended before a retrial of this issue.

[1, 2] Appellants next urge that the Metropolitan trust No. 108 was what is commonly known as a Massachusetts trust or business trust, and that no liability is enforceable against the beneficiaries for its debts. The Supreme Court in the case of Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 627, 71 A. L. R. 871, had occasion to consider the liabilities of beneficiaries of the strictly Massachusetts trust or business trust and other trusts in the nature of partnerships. It was there said:

"This type of organization [Massachusetts or Business Trust] is nothing more than an attempt to use the old common-law trust for the purpose of carrying on business enterprises.

"Such a trust is brought into being by a declaration of trust, by the terms of which those desiring to invest their capital agree to the creation of a governing group of trustees, the powers and duties of this board being dependent on the terms of the trust agreement. The interest of each subscriber is evidenced by transferable certificates, similar to shares of stock in a corporation, and, in this state, subject to the scrutiny of the corporation department. The organization does not dissolve as does a partnership upon the transfer of any share, nor upon the death, insanity, or bankruptcy of a subscriber. The trust agreement usually provides that the trustees and not the subscribers are the owners of the property, and the trustees are given, in a true Massachusetts trust, complete control of the management of the business. In the trust agreement it is always provided that the subscribers are not personally liable for any of the acts of the trustees, a freedom from liability which, in this state, is even greater than that accorded to stockholders of corporations, except, since 1929, stockholders in limited corporations.

"Generally stated, a trust of this nature is created wherever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the trustees in their discretion pay over the profits of the enterprise to the creators of the trust or their successors in interest. As thus defined it is apparent that such a trust is created by the act of the parties and does not depend on statutory law for its validity. In the case of Hecht v. Malley, 265 U. S. 144, 146, 68 L. Ed. 949, 44 S. Ct. 462, 463,

Mr. Justice Sanford referred to such organizations as follows:

"'The "Massachusetts Trust" is a form of business organization, common in that State, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

"'Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created.'

"The leading case in Massachusetts where this so-called control test is fully discussed is Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355. In that case the question involved was whether the Boston Personal Property Trust was to be taxed as a partnership or as a trust. The court, after discussing certain cases holding the particular trust therein involved created a partnership, and others where it had been held that a trust had been created, stated (page 357 of 102 N. E.) that the distinction 'lies in the fact that in the former cases the certificate holders are associated together by the terms of the "trust" and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property, the property is their property, they are the masters; while in Mayo v. Moritz (151 Mass. 481, 24 N. E. 1083), where it was held the instrument created a trust, on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in Mayo v. Moritz had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them.'

"The court then held that the Boston Personal Property Trust was a trust and not a partnership, stating (page 358 of 102 N. E.): 'The certificate holders * * * are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which * * * they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders * * * can do is to give or withhold their consent to the trustees taking such action.'

"In another leading case decided shortly after Williams v. Inhabitants of Milton, supra, the same court said concerning the controlling features between a trust and a partnership: 'A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership.' Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009, 1010; see, also, Horgan v. Morgan, 233 Mass. 381, 124 N. E. 32; Sleeper v. Park, 232 Mass. 292, 122 N. E. 315; Crocker v. Malley, 249 U. S. 223, 2 A. L. R. 1601, 63 L. Ed. 573, 39 S. Ct. 270 [see, also, Rose's U. S. Notes]; Mayo v. Moritz, supra.

"In those jurisdictions other than Massachusetts that have recognized this type of organization as a trust, it is the retention or nonretention of ultimate control by the shareholders which has been treated as a determining factor in the question as to whether the particular organization is a trust or a partnership. Betts v. Hackathorn, 159 Ark. 621, 31 A. L. R. 847, 252 S. W. 602; Schumann-Heink v. Folsom, 328 Ill. 321, 58 A. L. R. 485, 159 N. E. 250; Sears, Trust Estates as Business Companies (2d Ed.) 144. By the weight of authority, where the trustees have complete control of the business, the creators of the trust are treated as are the cestuis que trust of an ordinary equitable trust, and are exempt from direct personal liability to the creditors of the business; but if the trustees are subject to the control of the creators of the trust, the latter or their successors are liable as partners. Rand v. Morse (C. C. A.) 289 F. 339; Hart v. Seymour, 147 Ill. 598, 35 N. E. 246; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Frost v. Thompson, supra."

When the instant case is measured by these rules it is evident that the control of the trustee over the property of the trust estate

is far too limited and the control over it and the actions of the trustee by the beneficiaries is too complete to permit any doubt of the fact that the trust here in issue cannot be classified as a Massachusetts or business trust. It comes within the other classification in which the beneficiaries reserve to themselves such control over the trustee and trust estate that a specie of partnership is created. It makes no difference that many of these powers of control are to be exercised by and through a "business manager." The beneficiaries expressly appointed him their agent for such purpose.

[3, 4] Appellants next urge that, as they were holders of certificates of beneficial interest under trust No. 108, for the issuance or sale of which no permit had been issued by the commissioner of corporations, they acquired no interest under these certificates and could not be held for the debt to the plaintiffs. There is nothing in the pleadings of the plaintiffs which would necessarily put in issue the necessity of such a permit. The issue was presented by the answer of the appealing defendants, except I. W. Fuqua, who did not raise the issue.

The plaintiffs proved that prior to the creation of trust No. 108 a syndicate had been formed for some purpose connected with the Muscoy ranch; that money was paid into an escrow; that title to the ranch was vested in Roof and Jonas, who with their wives conveyed the property to the trustee; that certificates of beneficial interest were issued to the beneficiaries after the creation of trust No. 108; that Jonas was made the managing agent of the beneficiaries; that J. B. Roof, Inc., acted as selling agent of the properties and sold between two and three hundred parcels; that this selling agent negotiated with plaintiffs for the two sales in question and accepted a considerable sum of money on account of the purchase prices which was never returned; that plaintiffs received nothing for their payments; that Jonas knew of all of the transactions of J. B. Roof, Inc., with the plaintiffs. There is no evidence as to when or how any of the appealing defendants, or any other beneficiaries, acquired their beneficial interests except as to Fuqua. There is evidence that he acquired his interest in 1928, but nothing as to how he acquired it. There is no evidence that any beneficial interest was ever offered for sale to the public.

Every sale of a security or a beneficial interest in a trust is not prohibited unless a permit for such sale is first secured. Buttrick v. Seines, 209 Cal. 567, 289 P. 616; People v. Pace, 73 Cal. App. 548, 238 P. 1089; In re Lamb, 61 Cal. App. 321, 215 P. 109; People v. Main, 75 Cal. App. 471, 242 P. 1078; Pollak v. Staunton, 210 Cal. 656, 293 P. 26. If the appealing defendants (except Fuqua) were members of the syndicate which furnished the money with which the purchase of the Muscoy ranch was made, their position of owners of beneficial interests under the resulting trust would not be changed by the conveyance of the legal title of the property by Jonas and Roof, the first trustees, to the Metropolitan Trust Company, the succeeding trustee. They would still remain owners of their beneficial interests in the real estate. Assuming these circumstances to be true, the certificates issued by the Metropolitan Trust Company to them created no new interest in the trust estate, but were merely evidences of interests created by operation of law when the resulting trust first came into being. Under such circumstances no permit might be necessary for the issuance of certificates if they were not to be sold or offered for sale. If Fuqua acquired his interest in the real estate by conveyance from one who was an owner of a beneficial interest under the resulting trust originally created, his position would be much the same. Buttrick v. Seines, supra.

[5-7] The evidence of the plaintiffs did not establish that the beneficial interests of defendants in the Muscoy ranch were illegally acquired. It therefore became incumbent upon the defendants to establish their defense that they had acquired no beneficial interest in the property or the trust because no permit had been issued by the commissioner of corporations. In 10 California Jurisprudence, 786, it is said: "Section 1869 of the Code of Civil Procedure provides that 'Each party must prove his own affirmative allegations.' So, not only is it incumbent upon the plaintiff to prove his affirmative allegations, but, as a general rule, the burden is on the defendant to prove new matter alleged as a defense, even though it requires the proof of a negative. 'It makes no difference, therefore, whether the actor is plaintiff or defendant, so far as concerns the burden of proof. If he undertake to make a case, whether affirmative or negative, this case must be made out by him, or judgment must go against him. Hence it may be stated, as a test admitting of universal application, that whether the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain. If there is a case made out against a defendant, on which, if the plaintiff should close, a judgment would be entered against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated.'" In the absence of any evidence that the beneficial interests of the defendants in the trust estate were illegally acquired, we cannot relieve them of their responsibility on this ground.

[8, 9] Appellants urge that there is no sufficient proof of the authority of J. B. Roof, Inc., as their agent to permit its actions to bind them. We will here consider this question only in so far as it relates to the recovery of the money paid by plaintiffs, together with interest. This portion of the case does not involve the binding effect of a contract to convey real estate. It only concerns the recovery of money paid by the plaintiffs to J. B. Roof, Inc., for which the plaintiffs received no consideration. The trial court held that these payments were made, and that the money had been converted to the use and benefit of the defendants. This finding is not entirely without evidentiary support. Appellants cannot question that Jonas was their duly authorized agent with written authority to represent them in the subdivision, improvement, and sale of property in the Muscoy ranch. The provisions of the declaration of trust fully justify this conclusion. Jonas knew the following: The transactions between the plaintiffs and J. B. Roof, Inc.; the representations made, the receipts signed, the payments made by the plaintiffs, both before and after it must have been perfectly apparent that no title to the property could ever be conveyed to the plaintiffs; the retention of the money, or at least that part of it which was not used in the promotion by J. B. Roof, Inc.; that the consideration for plaintiffs' payments failed; that the same general procedure followed in the attempted sale to plaintiffs was followed by J. B. Roof, Inc., in making between two and three hundred sales of property in the Muscoy ranch. Notice to the agent, when within the scope of his authority, is notice to his principals. Under these circumstances the appealing defendants cannot now be permitted to question the authority of J. B. Roof, Inc., to at least receive the payments which were made by the plaintiffs and converted to their use and benefit, and thus escape the responsibility for a return of these payments upon a failure of consideration for them. (In justice to the trustee, Jonas, and probably J. B. Roof, it should be remarked that they tried to levy an assessment on the beneficiaries so that plaintiffs' money could be refunded.)

[10] Appellants next urge that the portion of the judgment for $1,125, the reasonable market value of the avocado trees lost to plaintiffs, cannot be sustained under the provisions of section 3306 of the Civil Code, which provides as follows: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." They urge that there is no allegation, evidence, or finding of bad faith which will support this element of special damage. As this portion of the judgment must be reversed, and the complaint will probably be amended, this question need not be further discussed.

Appellants further contend that, assuming bad faith, only "the expenses properly incurred in preparing to enter upon the land" can be recovered, and that this is not the equivalent of the reasonable market value of the avocado trees. This contention must be sustained. The evidence and findings were directed solely to the reasonable value of the trees which is not the proper measure of damage in this case.

[11] The judgment in this action was dated May 11, 1932, was filed the same day, and entered May 12, 1932. A notice of appeal to the Supreme Court was given by Charles H. Jonas on July 22, 1932. A second notice of appeal to this court was filed August 6, 1932. The attempted appeal to this court is ineffectual. Section 4a, art. 6, Const.; rule 32, Rules of the Supreme Court and District Courts of Appeal.

The attempted appeal of Charles H. Jonas to this court is dismissed.

That portion of the judgment whereby the plaintiffs are given judgment for $2,272.83, money paid by them, with $528.76 accrued interest, is affirmed.

That portion of the judgment whereby plaintiffs recovered $1,125 damages in connection with the loss of the avocado trees is reversed, with directions to the trial court to permit the amendment of the pleadings on this issue if counsel be so advised, and to retry the sole issues of the expense, if any, properly incurred by plaintiffs in preparing to move onto the lands they attempted to purchase, and the bad faith, if any, of appellants, in the attempted sale of the lands to plaintiffs. The parties will pay their own costs on appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

BIERLICH v. UNGER et al.*

Civ. 8078.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1933.

Rehearing Denied Jan. 26, 1934.

Hearing Granted by Supreme Court Feb. 26, 1934.

Principal and surety ⇐76.

Surety contracting to hold mortgagee harmless on account of liens *held* not liable for mortgagor's failure to proceed with construction of building as agreed at time of purchasing deed of trust.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Suit by Julius Bierlich against Walter L. Unger, the Seaboard Surety Corporation of America and others. Judgment for plaintiff, and defendant last named appeals.

Reversed as to defendant last named.

Rehearing denied; ARCHBALD, Judge pro tem., dissenting.

Edgar H. Craddock, of Los Angeles, for appellant.

William Schreider, of Los Angeles, for respondent.

CRAIG, Justice.

Suit having been instituted for recovery of the principal sum of an undertaking given to indemnify the obligee against loss or damage in the event of a failure to construct a certain building upon land in the city of Los Angeles, judgment was rendered in favor of the plaintiff, from which the defendant surety corporation appealed.

Upon the belief that one Walter L. Unger was the owner of certain real property and that he and General Finance Corporation intended to build thereon, the respondent purchased a deed of trust on said property and a note in the sum of $3,750 secured thereby, for which he paid the sum of $3,000. Unger and said corporation, as principals, caused an undertaking to be issued by the appellant to respondent as obligee in the sum of $3,000 wherein were recited the foregoing facts among others, and an agreement upon certain specified conditions to pay said sum to said obligee. The anticipated construction work was not done, and it developed that Unger was not the owner of the property mentioned. The respondent foreclosed the deed of trust, and, having sustained considerable loss in the transaction, commenced an action against said principals and the surety company, appellant herein. Judgment was awarded him against all defendants, whereupon the surety company appealed, and among other grounds insists that the judgment should be reversed as to it for the reason that it did not by its undertaking guarantee the success or safety of respondent's investment. The parties agreed, and said bond recited, that Unger being the owner of said property, and respondent having agreed to purchase said trust deed and to pay $3,000 for the cost of construction if such bond be furnished, said surety became bound to pay to respondent the sum of $3,000 unless said principals should indemnify him against priority of "any and all mechanics' liens for labor, services, or materials furnished in the construction of said buildings" over his said trust deed, and to "hold harmless and indemnify the obligee against and from any and all liability on account of any such liens that may be prior to said trust deed." It is contended and was testified by the respondent at the trial that he believed said property had been transferred to Mr. Unger when the bond was given; he swore: "That is why I took out a bond, so that you would protect me on that." According to the allegations of his complaint, and the trial court's findings of fact, such must be held to have been respondent's understanding. However, since it is the plain language of the contract upon which he relies that the surety only held him harmless against liability on account of "any such liens that may be prior to said trust deed," and is not contended that construction was carried out or liens existed, occasion to invoke the conditions upon which suit was commenced did not arise, and as to the surety the judgment cannot be sustained.

The judgment is reversed as to the defendant and appellant Seaboard Surety Corporation of America.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

*For subsequent opinion see 36 P.2d 374.

136 Cal.App. 115

LOPEZ CANYON OIL CO. v. LOFQUIST.

Civ. 8140.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1933.

1. Limitation of actions ⇐179(2).

In stating cause of action for fraud, barred by limitation, plaintiff must not only aver ignorance of facts at time of their occurrence, but must also show times and circumstances under which facts constituting fraud were brought to his knowledge.

2. Limitation of actions ⇐180(4).

Corporation's complaint against its former secretary based on fraud *held* demurrable because not alleging circumstances leading to discovery of fraud less than ten years before commencement of action.

Complaint alleged that the defendant was plaintiff's secretary, and that from September 20, 1913, and for six months thereafter until December 29, 1919, he dominated the company and had entire control of records and of finances of corporation, and that since January, 1914, defendant actually prevented plaintiff from ascertaining the true facts, and has actively prevented any other stockholder of plaintiff from ascertaining the true facts, and that plaintiff first received true information on September 4, 1928, and that since 1918 defendant falsely and fraudulently represented that defendant had no funds belonging to the plaintiff.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by the Lopez Canyon Oil Company against Knute Lofquist, as executor of the last will and testament of R. W. Nuttall, deceased, substituted in the place and stead of R. W. Nuttall. Judgment for defendant, and plaintiff appeals.

Affirmed.

Leo E. Anderson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellant.

Earle K. Stanton, of Los Angeles, and M. R. Van Wormer, of San Luis Obispo, for respondent.

ARCHBALD, Justice pro tem.

This is an appeal from a judgment entered after an order sustaining defendant's demurrer to plaintiff's first amended complaint.

The original defendant, R. W. Nuttall, died after the filing of this appeal, and an order was made substituting as defendant the executor of his last will and testament.

By its amended complaint plaintiff seeks to recover from the original defendant four separate sums alleged to be due it from him, alleging that he was the secretary of plaintiff corporation for some time prior to September 20, 1913, and for six months thereafter, and that during such time and until December 29, 1919, he "dominated the said company, kept, made and had the entire control of the records and of the finances of said corporation." The first cause of action seeks to recover the sum of $13,920, being the balance remaining, after payment to himself of $1,800 for defendant's services as secretary, of the sum of $15,720 collected by defendant on an assessment levied September 20, 1913, by the corporation on its issued capital stock. Such count also asks interest on said balance at the statutory rate of 7 per cent. per annum from January 1, 1914. The second cause of action claims the sum of $4,161, being the balance left out of $4,761 collected by defendant on another assessment levied on the issued stock of such corporation on January 14, 1918, after payment of $600 then due Nuttall for salary as such secretary. Interest is also claimed on said balance from April 29, 1918. The third cause of action asks for the return and cancellation of 49,999 shares of the capital stock of plaintiff corporation, or in default thereof damages in the sum of $49,999, with interest from January 14, 1918, at the statutory rate, alleged to be due from Nuttall by reason of his conversion on or about January 14, 1918, of said 49,999 shares of plaintiff's capital stock, allegedly returned to said corporation by one A. L. Darrow, to whom it was issued by such corporation pursuant to the latter's unexecuted agreement to obtain money to sink a test well on property adjoining that of plaintiff. The fourth cause of action seeks the return and cancellation of 6,750 shares of plaintiff's capital stock, transferred to Nuttall on September 10, 1910, by Darrow from stock given Darrow on his said unexecuted agreement, or in default thereof damages in the sum of $6,750 with interest from September 20, 1913.

The amended complaint further alleges, in paragraph III of the first cause of action, adopted by reference in the other causes of action, for the purpose of bringing plaintiff's action within the statutory period limiting the commencement of such actions, "That since the 1st day of January, 1914, *defendant has actively prevented plaintiff from ascertaining the true facts* concerning the said transaction, *and has actively prevented any other stockholders of plaintiff from ascertaining the true facts* as to said transaction; *that by reason of the foregoing plaintiff did not ascertain the true facts, and was unable to ascertain the true facts, and first received the information which led to the investigation and to the subsequent ascertainment of the facts on or about the 4th day of September, 1928;* that the true facts were not actually ascertained and definitely determined until on or about the 1st day of September, 1929." (Italics ours.) Paragraph IV of the second cause of action contains the following additional explanatory allegations, adopted by reference in the third cause of action: "That ever since the 29th day of April, 1918, defendant [Nuttall] has falsely and fraudulently and with intent to defraud plaintiff, represented and stated that defendant had no funds belonging to plaintiff and falsely and fraudulently represented and stated that plaintiff was without funds; that plaintiff believed and relied on said representations and statements; that defendant had complete control of the records, finances and transactions, if any, of plaintiff and for this reason plaintiff has been and was unable to ascertain the true facts."

We have set out verbatim the language appellant urges is sufficient to make its com-

plaint secure against the attack of respondent's general demurrer, which raises the bar of the statute.

It does not appear from the record before us when the original complaint was filed, but we must assume that it was not before the admitted discovery of the alleged fraud, on or about September 4, 1928. It will be seen, therefore, that the conversion alleged in the first count took place over fourteen years prior to such alleged discovery, in the second and third counts more than ten years, and in the fourth more than fifteen years. It is also to be observed that in the first count defendant is alleged to have been the secretary "on September 20, 1913," for some time prior thereto "and for six months thereafter," and that during such time, viz., while he was acting as secretary, and to and including December 29, 1919, he completely dominated plaintiff company and had complete control of its records. Nowhere is it alleged that such domination continued longer.

[1, 2] The rule of pleading governing the statement of a cause of action shown to have accrued beyond the statutory period of limitation barring suit thereon is set forth in the leading case of Lady Washington Consolidated Company v. Wood, 113 Cal. 482, 487, 45 P. 809, 810. It is there stated that it is not enough to aver that plaintiff was ignorant of the facts at the time of their occurrence and has not been informed of them until a time within the statutory period, but "he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts." The plaintiff here is the corporation itself, not some stockholder who is suing in its behalf; and it is peculiar, to say the least, that the corporation, having levied an assessment in 1913, should, still believing that an individual not then its secretary had in his possession $13,920 raised on a former assessment, levy another assessment in 1918 through its board of directors and again permit such individual to collect and retain such additional funds. And what were the directors doing through the later years, after such domination admittedly ceased, that they failed to discover the frauds alleged? Perhaps the answer is the best explanation as to why plaintiff has failed to state the necessary circumstances excusing the late discovery but has contented itself with alleging conclusions only by way of excuse, except for the statement, that the ex-secretary dominated the corporation and had complete control of its records until December 29, 1919. What of the period of nearly nine years thereafter, when such domination apparently had ceased and during which plaintiff still failed to discover the alleged fraud? In our opinion, the amended complaint fails to set out any circumstances *showing how the facts* constituting the fraud were brought to plaintiff's knowledge, or any facts that would justify a court in determining that plaintiff did not have full means of discovering all of the facts alleged when the new secretary took charge; and we must assume that a new one took charge, or that the directors themselves knew, or at least should have known, all about the alleged irregularities at a much earlier date than that upon which the alleged domination of Nuttall admittedly ceased, and no excuse is attempted to show why such discovery was not made after such domination ended. It would seem that the continued domination of the affairs of the corporation by a man who, so far as the complaint shows, was a mere stranger to it, was sufficient to put plaintiff upon notice of all that is alleged. In this connection see the case of Consolidated Reservoir & Power Company v. Scarborough, 216 Cal. 698, 16 P.(2d) 268, where the Supreme Court reaffirmed the rule and held a complaint defective where it was alleged that certain defalcations of a director were concealed by reason of the misrepresentations of other directors and falsification of the minutes, and so were not discovered until a period within the statute.

In our opinion, the demurrer on the ground of uncertainty, in that it could not be ascertained from the complaint what defendant did in actively preventing plaintiff and its stockholders from ascertaining the true facts, was well taken. It would seem to have been something more than the mere control of the records during the time he was acting as secretary that prevented discovery; and just how he could have continued to keep possession of such records after his term of office expired would seem to be such an unusual thing that it is not answered by the statement that what defendant did was a matter within his own knowledge, and so there could be no uncertainty. And just how he could have *actively prevented inquiry* after he ceased to be secretary and no longer dominated the company is very uncertain.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

TREGONING v. REYNOLDS et al.

Civ. 4984.

District Court of Appeal, Third District, California.

Jan. 2, 1934.

Hearing Denied by Supreme Court March 2, 1934.

1. Landlord and tenant ⇐190(1).

"Constructive eviction" requires that acts complained of result in depriving lessee of substantial, as distinguished from insignificant or inconsequential, portion of leased premises.

[Ed. Note.—For other definitions of "Constructive Eviction," see Words & Phrases.]

2. Landlord and tenant ⇐190(1).

Generally, any disturbance of tenant's possession by landlord whereby premises are rendered unfit or unsuitable for occupancy, in whole or in substantial part, for purposes for which they were leased, amounts to "constructive eviction."

3. Landlord and tenant ⇐190(1).

There can be no constructive eviction if tenant continues in possession of whole, however much he may be disturbed in beneficial enjoyment.

4. Landlord and tenant ⇐190(1).

Acts of lessor in destroying old slaughterhouse and repairing unused dwelling *held*, under circumstances, not to amount to constructive eviction.

Evidence disclosed that destruction of old slaughterhouse was a year before lessees abandoned the leased premises, and that dwelling house which was repaired was unoccupied with no showing indicating that such repairs in any way inconvenienced lessees, nor that old slaughterhouse that was destroyed by lessor was used, or intended to be used, by lessees.

Appeal from Superior Court, Mendocino County; Donald Geary, Judge.

Action by Anna L. Tregoning against H. A. Reynolds and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Taft & Spurr, of Ukiah, for appellants.

Hale McCowen, Jr., of Ukiah, for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This action was brought by plaintiff to recover from defendants unpaid rent. Judgment was rendered for plaintiff. Defendants moved for a new trial and for an order vacating the judgment, and, said motions being denied, they appealed. This appeal was brought up on the judgment roll alone, although evidence was introduced at the trial.

Respondent alleges in her complaint that on the 18th day of August, 1927, she leased to appellants for the term of five years 600 acres of land at an annual rental of $1,800, said rent payable in advance as follows: $900 on October 1, 1927, and $900 on the 1st day of April, 1928, and $900 on the 1st day of October and April of each year thereafter.

Appellants answered, alleging that the respondent, while appellants were occupying the said premises as lessees, entered into and upon said premises and burned down the slaughterhouse and tallow press, entered into and took possession of a dwelling house, both of which were located on said leased premises, and entered upon said premises and removed wood and gravel therefrom, and made repairs upon said dwelling house, and assumed possession and control thereof; and, by way of cross-complaint, alleged that they were damaged by the said acts of plaintiff in the sum of $600, and asked judgment therefor.

Respondent answered the said cross-complaint; admitted that she burned the said slaughterhouse; but alleged that this was done with the consent of the tenants.

The court found the appellants failed to pay the installment of rent that was due April 1, 1932, and that on or about that date they voluntarily abandoned the said premises; that respondent did not consent to nor accept the surrender of same, but that, for the purpose of minimizing the damage caused by the said abandonment, and with the consent of appellants, she relet said premises and received payment for such reletting in the sum of $187.50; that about April, 1931, she destroyed said slaughterhouse because it was so old and out of repair as to be unsafe for use and could not be restored; that she did not take possession of any dwelling house on said premises, but simply repaired an old unoccupied dwelling house; that by and with the consent of appellants a third person built a cabin on the said leased premises and occupied same, removed driftwood from the beach in front of said premises, and also rock and gravel from a quarry thereon; that respondent did not assume control or possession of any part or portion of the said premises, and did nothing to render the said premises unfit or unsuitable for occupancy, in whole or in part, for the purposes for which they were leased; that appellants remained in the actual possession of the said premises, and had the beneficial enjoyment thereof from October 1, 1927, until April 1, 1932.

[1] It is the contention of appellants that the said acts of respondent amounted to an

eviction that justified them in abandoning the leased premises. But it is well settled that, to constitute a constructive eviction, it is essential that the acts complained of result in depriving the lessee of a substantial, as distinguished from an insignificant or inconsequential, portion of the leased premises. 15 Cal. Juris., p. 680; North Pacific S. S. Co. v. Terminal Inv. Co., 43 Cal. App. 182, 185 P. 205; Veysey v. Moriyama, 184 Cal. 802, 195 P. 662, 20 A. L. R. 1363; Kelley v. Long, 18 Cal. App. 159, 122 P. 832.

[2, 3] It does not appear that respondent, by any of her acts, interfered with a substantial part of the demised premises, or that they rendered the premises unfit for the purposes for which they were demised, or deprived appellants of the beneficial enjoyment of the leased premises. Reichhold Inv. Co. v. Sommarstrom Inv. Co., 83 Cal. App. 173, 256 P. 592. The general rule, however, relating to a constructive eviction is that any disturbance of the tenant's possession by the landlord whereby the premises are rendered unfit or unsuitable for occupancy, in whole or in a substantial part, for the purposes for which they were leased, amounts to a constructive eviction, if the tenant so elects and surrenders his possession. 16 R. C. L. p. 686; Reichhold Inv. Co. v. Sommarstrom Inv. Co., supra. But there can be no constructive eviction if the tenant continues in the possession of the whole, however much he may be disturbed in the beneficial enjoyment. Coen v. City of Los Angeles, 70 Cal. App. 752–766, 234 P. 426; Veysey v. Moriyama, supra.

The trial court found that in April, 1931, the respondent destroyed the old slaughterhouse, which was a year before appellants abandoned the leased premises. The record is silent as to when the other acts of respondent complained of were committed.

[4] While it is true the lease provided that the appellants should peaceably and quietly have and hold and enjoy the said premises for the term therein provided, we fail to find that any of the acts of respondent amounted to a breach of this covenant. There is nothing indicating that respondent assumed control of any part of the leased premises, and did nothing to render the said premises unfit or unsuitable for occupancy, in whole or in part, for the purposes for which they were leased. The dwelling house that was repaired was unoccupied, and there is nothing indicating that such repairs in any way inconvenienced appellants, nor does it appear that the old slaughterhouse that was destroyed by respondent was used, or intended to be used, by appellants, or in any manner interfered with their enjoyment of said premises, and, as to the cabin that was erected upon said leased premises, and the taking therefrom of wood and gravel by a third party, it appears that these things were done with the consent of subtenants of appellants, and there is no showing that they interfered in any way with appellants' use of said premises.

In Taylor's Landlord and Tenants (9th Ed.) § 309, A. P. 377, the rule is thus stated: "The rule is that while an eviction was originally a dispossession of the tenant by some act of the landlord, or by failure of the latter's title, it has now come to include any wrongful act of the landlord, either of commission or omission, which may result in a substantial interference with the tenant's possession or enjoyment, in whole or in part."

We are of the opinion that the said acts of respondent did not constitute an eviction of appellants from the said leased premises. We do not find any conflict in the findings of the court, as contended by appellants.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

135 Cal.App. 677

STARRY v. LAKE.

Civ. 4931.

District Court of Appeal, Third District, California.

Dec. 9, 1933.

Rehearing Denied Jan. 8, 1934.

1. Elections ⇐295(1).

Evidence *held* to show that Randall precinct is within limits of Crescent City, entitling electors of precinct to participate in city elections (St. 1854, p. 197; St. 1883, p. 93).

2. Municipal corporations ⇐25.

Long acquiescence in location of municipal boundaries by municipality and inhabitants thereof where all municipal actions have been done under assumption that such are the boundaries will support conclusion that they are the true boundaries, notwithstanding they were not originally so located, and hence indefinite and uncertain.

Appeal from Superior Court, Del Norte County; Harry W. Falk, Judge.

Election contest by Frank W. Starry against Lawrence C. Lake. From the judgment, defendant appeals.

Affirmed.

Fred W. Carroll, of Crescent City, for appellant.

Puter & Quinn, of Eureka, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an election contest. Inasmuch as no question is presented concerning the conduct of the election, as such, and no point is made on the manner of conducting the election in so far as the routine thereof is concerned, we may proceed directly to the one point involved.

At a city election held in Crescent City, certain people, residents of a territory described as Randall precinct, presented themselves at the polls and were denied the right to vote upon the ground that Randall precinct, so called, was not a portion of Crescent City; in other words, that Randall precinct was without the geographical and governmental limits of the city.

Without attempt to detail all of the issues presented at the trial, it is conceded by both sides on appeal that, if the said Randall precinct be within the city limits of Crescent City, then the judgment is to be affirmed; if our conclusion is to the contrary, the judgment of the court below is to be reversed.

We may note in advance that our consideration is confined to the record before us, and it may well be that, whatever our conclusion may be, from this record, the question would still remain open. By this we mean that we are not holding the procedure here invoked as sufficient to determine the point as against direct attack by the state or by any other party interested, in any other form of action.

The territory comprising Crescent City was originally a portion of what was then called Klamath county, in California. Some time prior to 1853 a settlement was founded there and a new city born. The land embraced within the limits of the proposed town was then unsurveyed public land belonging to the United States. The residents of the then town, through the governing authority thereof, in 1853 directed the survey and platting of the territory contemplated to be embraced in and constituting the proposed city. This survey was made by one Robinson. A plat and map thereof was duly made and filed, which survey and map will be hereinafter referred to as the Robinson map.

In 1854, the Legislature of the state of California enacted a statute entitled "An Act to Incorporate Crescent City." In this act (Stats. 1854, p. 197) the boundaries of Crescent City are set forth as follows: Commencing at a point established by T. P. Robinson, county surveyor of Klamath county, east of Elk creek; running thence south to low-water mark and north twenty-five chains and——— links; thence west one mile; thence south to low-water mark; and thence following low-water mark to the intersection of the east line. The territory remained unsurveyed public land, the title to which remained in the federal government. The statutes then in force regulating the disposal of the public domain provided for the establishment of towns and townsites upon the public domain and for the conveying of the lands actually occupied by and in such settlements to the actual settlers and inhabitants. According to the terms of the statute and the rules of the general land office it was required that the townsites be within regular legal subdivisions and platted in accord therewith.

In 1863 and 1864, the council of Crescent City, preliminary to making application for patent to the lands embraced within the settlement, ordered another survey which when completed was known as Randall survey. This survey coincided with the sectional lines and embraced the territory in dispute here, namely, Randall precinct. In 1886, the federal land department issued a patent to the town of Crescent City for the land embraced within the Randall survey. This patent ran as a trust for the benefit of the actual settlers and occupants of the lands embraced therein. It was issued pursuant to the provisions of the federal statutes governing the selection and location of townsites, which statutes commenced with the Act of 1820 and included acts supplementary thereto as enacted in the years 1843, 1844, 1864, and 1867. By and through these several enactments the federal government has recognized the necessity of community settlement and organization and has made provision for the disposal of public lands to such communities in addition to the methods of private acquisition of the public domain.

Inasmuch as the regulations governing did provide that patents should issue to such lands only when and as occupied by actual bona fide occupants in possession of the lands for the purposes of a townsite, it is obligatory upon us to assume that a finding was made by a public authority authorized and directed to inquire, and that before patent issued it was found that the territory sought was then actually occupied as a townsite, and that patent issued only to such lands as were actually occupied as a town. From the date of the patent (1866) the town authorities and all of the residents thereof have considered the boundaries of Crescent City as being coextensive with the Randall survey and thus including Randall precinct.

In 1883, the Legislature enacted a statute entitled "An Act to Provide for the Organization, Incorporation, and Government of Municipal Corporations." St. 1883, p. 93. This act was all-embracing and did with great detail provide for the organization and classification of all municipalities within the state desirous of adopting the provisions of the statute. Crescent City, through its governing body, elected to organize itself into a city of the sixth class under the terms of

the statute and upon compliance with the procedure outlined Crescent City did in 1885 reorganize as a city of the sixth class and in such reorganization did include within the city limits the territory of Randall precinct.

It is an undisputed fact in the case that for approximately sixty years Randall precinct has been considered a part of Crescent City. The governing authority of the city in levying taxes, assessment for public improvements, and in all municipal affairs has treated Randall precinct as a part of Crescent City. The residents thereof have continuously voted at city elections at all elections prior to the one here in question. Without detailing the various matters of municipal cognizance in which Randall precinct and its residents participated with the remainder of Crescent City as an undivided whole, it may be stated that in every respect Randall precinct and its inhabitants were a part and portion of Crescent City and its government. During all of this time the federal census authorities enrolled the inhabitants of Randall precinct as a portion of the population of Crescent City. In fact, in no manner could it be inferred that Randall precinct had any separate existence. This condition, as outlined, continued on for more than sixty years, and then the city council, apparently without any form of judicial or other determination, arbitrarily declared Randall precinct out and its residents and electors not entitled to further participate in any of the city's affairs.

The foregoing suffices to give the picture as the record before us presents the same. It may be that we have amplified minor facts so as to embrace, not only the fact, but the obvious inference resting therein and which is implied in the trial court's findings. This, however, is but incidental. The facts as stated are undisputed.

It is the contention of appellant that the whole case hinges on one thing, and that is the certainty of the original Robinson survey and the acceptance thereof by the Legislature in organizing the city of Crescent City in 1854. The argument is that the lines and calls of the Robinson survey left the question definitely settled and determined for all time; that the boundaries of Crescent City as disclosed from this map were never the subject of doubt, but could be and were easily traced. The answer is that this is but appellant's version of the evidence. The boundaries of the city of Crescent City as disclosed in the statute creating the city adopted the Robinson survey only by reference to a "point" east of Elk creek. The present testimony discloses that the said point could be located only by a surveyor following the field notes and by reference to other objects and monuments of doubtful permanence. The monument, if any there ever was, locating this Robinson point, is not visible on the ground, nor is there evidence disclosing the fact that it ever was visible or capable of independent location. On the other hand, appellant presents evidence directly to the contrary in an effort to overcome the claim of acquiescence. He attempts, and did attempt in the court below, to show that there never was any acquiescence in the boundaries of Crescent City, and that the exact boundaries were always the subject of question and dispute.

From sufficient evidence the trial court found that for more than sixty years the territory within said precinct and the residents and inhabitants thereof have been treated and considered by the officers and municipal authorities as a part of Crescent City in all municipal functions and purposes of every kind or character, including municipal waterworks, lighting, street improvements, sanitation, levying and collecting taxes for municipal purposes, holding city elections, policing, bonding for public improvements, and in every function that a city of the sixth class possesses.

The case then is outlined, and as far as presented by the record here, seems free from difficulty. We again note, however, that our decision involves only the case and the parties before us. As noted, the proceeding is an election contest. The city of Crescent City is not a party to the action, nor is any of its officers. Grave questions may arise upon an adjudication of boundaries, and it seems apparent that in such a controversy all parties whose rights are to be in any wise altered should have a day in court. Practically all that is before us is that action of the city council in arbitrarily declaring Randall precinct without the limits of Crescent City and the exclusion of the electors of that precinct from participation in the city election.

[1] We think that the action of the trial court in holding that Randall precinct was within the limits of Crescent City, and that the electors thereof were entitled to participate in the city election, was a correct solution of the problem presented.

Practically all enforceable law has its genesis in custom and law without the background of custom or in conflict therewith is rarely accepted or subject to uniform enforcement. When a law is based upon a custom, the latter is not destroyed, but rather perpetuated, and the two go on together with an interpretation harmonious with the combination. This idea is manifested in many instances. For instance, courts will construe a law in harmony with a prevailing construction generally adopted over a period of years; courts will interpret contracts following the interpretation given them by the parties. It is out of this dominant idea that many classes of estoppel have their origin, though perhaps academically classified under

more restricted theories. As a natural corollary we find the doctrine of acquiescence, and rather than attempting a rigid definition, which in the very nature of the doctrine would be indefinable within any arbitrary limits, we turn to the authorities for illustration.

[2] Long acquiescence in the location of municipal boundaries by the local corporation and the inhabitants thereof, where all municipal action and improvements have been done under the assumption that such are the boundaries, will support the conclusion that they are the true boundaries, notwithstanding they were not originally so located and, hence, indefinite and uncertain. McQuillin on Municipal Corporations, vol. 1, p. 705. Without quotation that same doctrine is announced by this author in the sections and pages following the cited page. Our own Supreme Court quotes from this authority in the case of City of Alameda v. City of Oakland, 198 Cal. 566, at page 576, 246 P. 69, 73, and in referring to the facts of the case under consideration the court says: "The issues presented in this case from the standpoint of both the law and the facts were properly the subject of legitimate controversy because of the uncertainty of the location of said boundary line, and were therefore the proper subject of the application of the doctrine of acquiescence."

In the cited California case the Supreme Court definitely and unequivocally recognizes and upholds this doctrine and cites the case of Michigan v. Wisconsin, decided by the United States Supreme Court and reported in 270 U. S. 295, 46 S. Ct. 290, 298, 70 L. Ed. 595. Without quotation from this Michigan-Wisconsin Case, we may note that not once, but several times, the United States Supreme Court, in unmistakable language, sets up the doctrine of long acquiescence paramount to recollection of witnesses produced on either side. The doctrine as announced by this tribunal of last resort is stated thus: "It is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

Numerous authorities, both state and federal, might be cited, but the foregoing suffice the needs of the present discussion.

Appellant urges that, inasmuch as the lines of the Robinson survey could be traced out by a surveyor and located at any time, there could be no uncertainty as to the boundaries of Crescent City. The record does not support appellant's premise that the lines could be so traced out, but, conceding this to be true, yet that does not arbitrarily solve the question of uncertainty. Price v. De Reyes, 161 Cal. 484, 489, 119 P. 893; Silva v. Azevedo, 178 Cal. 495, 498, 173 P. 929; Nusbickel v. Stevens Ranch Co., 187 Cal. 15, 16, 200 P. 651.

Going further on this point, the undisputed facts are that, in addition to the Robinson survey, there was the Randall survey, the patents to the city of Crescent City, and the organization of the city into a city of the sixth class. Assuming that the boundaries of Robinson survey were certain and definite likewise were the boundaries as outlined by the Randall survey certain; also the description as given in the patents to the townsite and the description set forth in the reorganization as a city of the sixth class. With all but the Robinson survey agreeing on the Randall survey, there surely was enough to present an uncertainty as to the correct boundaries of the city, and an ideal set-up was presented for the application of the acquiescence doctrine.

From the foregoing we conclude that the court below was correct in holding that Randall precinct was and is a portion of Crescent City, within the territorial limits of said city, and that the electors residing in said precinct could not arbitrarily be denied the right of suffrage.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

135 Cal.App. 790

Frank W. STARRY, Plaintiff and Respondent, v. Arthur PETERSON, Defendant and Appellant.

Civ. 4930.

District Court of Appeal, Third District, California.

Dec. 9, 1933.

Rehearing Denied Jan. 8, 1934.

Appeal by defendant from a judgment of the Superior Court of Del Norte County, Harry W. Falk, Judge, in a proceeding contesting an election.

Affirmed.

Fred W. Carroll, of Crescent City, for appellant.

Puter & Quinn, of Eureka, for respondent.

PER CURIAM.

This is a companion case to that of Starry v. Lake, 28 P.(2d) 80, in which an opinion of this court has this day been filed.

Both cases were submitted upon the same briefs, and the question in each is identical.

Upon the authority of the case of Starry v. Lake, the judgment in the instant case is affirmed.

135 Cal.App. 672

Ex parte CARROLL.

Cr. 2443.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1933.

1. Divorce ⇐207.

Though divorce suit is equity case, receiver may be appointed therein only under property distribution statutes or to undo fraud, protect from oppression, etc. (Civ. Code, §§ 140, 147, and § 146, subd. 3; Code Civ. Proc. § 564, subd. 7).

2. Divorce ⇐252.

Court, deciding in divorce suit that property belongs to parties as tenants in common, cannot order it sold and proceeds divided as in partition suit (Civ. Code, § 147).

3. Divorce ⇐269(1).

Order for sale of spouses' separate property in wife's separate maintenance suit, wherein husband cross-complained for divorce, being in excess of court's jurisdiction, order commanding wife not to interfere with receiver's sale of property was void and disobedience thereof not contempt (Civ. Code, § 147).

4. Contempt ⇐21.

Disobedience of void order does not constitute contempt.

5. Divorce ⇐269(13).

Order, imposing fine and imprisonment for contempt of court by wife in disobeying order not to interfere with sale of spouses' separate property by receiver, appointed in her separate maintenance suit, wherein husband cross-complained for divorce, *held* void (Code Civ. Proc. § 564, subd. 7; Civ. Code, §§ 140, 147, and § 146, subd. 3).

Proceeding by Catherine M. Carroll, also known as Catherine Wilson, for a writ of habeas corpus to the Sheriff of Los Angeles County.

Writ granted, and petitioner discharged.

C. C. Caswell, of Los Angeles, for petitioner.

Sherman & Sherman, of Los Angeles, for respondent Raymond A. Carroll.

PER CURIAM.

The petitioner, upon a hearing in the superior court of Los Angeles county, was adjudged guilty of contempt of court, and on August 30, 1933, was sentenced therefor to imprisonment for five twenty-four hour days in the county jail, and to pay a fine of $300, the alternative for payment of the fine being fixed by the court as further imprisonment in jail of twenty-four hours for each $2 of the fine unpaid. The writ of habeas corpus is sought on the ground that no contempt was committed by petitioner in her failure to obey the orders of the court commanding her not to interfere with a sale of real property and the furniture and furnishings therein by a receiver previously appointed by the court, and further commanding her to co-operate with said receiver in effecting such a sale. It is contended by petitioner that the order appointing the receiver was void for want of jurisdiction; therefore that no contempt could arise by her failure to work with an officer illegally appointed.

The original appointment was made during pendency of a separate maintenance action brought by petitioner against Raymond A. Carroll, upon motion of the latter, who had cross-complained for a divorce, the receiver being instructed to sell two parcels of real estate, the title to which was placed in question by pleadings in the divorce action. The petitioner objected, but did not appeal from the order appointing the receiver, and, when one of the parcels was sold, the net proceeds were divided equally between the parties. Later the court by its interlocutory order granted a divorce to the husband, awarded no alimony or separate maintenance to petitioner, decreed that the remaining parcel of real property was held in trust by Ray A. Carroll, Limited (which corporation had been joined as a defendant), for the husband and wife as tenants in common, share and share alike; that the furniture and furnishings in said property were also owned by them as tenants in common in equal shares; that the real estate and furniture be sold by the receiver who was continued in office, the proceeds of the sale, after expenses paid and adjustment of certain claims against the property by each of the parties, to be divided in equal shares. The findings on which the judgment was based recited that: "Said real property is heavily encumbered, and if not disposed of the encumbrances upon the same will be foreclosed and the beneficial interest of the plaintiff and defendant Raymond A. Carroll in and to said real property will become lost and valueless and legal title to said real property will be lost by said corporation, Ray Carroll Co., Ltd., and by reason of the fact that the furniture and furnishings in said house cannot be equitably divided between the parties hereto, and

by reason of the fact that plaintiff is entitled to a lien thereon, as set forth in the findings herein, and by reason of the fact that said furniture and furnishings can be sold and disposed of to better advantage if sold with said real property, it is necessary that said real property and furniture and furnishings be sold."

On February 14, 1933, notice of appeal from the judgment in the separate maintenance action, except the portion thereof awarding jewelry to plaintiff, was filed by the plaintiff, which appeal has not been perfected.

The question for us to decide is whether the court was authorized to continue in office, after entry of the interlocutory judgment, the receiver previously appointed and to instruct him to sell the property which, by the court's decree, was found to belong to the husband and wife as tenants in common. Attorneys for the husband have filed a brief in opposition to the writ, and, while they admit "that as a general rule the superior court in a divorce proceeding has no jurisdiction to deal with the separate property of the spouses" (Allen v. Allen, 159 Cal. 197, 201, 113 P. 160, 162), contend that under circumstances peculiar to this case the authority for such appointment or continuance thereof with instructions to sell is found in subdivision 7 of section 564 of the Code of Civil Procedure, providing that receivers may be appointed "in all other cases where receivers have heretofore been appointed by the usages of courts of equity." Petitioner contends, first, that the court has no jurisdiction over the subject-matter, for the reason that the property in question, real estate and furniture, was not found to be community property, and therefore could not be sold as community property, but sometimes may be sold under subdivision 3, section 146, Civil Code, where homestead rights are involved, or section 147, Civil Code, where community property is to be divided; second, that section 140, Civil Code, authorizing appointment of a receiver to secure payment of alimony or separate maintenance, cannot operate in this case for the reason primarily that the appointment was not requested, but on the contrary was resisted by the wife, who had asked for separate maintenance; and, finally, because the court by its judgment made no award for separate maintenance. The claim is in effect that in divorce and separate maintenance cases these three sections cover the only situations where a receiver may be appointed or the property sold. It is true, nevertheless, as stated by opponents, that in certain reported California divorce or separate maintenance cases receivers were appointed and the appointments upheld, but in every case to which we have been cited, aside from those where the appointments were made under section 140, Civil Code, to secure alimony or separate maintenance or the property was sold to divide the community holdings, there existed some purely equitable reason for such appointment, usually to protect the wife from the fraud of the husband. In such case, of course, the appointment is authorized by "the usages of equity"; e. g. Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97. For the same principle, see Patents Process, Inc., v. Superior Court, 101 Cal. App. 541, 282 P. 21. No such reason for the appointment appeared in the present case. In Takeba v. Superior Court, 43 Cal. App. 469, 185 P. 406, not a divorce action, the appointment of a receiver was upheld as conforming to usages of equity, and opponents here feel that, even though we are now concerned with a divorce action, still the doctrine of that case is broad enough to sustain orders made by the trial court in relation to this receivership. In the Takeba Case at page 476 of 43 Cal. App., 185 P. 406, 409, appears the following:

"Where the dispute in a litigation is as to the title to the property involved therein, and it is made satisfactorily to appear that the property is of such a character or is in such a situation as that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or to some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties. This means of course, that the court itself may take possession or custody of the property and hold or dispose of it, according as the nature of the property or the exigencies of the situation with respect to it may require."

Examination of the opinion discloses that the attack upon the appointment of the receiver and his power to take and sell the crop of peaches then ripening on the trees was made before there had been any determination of the question as to who owned the peaches; this question being involved in an unlawful detainer action arising out of a ranch lease. But in the instant case the court, at the very time and by the same decree under which it continued the receiver in office and ordered the sale, determined all questions of title, holding that the property belonged to the husband and wife as tenants in common.

[1-5] By this judgment we are brought face to face with the question as to whether a court determining the merits of a divorce action and the character of the property involved is authorized to order sold by its formal judgment the separate property of both spous-

es; no award of alimony or separate maintenance being made. Counsel have not cited, nor have we been able to find, a case where, in a divorce action, a receiver has been appointed, no fraud or inequitable situation appearing, merely because of the precarious conditions under which the property of the parties is held. It has been decided that an action for divorce is a case in equity (9 Cal. Jur. 775, and cases there cited), but it is our belief that, notwithstanding such characterization of the action, a receiver may be appointed in such a case only as provided by sections of the Civil Code relating to property distribution, or when required by principles of equity to undo fraud, to protect from oppression, or for a similar purpose; further, that, when the court has decided that the property belongs to the parties as tenants in common, it is without power to order this property sold and the proceeds divided as in a suit for partition, this power being given to the court solely in relation to community property. Section 147, Civ. Code. Since in our opinion this order for the sale of separate property was in excess of the jurisdiction of the court, it follows that the further order commanding petitioner not to interfere with, but to co-operate with, the receiver in selling the property, was void. Since disobedience of a void order does not constitute contempt (Andrews v. Superior Court, 103 Cal. App. 360, 365, 284 P. 494; see, also, cases cited in 5 New Cal. Dig. 226 and 5 Cal. Jur. 918, 919), the order of the court imposing the penalty of fine and imprisonment is in itself void. See 5 Cal. Jur. 957. Therefore let the petitioner be discharged.

135 Cal.App. 714

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. BANK OF AMADOR COUNTY.

Civ. 4970.

District Court of Appeal, Third District, California.

Dec. 13, 1933.

As Corrected Jan. 8, 1934.

1. Evidence ⇐269(1).

Conversations between trustee under deed of trust and attorney for grantee thereunder as to what trustee told attorney with respect to land *held* inadmissible to show acts constituting possession by grantee.

2. Evidence ⇐269(1).

Statement to grantor by trustee under deed of trust that he took possession for grantee *held* inadmissible to show actual possession by grantee.

3. Mortgages ⇐187.

Where mortgagor is left in possession of mortgaged premises, in order to constitute possession by mortgagee sufficient notice to creditors or third parties having dealings with mortgagor, there must be actual, open, visible possession; mere words or paying of bills being insufficient.

4. Mortgages ⇐187.

"Deed of trust," though differing in form from mortgage, is essentially a security, and one claiming as trustee in possession must have performed such physical acts as would be required to constitute a mortgagee in possession in order to bar rights of subsequent creditors.

"Mortgagee in possession" is one who has lawfully acquired actual possession of the premises mortgaged to him, standing on his rights as mortgagee, and not claiming under another title for the purpose of enforcing his security upon such property, or making its income pay his debts, but the fact that the mortgagee receives the rents and profits does not constitute him a mortgagee in possession unless he takes the rents in such a way as to take out of the hands of the mortgagor the management and control of the estate. "Possession of land" is actual control by physical occupation, the holding of it, and the exercise of dominion over it, the immediate, exclusive dominion of it, that position or relation which gives to one its use and control and excludes all others from a like use or control.

[Ed. Note.—For other definitions of "Deed of Trust," "Mortgagee in Possession" and "Possession," see Words and Phrases.]

5. Mortgages ⇐187.

Acts performed and dominion exercised by mortgagee to constitute possession are similar to acts performed and dominion exercised to constitute adverse possession, except as to payment of taxes.

6. Mortgages ⇐199(2).

That trust deed purported to include rents, issues, and profits as security would not avail to give a right thereto to grantee under trust deed, unless trustees were in actual possession at time of grantor's execution of chattel mortgage upon growing crop (Code Civ. Proc. § 707; Civ. Code, § 2927).

7. Chattel mortgages ⇐138(2).

Holder of crop mortgage executed after execution of deed of trust conveying realty with rents, issues, and profits thereof as security *held* entitled to proceeds of crop where

trustees under deed of trust did not take possession at time that mortgage upon crop was executed (Code Civ. Proc. § 707; Civ. Code § 2927).

Facts disclosed that the grantor continued to occupy the premises included in the trust deed and covered by the chattel mortgage upon the growing crop; that he managed and controlled the same, sold the crop, and collected the money; that there was no apparent change of possession except that the trustee notified the grantor that the grantee would take possession of the premises, but nothing was done which would give notice to third parties; and that the men who were employed to work upon the premises were hired by the grantor, though their wages were paid by the grantee under the trust deed, which in and of itself did not show change of possession.

Appeal from Superior Court, Amador County; J. A. Smith, Judge.

Action by the Bank of America National Trust & Savings Association against the Bank of Amador County. Judgment for defendant, and plaintiff appeals.

Reversed.

Louttit, Marceau & Louttit, of Stockton, for appellant.

Case & Forslund, of Stockton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action involves the question of whether the beneficiary of the deed of trust conveying real property, together with the rents, issues, and profits thereof, or the holder of a subsequent crop mortgage, mortgaging the crop thereon, is entitled to the proceeds of a growing crop. Also, error of the court in admitting evidence. The defendant holding the trust deed had judgment, and from this judgment the plaintiff appeals.

The transcript shows that on or about the 7th day of August, 1930, Richard Raggio and Clayton Raggio executed a deed of trust to the respondent, the trust deed conveying to trustees for the benefit of the respondent certain real property owned by the Raggios, together with the rents, issues, and profits thereof, and provided, among other things, that in case of default the trustees named in the deed of trust, either personally or by receiver, might enter upon and take possession of the property, and collect the rents, issues, and profits thereof.

On the 3d day of October, 1931, the Raggios executed to the appellant, as security for the payment of a promissory note, a crop mortgage mortgaging to said appellant all crops growing, or that might be growing during the years 1931–1933, inclusive. This mortgage covers all kinds of crops that might be planted, or that were growing upon the premises described therein, being the same premises described in the trust deed. The trust deed and mortgage were both duly recorded.

Subsequent to the execution of the crop mortgage, the Raggios, without having obtained consent of the appellant, sold certain alfalfa growing upon the mortgaged premises for the sum of $500. The check representing the receipt for the sale of the alfalfa was turned over to Mr. Case, the attorney for the respondent. On the part of the respondent it was alleged that the Raggios defaulted in the payment of their obligations, and that thereupon Mr. Culbert, one of the trustees named in the deed of trust, took possession of the premises, and claimed the rents, issues, and profits thereof, etc. The claim of the defense is further that this possession was taken prior to the execution of the crop mortgage.

The claim of possession is based upon the following testimony, all of which was admitted, under objection, as being hearsay, incompetent, immaterial, and not sufficient to establish the fact of possession, to wit: Mr. Culbert, for the respondent, testified as follows:

"Q. (by Mr. Case): I will ask you what you did in September, 1931, with regard to taking possession? A. I went to the ranch, and after a conversation with Raggio, advised him that I, as trustee of the Bank of Amador County, then and there take and claim possession of the Raggio ranch; and from there I went to Stockton, and so advised you (referring to Mr. Case).

"Q. What was that conversation? (referring to a conversation had with Mr. Case in Stockton). A. Well, with reference to interest and taxes and the reclamation district taxes.

"Q. State what was said? A. He (referring to Raggio) said he was unable to pay anything, unable to pay anything.

"Q. What did he say with reference to his ability to occupy and run the ranch? A. Well, he said he would like to stay there and see what he could get out of it. I said, 'All right, you can stay there, but it is our ranch now.'

"Q. What did you direct your attorney to do? A. I directed you to proceed as soon as possible to foreclose and take it over.

"Q. And what with reference to operating the ranch and financing it? A. I instructed you to pay such bills as were necessary for the handling of the ranch, and sent you a check-book for that purpose immediately on arriving home, which was the next day."

Cross-examination by Mr. Marceau:

"Q. After you were there in September, Mr. Raggio continued to live there? A. Yes, Clayton stayed there.

"Q. And he did the work on the ranch? A. Well, he did some work; I hired others there to do some work, a lot of things.

"Q. The men that you hired were men that had been working for him before? A. I don't know.

"Q. You just told Mr. Raggio to do certain things, and you had Mr. Raggio do the employing of these men? A. Yes, Raggio looked after these things for me.

"Q. And you never personally moved on the ranch? A. No, thank God, no.

"Q. And no officer of the bank? A. No."

Mr. Case, called as a witness for the respondent, testified as follows:

"Q. Did you have a conversation with Mr. Culbert about the middle of September, 1931, with reference to the Raggio loan and the Raggio ranch? A. I did.

"Q. Where was that conversation held? A. In my office in Stockton.

"Q. Who were present? A. Mr. Culbert and myself.

"Q. What was that conversation? A. Mr. Culbert told me he had been to the Raggio ranch and made an examination, and in view of the fact that Mr. Raggio was unable to pay the taxes and operate the ranch, he had taken possession, and wished me to represent him in all matters relative to the operation of the ranch. He told me to purchase livestock from the Bank of America and purchase some feed and operate the ranch, and to take all payments of any kind, and when the proper time came, to arrange for the planting of the ranch crops, and that he would be constantly in communication with me and advise what he wanted me to do in the matter. He also told me to proceed to foreclose the deed of trust and cause the property to be sold under the trust deed. He further stated that he would give me a check-book, and place the money in my name in the Bank of Amador County, as agent, and that I was to pay all operating bills and proceed to operate the ranch.

"Q. What did you do with respect to these instructions? A. When Mr. Culbert sent me the check-book, I proceeded to pay all labor used on the ranch, and I purchased the horses and the hay and other chattels from the Bank of America and paid for them with checks. Mr. Raggio came to my office frequently, and I instructed him what to do. He did nothing about hiring men without consulting me. He would state to me what men he hired, what they did during said employment. I also went to the ranch frequently and examined the ranch and what was being done. And I paid all the bills for operating the ranch."

[1-3] Mr. Culbert also testified as follows, regarding the growing alfalfa which was sold for feed, to a man by the name of Saunders, with reference to a conversation had with Raggio: "A. Yes, he spoke to me of feed conditions there, and said he might be able to sell it to a sheepman. I said, 'All right; look around and see if you can find a sheepman that will buy it; find out what he will give and then let me know.' A few days later he advised me when I was in Stockton, how he had contacted a man by the name of Saunders, and that Saunders would give him $500.00 for the feed, and he thought it was a pretty good price. I said, 'Go and get that $500.00 as soon as you can, and you bring it to me or to Mr. Case.'"

All of the questions asked of the witness Culbert relative to conversations between him and Raggio, and also relative to conversations with Mr. Case, and likewise all of the testimony of Mr. Case as to conversations between him and the witness Culbert and Mr. Raggio, were objected to on the ground of irrelevancy, incompetency, immateriality, and hearsay; that the questions called for self-serving declarations; that defendant, by permitting Raggio to remain in possession of the ranch as the ostensible owner, was estopped from claiming that Raggio held possession merely as an agent of the defendant; that nearly all of the questions called for, and the answers given, related to conversations between Mr. Culbert and his attorney, or conversations had between Mr. Culbert and Mr. Case on the one hand, and Mr. Raggio on the other, elicited and constituted only hearsay testimony. The conversations between Mr. Culbert and Mr. Case in the city of Stockton as to what Mr. Culbert told Mr. Case, and also what he told Mr. Case to do, were immaterial and irrelevant, as showing acts constituting possession; likewise, what Mr. Culbert said to Mr. Raggio, that he took possession for the bank, did not show any actual possession, but only what he (Culbert) said to Mr. Raggio. It does show that by the trustee's own declaration he left Mr. Raggio in possession of the premises. Neither Mr. Culbert, as trustee, nor any officer of the bank, went upon the mortgaged premises and remained in possession thereof. In order to effect a change of possession, there must be something more than mere words, and also something more than the mere paying of bills, when a trustor or mortgagor is left in possession of the mortgaged premises, in order to constitute a possession sufficient to give notice to creditors or third parties who may have dealings with the trustor or mortgagor.

In order to constitute a mortgagee or trustee in possession, there must be something more than a mere paper title. There must be an actual, open, visible possession.

[4] As shown by the cases hereinafter cited, the law is well settled in this state that a deed of trust, though differing in form from a mortgage, is essentially a security, and therefore one claiming as a trustee in possession must have performed such physical acts

as would be required to constitute a mortgagee in possession in order to bar the rights of subsequent creditors.

In 41 C. J. p. 612, the term "mortgagee in possession" is thus defined: "The term 'mortgagee in possession' is applied to one who has lawfully acquired actual possession of the premises mortgaged to him, standing upon his rights as mortgagee, and not claiming under another title, for the purpose of enforcing his security upon such property, or making its income pay his debts; but the fact that the mortgagee receives the rents and profits does not constitute him a mortgagee in possession unless he takes the rent in such a way as to take out of the hands of the mortgagor the management and control of the estate."

In 49 C. J. p. 1094, we find the definition of "possession of land" which we think applicable to the instant case, to wit: " 'Possession of land' has been defined as the actual control, by physical occupation; the holding of it, and the exercise of dominion over it; the immediate, exclusive dominion of it; that position or relation which gives to one its use and control and excludes all others from a like use or control. Thus it appears that there may be different modes of acquiring and holding possession of land; and what constitutes possession in a given instance, is sometimes difficult to determine, owing to the existence of qualifying circumstances." In the instant case conversations between the witnesses Culbert and Case and what Mr. Culbert may have stated to Raggio do not constitute qualifying circumstances.

[5] The acts performed and the dominion exercised by a mortgagee, to constitute possession, we think are akin to the acts performed and dominion exercised, to constitute what, in law, would be adverse possession, save and except as to payment of taxes now required by statute.

In the case of Steele v. Benham, 84 N. Y. 634, where the question of whether a mortgagee was in possession, such as to notify creditors, was involved, we find the following: "To satisfy the statute the possession must be actual, not merely constructive or legal. In Topping v. Lynch, 2 Rob. [25 N. Y. Super. Ct.] 484, it was said that the words 'actual and continued change of possession' in this statute 'mean an open public change of possession, which is to continue and be manifested continually by outward and visible signs, such as render it evident that the possession of the judgment debtor has ceased.' In Crandall v. Brown, 18 Hun [N. Y.] 461, it was said that 'constructive possession cannot be taken under a chattel mortgage;' that 'possession must be taken in fact,' and that 'possession cannot be taken by words and inspection.' "

In Hart v. All Persons, 26 Cal. App. 664, 148 P. 236, 241, this court, dealing with the question of actual possession, quoted with approval the following language: "In Lofstad v. Murasky [152 Cal. 64, 91 P. 1008] the court quoted approvingly from Wolf v. Baldwin, 19 Cal. 313, in stating what kind of actual occupation was required under the Van Ness ordinance and as applicable under the McEnerney act, as follows: 'A possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. * * * It must, in other words, be an open, unequivocal, actual possession—notorious, apparent, uninterrupted, and exclusive—carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property.' It was said, in Brumagim v. Bradshaw, 39 Cal. 24, 46: 'A mere intention to occupy land, however openly proclaimed, is not possession. The intention must be carried into actual execution by such open, unequivocal, and notorious acts of dominion as plainly indicate to the public that the person who performs them has appropriated the land and claims exclusive dominion over it. Anything short of this is not what the law denominates * * * possession.' "

To the same effect is the decision of this court in the case of Mattes v. Hall, 21 Cal. App. 552, 132 P. 295.

[6] In Casey v. Doherty, 116 Cal. App. 42, 2 P.(2d) 495, the rule is stated, supported by authorities cited, that "a mortgagee not in possession is not entitled to the rents, issues and profits of the premises where the mortgagor has remained in possession of the mortgaged premises." The fact that the rents, issues, and profits of the mortgaged property "are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver." Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 485, 53 Am. St. Rep. 201. Thus, the fact that in the instant case the trust deed purported to include the rents, issues, and profits as security would not avail, unless the trustees were in actual possession at the time of the execution of the chattel mortgage belonging to the plaintiff.

In the case of First National Bank of Lindsay v. Garner, 91 Cal. App. 176, 266 P. 849, this court went into the question very thoroughly as to the respective rights between a mortgagee whose mortgage included in its provisions, rents, issues, and profits, as against a third person claiming under a chattel mortgage covering the crops grown upon the mortgaged premises, and it was there held that, until the mortgage had been foreclosed,

the mortgagor in possession was entitled to the rents, issues, and profits of the mortgaged premises, and of course possessed the right to mortgage the same.

Under section 2927 of the Civil Code, a mortgagor is entitled to possession unless otherwise provided for in the mortgage, and, under section 707 of the Code of Civil Procedure, the title to the rents, issues, and profits do not pass from the owner of the premises until the date of sale, and therefore a chattel mortgage on crops, executed prior to the date of sale, would be valid.

In Nelson v. Bowen, 124 Cal. App. 662, 12 P. (2d) 1083, 1085, this court had occasion to go into the question of possession as between one holding under a trust deed and the claim of one based upon a chattel mortgage executed after the date of taking possession. The trial court found the following facts which this court held to be sufficient to show actual possession under the trust deed, to wit: "The insurance company [assignee under the trust deed] on or about the 19th day of April, 1927, peaceably and lawfully took possession of the real property and all the appurtenances, including as well the growing crops thereon, and that upon said date the orchard company peaceably surrendered possession thereof to respondent insurance company; that the insurance company thereafter plowed, cultivated, sulphured, cared for, and harvested and marketed all the crops growing on said premises, and paid all the expenses thereof; that the occupancy of the insurance company was open, notorious, etc.; that on and after the 19th day of April, 1927, the orchard company exercised no control whatever over said property, or of the growing crops thereon, and did not in any manner care for, harvest, or market any of the growing crops; that on the 26th day of May, 1927, the orchard company, its agents, officers, and employees, removed from said real property and wholly abandoned the same, and thereafter, and at all times mentioned herein, abandoned said property and surrendered the possession thereof to the insurance company; that thereafter the insurance company at all times continued to hold the possession of said property, and of the crops growing thereon; that the crops on said property consisted of prunes, peaches, grapes, and other fruits," etc.

This court further quoted from 41 C. J. p. 612, as to what constitutes a mortgagee in possession. As to what constitutes a mortgagee in possession, and their rights and liabilities pertaining to such relation, we cite further from 17 California Jurisprudence, p. 1016, which supports what we have heretofore stated, and the cases cited.

That a trust deed executed for the purposes of security is in substance no different from a mortgage, save and except the power of sale is vested in the trustees, is established by the following cases: In MacLeod v. Moran, 153 Cal. 97, 94 P. 604, 605, the Supreme Court said: "The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale"—citing authorities.

In Wasco Creamery & Construction Co. v. Coffee, 117 Cal. App. 298, 3 P.(2d) 588, the cases are cited supporting and following the rule announced in MacLeod v. Moran, supra.

This court, in the case of Bank of Italy National Trust & Savings Ass'n v. Bentley, 4 P. (2d) 546, went into the nature and characterization of trust deeds, citing authorities to the effect that a trust deed, when given as security, is nothing more than a mortgage, with power of sale. While a hearing was granted by the Supreme Court in this case, the decision of the Supreme Court reported in 20 P.(2d) 940, follows the same line of reasoning, to the effect that a trust deed with power of sale is in substance only a different form of security when given for the purpose of securing the repayment of money.

[7] The record in this case shows beyond controversy that Clayton Raggio continued to occupy the premises included in the trust deed and covered by the chattel mortgage, managed and controlled the same, sold the crop, and collected the money. It further appears from the record and the testimony which we have set forth that there was no apparent change of possession. Nothing was done which would give notice to third parties. The men who were employed to work upon the premises were hired by Clayton Raggio. The fact that their wages were paid by the respondent is not of itself any evidence of a change of possession.

Without discussing further the inadmissibility of the testimony, it is sufficient to state that the finding of the court as to the change of possession is not supported by the testimony. The indebtedness of the Raggios to the plaintiff and the execution of the chattel mortgage are admitted.

It follows from what we have said that the judgment of the trial court should be reversed, and it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

JENKS v. CAREY et al.

Civ. 9098.

District Court of Appeal, First District, Division 1, California.

Dec. 27, 1933.

Hearing Denied by Supreme Court Feb. 21, 1934.

1. Master and servant ⇐404.

Industrial Commission may use as proof evidence which would be inadmissible under ordinary common-law or statutory rules of procedure.

2. Master and servant ⇐405(1).

Opinions of witnesses as to facts showing employee was injured in course of employment, although undisputed, were insufficient to compel finding in accordance therewith, question of their weight being for Industrial Commission (Code Civ. Proc. §§ 1844, 1847).

3. Master and servant ⇐371.

Employee is "in course of employment" when he does reasonable things which contract expressly or impliedly permits, or where in course of employment he is confronted with sudden situation which without opportunity for reflection impels immediate action resulting in injury.

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

4. Master and servant ⇐371.

Employee is "in course of employment" where act done is customarily associated with his duties, or where, although not directed to do act resulting in injury, employee believed in good faith that he was following directions of superior.

5. Master and servant ⇐375(1).

Injury received by employee while voluntarily doing something outside of employment, though for benefit of employer, is not injury suffered "in course of employment."

6. Master and servant ⇐414.

Whether insurance salesman was expressly or impliedly directed to take insured person injured in automobile collision to hospital, or believed in good faith he was so authorized so that injury sustained when going to hospital occurred in course of employment *held* for Industrial Commission.

7. Master and servant ⇐417(7).

Findings of fact by Industrial Commission based on weight and credit to be given testimony or fair inferences to be drawn are conclusive on reviewing court.

8. Master and servant ⇐403.

Compensation claimant has burden of establishing that injury arose out of and in course of employment.

9. Master and servant ⇐417(7).

Industrial Commission's findings are not reviewable where they find support under any rational view of evidence, though reviewing court may think that different conclusion should have been reached.

10. Master and servant ⇐417(7).

Findings of Industrial Commission need not in opinion of reviewing court accord with preponderance of evidence to make commission's findings conclusive.

11. Master and servant ⇐417(7).

Where court could not say that Industrial Commission acted arbitrarily in denying compensation for death of insurance salesman injured while taking insured person to hospital from scene of automobile accident or that commission's conclusions were unsupported or unreasonable, court could not set aside its findings or award.

Proceeding under the Workmen's Compensation Law by Eva R. Jenks, claimant, for the death of her husband, opposed by Edward Carey, employer, and the Ocean Accident & Guaranty Corporation, insurance carrier. The Industrial Accident Commission denied an award, and claimant brings certiorari.

Affirmed.

Francis Gill, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for respondent Ocean Accident & Guaranty Corporation.

PER CURIAM.

Theodore R. Jenks in his lifetime was employed by respondent Carey as an insurance salesman. He received a salary and commission. On Sunday, August 21, 1932, between 5 and 6 o'clock a. m., while at his home he received a telephone call from A. L. Dutra, who stated that he had met with an automobile accident and requested decedent to come to his assistance. Decedent agreed and drove his automobile to the scene of the accident. Upon his arrival he volunteered to take Dutra to the hospital. While proceeding to do so, another accident happened, as the result of which decedent was injured and subsequently died. Decedent and Dutra were friends, and the latter carried insurance which had been solicited by decedent and written by companies represented by respondent Carey.

Petitioner claimed that the injury arose out of and in the course of the decedent's em-

ployment. The commission found against her and denied an award. A petition for rehearing was denied, following which the present proceeding in certiorari was commenced.

The petitioner contends that the commission's findings are not supported by the evidence.

Respondent testified that, while his office was closed on Sundays, decedent worked at all hours; that in case a car owner carrying insurance written through his office should meet with an accident and call for assistance he expected decedent to respond and, if necessary, take such person to the hospital. Neither decedent nor respondent's other employees had previously rendered the latter service, their instructions being to make a report of the circumstances of the accident, obtain the names of witnesses, and, if the injured car needed repairs, to notify a garage or repairman. The employees were also instructed generally to exert themselves in procuring new business and keeping the assured satisfied. It was also testified that respondent had previously responded to similar calls. Said respondent also stated that had he carried no insurance he would have been unwilling to pay the compensation sought by said petitioner, but later testified that the fact that he was insured did not influence his opinion as to his liability. An insurance solicitor employed by Carey testified that he would have followed the course pursued by decedent under the same circumstances, but stated that his instructions were as testified by respondent. Other witnesses testified, but the foregoing is in substance the only testimony given on the question of decedent's authority or duties.

[1, 2] The petitioner contends that the testimony being uncontradicted the commission could not properly disregard it, and was bound to accept it as proof that decedent was injured in the course of his employment.

It is the rule in ordinary actions that where the duty of an employee under given circumstances is not a matter for expert testimony the opinions of witnesses are not admissible. Winslow v. Glendale Light & Power Co., 164 Cal. 688, 130 P. 427; Waniorek v. United Railroads, 17 Cal. App. 121, 118 P. 947; Simon v. McCoy, 28 Cal. App. 523, 153 P. 406; King v. Cline, 49 Cal. App. 696, 194 P. 290; Central R. R. v. DeBray, 71 Ga. 406; McIsaac v. Northampton Electric Lighting Co., 172 Mass. 89, 51 N. E. 524, 70 Am. St. Rep. 244; Krueger v. Chicago, etc., Ry. Co., 84 Mo. App. 366; Providence Tool Co. v. U. S. Manufacturing Co., 120 Mass. 35; Wolverton v. Village of Saranac, 171 Mich. 419, 137 N. W. 211. Such testimony, if admitted, is entitled to little weight. Waizman v. Black, 101 Cal. App. 610, 281 P. 1087. However, the commission has power to use as proof evidence which would not be admissible under the ordinary common-law or statutory rule of procedure. Western Pipe, etc., Co. v. Industrial Accident Com., 194 Cal. 379, 228 P. 859. But it is clear that such opinions, although undisputed, are insufficient to compel findings in accordance therewith, and the question of their weight is for the commission.

[3-10] It has been held that an employee is in the course of his employment when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do (Hartford Accident & Indemnity Co. v. Industrial Accident Com., 202 Cal. 688, 262 P. 309, 58 A. L. R. 1392), and also where in the course of his employment he is confronted with a sudden and unexpected situation which, without opportunity for reflection, impels immediate action, resulting in injury (Ocean Accident, etc., Corporation v. Industrial Accident Com., 180 Cal. 389, 182 P. 35). The same rule applies if the act done is customarily associated with his duties (Southern Pacific Co. v. Industrial Accident Com., 177 Cal. 378, 170 P. 822), or where, although not directed to do the particular act from which he suffered injury, he believed in good faith that he was following the directions of his superior (Myers v. Industrial Accident Com., 191 Cal. 673, 218 P. 11). But an injury received while voluntarily doing something outside of his employment, even though for the benefit of his employer, is not an injury suffered in the course of employment. Engels Copper, etc., Co. v. Industrial Accident Com., 183 Cal. 714, 192 P. 845, 11 A. L. R. 785. However, the questions whether he was expressly or impliedly directed to do the act from which the injury arose, or believed in good faith that he was authorized, are for the determination of the fact-finding body, and findings of fact based upon the weight and credit to be given the testimony of witnesses or the fair inferences to be drawn from the evidence are conclusive upon the reviewing court. Myers v. Industrial Accident Com., supra. The burden is upon the claimant to establish the fact that the injury arose out of and in the course of the employment (George L. Eastman Co. v. Industrial Accident Com., 186 Cal. 587, 200 P. 17), and, as stated above, the weight and sufficiency of the evidence and the credibility of the witnesses are matters to be determined by the commission (State Compensation Insurance Fund v. Industrial Accident Com., 195 Cal. 174, 231 P. 996; Ragos v. Industrial Accident Com., 83 Cal. App. 313, 256 P. 487). Its findings are not reviewable where they find support under any rational view of the evidence. North Pacific Steamship Co. v. Industrial Accident Com., 174 Cal. 500, 163 P. 910; Southern Pacific Co. v. Industrial Accident Com., supra. The same rule applies even though the reviewing court may think that other inferences might fair-

ly have been drawn from the evidence, or that a different conclusion should have been reached. Hartford Accident & Indemnity Co. v. Industrial Accident Com., supra; Clopton v. Clopton, 162 Cal. 27, 121 P. 720. Nor is it necessary that the findings shall in the opinion of the reviewing court accord with the preponderance of the evidence. San Francisco v. Industrial Accident Com., 183 Cal. 273, 283, 191 P. 26.

A witness is presumed to speak the truth (Code Civ. Proc., § 1847), and the direct evidence of one witness entitled to full credit is sufficient for the proof of any fact except perjury and treason (Code Civ. Proc. § 1844). It has accordingly been held that as a general rule the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact. Davis v. Judson, 159 Cal. 121, 113 P. 147. Nevertheless, as pointed out in the above and numerous other cases, the rule has its exceptions, and the most positive testimony may be contradicted by circumstances in evidence in connection with the matter which satisfy the court of its falsity, and the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statements. Quock Ting v. U. S., 140 U. S. 417, 420, 11 S. Ct. 733, 851, 35 L. Ed. 501; Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; Staples v. Hawthorne, 208 Cal. 578, 283 P. 67; Wilson v. Wood, 69 Cal. App. 552, 231 P. 1010. As was said in Blankman v. Vallejo, 15 Cal. 638, a court may reject the most positive testimony, although the witness be not discredited by direct testimony impeaching him or contradicting his statements. See, also, Davis v. Judson, supra; De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059. In Singer v. Industrial Accident Com., 105 Cal. App. 374, 287 P. 567, relied upon by petitioner, as recited in the opinion in that case, the facts were not disputed, and it was held that but one inference could reasonably be drawn therefrom, namely, that the injury arose out of and in the course of the employment; and in Pacific Indemnity Co. v. Industrial Accident Com., 105 Cal. App. 535, 288 P. 129, the inference drawn by the commission that the injured employee was acting within the actual scope of his employment was held to be supported and the award affirmed. So in other cases cited by petitioner it was held that evidence which the commission believed supported its findings. Elk Grove, etc., District v. Industrial Accident Com., 34 Cal. App. 589, 168 P. 392; Maryland Casualty Co. v. Industrial Accident Com., 39 Cal. App. 229, 178 P. 542; Pacific Employers' Ins. Co. v. Industrial Accident Com., 79 Cal. App. 195, 249 P. 33; Los Angeles County v. Industrial Accident Com., 89 Cal. App. 736, 265 P. 362; Federal Mutual, etc., Ins. Co. v. Industrial Accident Com., 94 Cal. App. 251, 270 P. 992; Behr v. Industrial Accident Com., 126 Cal. App. 522, 14 P.(2d) 915; Western Pac. Ry. Co. v. Industrial Accident Com., 193 Cal. 415, 224 P. 754. To the same effect is Voehl v. Indemnity Insurance Co. of North America, 288 U. S. 162, 53 S. Ct. 380, 77 L. Ed. 676.

With the exception of the Singer Case it was claimed in the California cases last cited that the employee had deviated from the course of his duty and at the time of his injury was doing something outside of his employment, but, as the court held, the question was one for the commission, and, there being evidence supporting its finding, the same could not be disturbed. The same rule was followed where it was claimed that the employee at the time of his injury was engaged in an excluded employment (George v. Industrial Accident Com., 178 Cal. 733, 174 P. 653; Crockett v. Industrial Accident Com., 190 Cal. 583, 213 P. 969); and in analogous cases, where recovery was sought for the negligence of an employee, it was held that the question whether he was acting within the scope of his employment or had deviated so materially therefrom as to constitute a complete departure is one for the jury unless the deviation is so slight or so marked that the court can say that no conclusion other than that the act was or was not a departure could properly be drawn (Gousse v. Lowe, 41 Cal. App. 715, 183 P. 295; Dennis v. Miller Automobile Co., 73 Cal. App. 293, 238 P. 739; Kruse v. White Bros., 81 Cal. App. 86, 253 P. 178; Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 P. 966).

The witnesses in the present case were not wholly disinterested. The employer, who was fully protected from liability, as well as the decedent's fellow employees, evinced a desire—which was natural under the circumstances, to testify to such conclusions, in addition to the facts claimed to be true, as would support a recovery against the insurance company. While this testimony, if believed by the commission, would have been sufficient to support an award, nevertheless the questions of credibility and weight as well as the inferences to be drawn from the circumstances were to be decided by that body, and, as stated, this court is without power to determine these questions. Southern Pac. Co. v. Industrial Accident Co., supra.

[11] We cannot say that the commission acted arbitrarily or that its conclusions are unsupported or unreasonable. Where such is the case, as held in the above decisions, we cannot set aside its findings or the award based thereon. The award is affirmed.

136 Cal.App. 163

PAULOS v. MARKET ST. RY. CO. et al.

Civ. 8700.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1934.

Rehearing Denied Feb. 3, 1934.

Hearing Denied by Supreme Court March 5, 1934.

1. Street railroads ⇐117(24).

Under conflicting testimony, questions whether plaintiff passed to right of center of intersection before making left turn with wagon struck by interurban electric car and whether he exercised ordinary care for own safety *held* for jury (St. 1923, p. 558, § 129, as amended by St. 1929, p. 541, § 54, and § 130, as amended by St. 1925, p. 412, § 15a).

2. Trial ⇐260(1).

Refusal of instruction covered by given instruction *held* harmless.

3. Street railroads ⇐99(16).

Where wagon, in making left turn at intersection, collided with interurban electric car traveling in opposite direction, position of wagon in street *held* governed by statutory section respecting turns at intersection, not section requiring driving on right side of highway (St. 1923, pp. 557, 558, §§ 122, 129, as amended by St. 1929, pp. 540, 541, §§ 50, 54).

4. Trial ⇐251(8).

In action for collision between plaintiff's horse-drawn wagon and interurban electric car, instruction precluding recovery if wagon driver had violated any provisions of Motor Vehicle Act and violation was direct and proximate cause of injury *held* properly refused as meaningless to jury, since no previous instruction mentioned the act.

5. Street railroads ⇐118(11).

In action for intersectional collision between wagon and interurban electric car, instruction to find for defendants if plaintiff, making left-hand turn, did not approach point of turning in traffic lane to right of center of "right of way," *held* properly refused, since statute referred to "center of roadway," and the two centers were differently located (St. 1923, p. 558, § 129, as amended by St. 1929, p. 541, § 54).

6. Appeal and error ⇐1032(3).

Erroneous refusal of instruction is not ground for reversal unless appellant shows harm resulted therefrom.

7. Negligence ⇐83.

Doctrine of last clear chance necessarily implies contributory negligence in plaintiff.

8. Appeal and error ⇐1068(5).

Erroneous refusal of defendant's instruction that any violation of any law affecting operation of vehicles constitutes negligence of driver *held* harmless, where jury, in holding defendant liable under last clear chance doctrine, impliedly found plaintiff contributorily negligent.

9. Negligence ⇐83.

Person seeing another in dangerous position may not rely upon own dullness to excuse him from not realizing danger of other's position, as regards application of last clear chance doctrine.

10. Trial ⇐252(9).

Where there was no evidence that defendant motorman had mental or physical defects, omission, in last clear chance instruction, of consideration of possible mental or physical defects of motorman, could not be considered on appeal.

11. Trial ⇐250.

Alleged omission in instruction as to matter not in issue and not appearing to be applicable under evidnece cannot be considered on appeal.

12. Street railroads ⇐118(15).

In action for collision between wagon and interurban electric car, instruction under last clear chance doctrine *held* not erroneous for failure to state that contributory negligence contemporaneous with accident, or plaintiff's ability to avoid accident when motorman became aware of danger, would bar recovery, since omitted factors excluded application of doctrine.

13. Appeal and error ⇐216(2).

Defendants, not requesting instruction as to certain matters, could not, on appeal, complain of court's failure to include such matters in instruction under last clear chance doctrine.

14. Appeal and error ⇐1064(1).

Fact that court, in instructions on contributory negligence, interpolated comment that last clear chance doctrine was exception thereto, *held* not reversible error as unduly emphasizing the doctrine and depriving defendants of defense of contributory negligence, since mere repetition of correct statement of law is not, ordinarily, ground for reversal.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Gus Paulos against the Market Street Railway Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Ingemar Hoberg, of San Francisco (Leslie C. Gillen and Miller, Van Ness & Leo J. McEnerney, all of San Francisco, of counsel), for respondent.

GRAY, Justice pro tem.

Respondent, Gus Paulos, brought this action to recover damages for personal injuries, sustained in a collision between a horse-drawn peanut wagon, driven by him, and an interurban car, owned by appellant Market Street Railway Company and operated by appellant M. Kenny. The case was tried before a jury, which returned a verdict in respondent's favor and against appellants for $6,500. The latter appealed from the judgment, entered on such verdict, assigning as errors (1) the denial of their motions for a nonsuit and for a directed verdict; (2) the refusal to give certain instructions, requested by them, on the issue of contributory negligence; and (3) the giving of certain instructions, proposed by respondent, on the doctrine of last clear chance.

[1] The wagon was struck by the car, north bound on Mission street as respondent, who had been traveling south on Mission street, was making a left-hand turn into Trumbull street, which terminates in Mission street. Appellants do not question the sufficiency of the evidence to support the jury's implied finding that they were negligent, but they do claim that the evidence establishes, as a matter of law, respondent's contributory negligence, because it shows that he made the turn in violation of sections 129 and 130 of the "California Vehicle Act" (section 129, as amended by St. 1929, p. 541, § 54, and section 130, as amended by St. 1925, p. 412, § 1ba), and that his driving of the slow-moving wagon in front of the rapidly approaching car negatived his exercise of ordinary care for his own safety. Consideration of these claims requires only a review of the evidence as to respondent's knowledge of the surrounding circumstances and his conduct before and at the time of the accident. Whether he passed to the right of the center of the intersection before turning, as required by said section 129, or cut the corner, is decided by the location of the place of collision. His course of travel and the position of his wagon at time of impact, as indicated on a diagram used at the trial, shows that he had passed to the south of the center line of Trumbull street, extended, as required by such section. A passenger on the front end of the car testified, upon respondent's behalf, that the wagon, at time of impact, was on such center line, but indicated its position, on the diagram, northerly of such line. A pedestrian, also on respondent's behalf, testified that, after the accident, he found glass on the pavement south of the center line. Another of plaintiff's witnesses found glass to the north of the center line. Motorman Kenny, another passenger, and a motorist traveling behind the respondent, each stated that the accident occurred north of Trumbull street. A third passenger called by appellants testified both that the collision happened on the south side of the intersection and that the car had crossed Trumbull street before the accident. In view of the conflict, not only between witnesses, but also in the testimony of two witnesses, the court properly denied the motions, and left the determination of the truth to the jury. 19 Cal. Jur. 743.

Whether respondent first ascertained he could make the turn in safety, before attempting so to do, as required to do by said section 130, or made the turn without exercising ordinary care for his own safety, is also the subject of conflicting testimony. Respondent testified that he saw the car four blocks away, a distance of 1,000 feet, when he commenced his turn; that he then thought he had ample time to complete the turn; that he next observed the car one and one-half blocks away, approaching at a speed of 40 to 45 miles per hour, that he heard its bell and whistle when the car was 100 feet distant and the wagon was on the tracks; and that then he speeded up his horse. His passenger witness estimated the car's speed at the intersecting street where respondent first saw it at 20 to 25 miles per hour and immediately before the impact at 40 to 45 miles per hour. He also stated the wagon was dragged 200 feet by the car. A passer-by, also called by him, fixed the car's speed at the time of the collision at 40 to 45 miles per hour and the distance the car and wagon traveled thereafter at 300 feet and 30 feet, respectively. His other pedestrian witness stated that the car's speed at the next southerly intersecting street was 40 miles per hour and that the car stopped 275 feet beyond the place of impact. The motorman testified that his speed for several blocks had been 20 to 25 miles per hour; that, when 90 feet away, the wagon turned in front of the car; that he immediately reversed his motor; and that the car dragged the wagon 45 or 50 feet, when it stopped. One passenger, called by appellants, fixed the speed of the car at 20 to 25 miles per hour. Very similar facts, on an issue of contributory negligence, were held in Wagner v. United Railroads, 19 Cal. App. 396, 126 P. 186, to present a question of fact for the jury's determination and not a question of law for the court's decision.

[2-8] Appellants complain of the court's refusal to instruct, at their request, that it was respondent's duty to use ordinary care to protect himself from injury. Since the same matter was covered by an instruction that respondent was bound to have exercised

ordinary care to avoid injury to himself, no damage resulted from such refusal. The court gave several instructions, proposed by appellants, each of which commenced with the statement that "the laws of the state of California provided, at the time in question, among other things as follows," and thereafter, respectively, contained the second paragraph of section 129, the first paragraph of section 122 (as amended by St. 1929, p. 540, § 50), and section 130 of the California Vehicle Act, without, however, stating their source. Since the accident occurred while respondent was making a left-hand turn, his position in the street was governed by section 129 and not by section 122, and the latter should not have been read to the jury. Appellants complain that the refusal to give three of their proposed instructions resulted in the jury not being advised as to the effect of any violation of such sections by respondent. In the first, the jury were told to return a verdict for appellants if they found that respondent had violated "any of the provisions of the motor vehicle act" and that such violation was a direct and proximate cause of his injuries. This instruction would have been meaningless to the jury, since no previous instruction mentioned the act. The third instruction advised a verdict for appellants, if the jury found that respondent, in making a left-hand turn, did not approach the point of turning in the traffic lane to the right of and next to the center of the *right of way* and sustained his injuries solely in consequence of such conduct. The substitution of the phrase "center of the right of way" for the phrase "center of the roadway," used in section 129, was not only erroneous, but would have been confusing, since, due to the peculiarities of this intersection, the two centers are differently located. The second refused instruction stated that "*any violation of any law* affecting the operation of vehicles constitutes negligence on the part of the driver or operator of such vehicle." Since there was no evidence as to respondent's violation of any law, other than the above sections, the italicized portion would not have misled the jury into considering whether any other law had been violated by him. Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76. Although such refusal was erroneous, appellants must show that harm resulted therefrom before a reversal would be justified. 2 Cal. Jur. 1026. They do not question that the evidence raised an issue as to the last clear chance nor that the evilence is sufficient to support the verdict upon that theory. The doctrine of the last clear chance necessarily implies contributory negligence in the plaintiff or injured party. Keiper v. Pacific Gas & Electric Co., 36 Cal. App. 362, 172 P. 180. The verdict, therefore, in holding appellants liable under that doctrine, impliedly found respondent was guilty of contributory negligence, and so appellants could not have been injured by such refusal. 4 C. J. 1051.

[9-11] Appellants do not deny that the evidence warranted instructions upon the doctrine of the last clear chance, but they do argue that five of those instructions were erroneous in specified particulars. They contend that the first of these instructions permitted the jury to predicate an application of the doctrine upon constructive instead of actual notice of peril. The criticized part of the instruction, which generally stated the essential elements of the doctrine, reads as follows: "This is known in our law as the last clear chance rule and presupposes that the plaintiff has been negligent; that as a result thereof he is in a situation of danger from which he cannot escape by the exercise of ordinary care; that the defendant is aware of his dangerous situation under such circumstances, or *sees or knows facts from which a reasonable man would believe him to be in peril;* that he realizes or *ought from the circumstances at the time to realize the inability of plaintiff to escape therefrom;* that the defendant then had a clear chance to avoid injuring the plaintiff by the exercise of ordinary care and failed to do so." (Italics ours.) As appellants correctly interpret it, this instruction advised the jury that the doctrine was applicable either if the motorman actually knew of respondent's peril or if he knew of facts from which a reasonable man would infer such peril. The second alternative (the italicized portion) is wrong, they argue, because, before the doctrine can be applied, "knowledge must be brought home to the particular defendant in charge of the instrumentality whether he be near-sighted, hard of hearing, excitable, lacking in judgment or otherwise so infirm or dull as not to readily realize the dangerous situation in which the plaintiff has carelessly placed himself." Such argument is contrary to the decisions.

"As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position (Basham v. Southern Pacific Co., 176 Cal. 320, 168 P. 359); and if he sees the dangerous situation he must use reasonable diligence in analyzing the same (Starck v. Pacific Electric Ry. Co., 172 Cal. 277, L. R. A. 1916E, 58, 156 P. 51), knowledge of danger being imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril (Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 98 Am. St. Rep. 85, 63 L. R. A. 238, 74 P. 15)." Nicolai v. Pacific Electric Ry. Co., 92 Cal. App. 100, 105, 267 P. 758, 761. Even if the motorman had denied actual knowledge, the jury could have

disbelieved him and found, from the evidence, that he had such knowledge. Hoy v. Tornich, 199 Cal. 545, 250 P. 565; Darling v. Pacific Electric Ry., 197 Cal. 702, 242 P. 703; Chappell v. San Diego & Arizona Ry. Co., 201 Cal. 560, 258 P. 73. Appellants criticize the above enunciation of the rule for its failure to include consideration of the mental or physical defects or deficiencies, if any, of the individual defendant. The judgment would not be affected by any determination that might be now made as to the correctness of appellants' contention, because there is no evidence establishing that the motorman was afflicted with any such defect or was otherwise than normal in those respects. Armstrong v. Day, 103 Cal. App. 465, 284 P. 1083. Alleged omission in an instruction as to matters not in issue and which do not appear to be applicable under the evidence cannot be considered on appeal. Hutchason v. Spinks, 3 Cal. App. 291, 85 P. 132. "The court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." California v. San Pablo, etc., R. R. Co., 149 U. S. 308, 13 S. Ct. 876, 878, 37 L. Ed. 747, quoted in In re Blythe's Estate, 108 Cal. 124, 126, 41 P. 33.

[12-14] In a second instruction, the jury were told to return a verdict for respondent if they found that he was in a position of danger from which he could not extricate himself at the time of the approach of the street car, although placed in such position by his own negligence and that the motorman was aware of his position of danger and, by the exercise of ordinary care, could have avoided the accident. Appellants find fault with this instruction for its failure to state that respondent could not recover if his contributory negligence was contemporaneous with the accident, or, if he could have avoided the accident, when the motorman became aware of his danger. The omitted factors exclude the application of the doctrine of the last clear chance (Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259), and therefore are not elements properly to be included in a statement of the doctrine. In absence of a request for an instruction on such matters, they cannot now complain. Townsend v. Butterfield, 168 Cal. 564, 143 P. 760. In reading three instructions on contributory negligence, the court interpolated the comment that the doctrine of last clear chance was an exception thereto. Appellants complain that such action unduly emphasized that doctrine and deprived them of their defense of contributory negligence. The doctrine is an exception to the rule of contributory negligence. 19 Cal. Jur. 652. Mere repetition of a correct statement of law is not ordinarily a ground of reversal. Grillich v. Weinshenk, 64 Cal. App. 474, 222 P. 160.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

136 Cal.App. 107

SILVESTER v. SCANLAN et al.

Civ. 8834.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1933.

Hearing Denied by Supreme Court Feb. 26, 1934.

1. Damages ⇐216(10).

Instruction that jury might consider in assessing damages whether injury might reasonably be expected to cause plaintiff any worry in future *held* error, in absence of evidence that plaintiff would with reasonable certainty suffer future disability (Civ. Code, § 3283).

2. Damages ⇐185(1).

Plaintiff cannot recover present damages for apprehended future consequences unless evidence shows such degree of probability of their occurring as amounts to reasonable certainty that such future consequences will result from original injury (Civ. Code, § 3283).

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Mary Silvester against Thomas E. Scanlan and another, copartners, doing business under the firm name of Miller & Scanlan, and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

Bronson, Bronson & Slaven, of San Francisco, for appellants Thomas E. Scanlan and Mark A. Miller.

Stanley J. Smith, of Oakland, for appellants Agnes E. McMullen, Ida O. Jones, and G. H. Jones.

Elliott Johnson and Ford & Johnson, all of San Francisco, for respondent.

PER CURIAM.

Action for damages for personal injuries. A verdict was rendered for plaintiff in the sum of $12,500. A motion for a new trial was made and denied. From the judgment entered on the verdict this appeal is taken.

The facts surrounding the case are without dispute. On May 29, 1929, plaintiff was walking on the sidewalk on Washington street, in Oakland, in front of a building owned by defendants Agnes E. McMullen, Ida O. Jones, and G. H. Jones. The building was being painted by defendants Scanlan and Miller. At this time a portion of the gutter was dislodged from the roof by one of the painters and it fell to the street, striking plaintiff a glancing blow. The portion of the gutter that fell was hollowed out so that it was an inch or so in thickness. Plaintiff was dazed or rendered unconscious by the blow and was taken to the Central Emergency Hospital. The surgeon in charge found a slight abrasion on the right side of her neck and another slight abrasion over the right collar bone. A little iodine was applied to the abrasions, and plaintiff left the hospital. Thereafter she brought this action for damages. At the conclusion of the trial a jury rendered a verdict in the sum of $10,000 against all the defendants. About three weeks thereafter private investigators hired by defendants made the acquaintance of plaintiff and succeeded in having her pose for moving pictures. These pictures of plaintiff portrayed a vigorous, well co-ordinated person acting like any normal person would act, without any evidence of neurosis from which she claimed at the trial to be suffering. The pictures were made the basis of a motion for a new trial, it being claimed that plaintiff had suffered no damage, but was malingering, and that her claim of injuries was without merit and dishonest. The court granted the motion on the question of damages alone. A second trial was had, resulting in a verdict for plaintiff in the sum of $12,500. It is from the judgment based thereon that the present appeal is taken.

The plaintiff, as part of her case, introduced evidence to show that she was at times unable to do her housework or practically any work at all; that she suffered from fainting spells and had to be put to bed and on occasions remained there for three or four days at a time; that she was compelled to recline on a couch at frequent intervals during the day and could not move her head backward or forward without becoming dizzy; that her sight was blurred; that she could not walk any distance unassisted, and could not completely dress or undress herself. There was also medical testimony to show that plaintiff was suffering from traumatic neurosis, or nervousness, following her slight physical injury.

The moving pictures above referred to were in evidence, and there was medical testimony to show that the activity displayed by plaintiff in the pictures did not necessarily preclude the existence of a traumatic neurosis. The pictures represented plaintiff as wrestling with a dog, playing ball, and indulging in setting-up exercises. Dr. Warren Allen, neurologist of Oakland, Dr. Milton B. Lennon, chief of the department of psychiatry of the University of California, and Dr. Walter F. Schaller, professor of psychiatry at Stanford University Medical School, all testified in effect that the activity exhibited by plaintiff in the moving pictures was absolutely inconsistent with her claim of disability, and that she was malingering. Dr. Allen had on the first trial supported plaintiff in her testimony, but on the present trial testified that plaintiff had imposed upon him; that upon the first trial he had based his opinion of her injuries upon her false statements. There was also testimony to show that plaintiff had suffered from the ailments of which she complained long prior to the date of the accident. Records from the Berkeley Health Center were in evidence, and they showed that plaintiff had visited that institution prior to the date of her injuries for relief from pains in the back, weakness, and frequent headaches. Notwithstanding the evidence to the effect that plaintiff was a malingerer and a fraud, the jury, as above stated, rendered a verdict in her favor for $12,500. Motion for a new trial was made and denied, and judgment followed the verdict.

Appellants urge several grounds for a reversal. They claim that the facts and circumstances of the case show a miscarriage of justice, of the clearest and most pernicious type; that the attorney for the plaintiff cleverly developed the fact that an insurance company rather than the nominal defendants was primarily interested in the action; that the record is replete with instances of grossly improper interrogation by such attorney, and with many erroneous rulings of the court on evidence; that the record shows the improper actions and statements of counsel created an atmosphere of prejudice toward defendants, which was reflected in a demonstration by the spectators, and which prevented defendants from having a fair trial. It is also claimed that the damages awarded are excessive and inspired by passion and prejudice; and, finally, that the court erred in the giving and refusing to give certain instructions, which action was prejudicial to defendants. We need only discuss the latter objection, as we are of the opinion that the giving of certain of the complained of instructions compels a reversal of the judgment.

[1, 2] It is not claimed that plaintiff suffered any substantial physical injuries, her claim being that her injury consisted of a traumatic neurosis or nervousness. The court instructed the jury that it might take into consideration in connection with assessing damages the question as to whether or not the injury sustained by plaintiff might reasonably be expected to cause any mental

worry in the future. It is admitted that certain of the instructions relating to damages for future pain and suffering correctly state the law if an instruction upon the subject was proper, but it is urged that the concluding portion of one of the instructions was erroneous for the reason that it stated the jury could consider whether or not the injury might reasonably be expected to cause the plaintiff any mental worry in the future. Whether this portion of the instruction correctly states the law or not is unimportant, as no instruction on the subject of future worry was justified. Section 3283 of the Civil Code provides that "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future." In construing this section, it has been said that to justify a recovery for future consequences the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury, will not warrant a verdict for damages. Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 P. 436. Here there was no evidence that plaintiff would with reasonable certainty suffer any future disability as the result of her alleged injuries. In order to prove apprehended consequences, plaintiff called two medical witnesses who testified concerning future impairment. There was also read in evidence the testimony of another physician who testified at the previous trial. None of these witnesses testified that they were certain plaintiff would suffer in the future; on the contrary, their testimony shows that any opinion they might give as to future mental suffering would be highly speculative. Consequences which are contingent, speculative, or merely possible are not to be considered. It is not enough that the injuries received may develop into more serious conditions than those which are visible, nor even that they are likely to develop. To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Here there is no such evidence. By reason of the giving of the instructions referred to, it is impossible to say what portion of the verdict was given to plaintiff for her slight physical injury and subsequent alleged suffering, and what portion represented prospective damages for mental ailments that might or might not be suffered in the future.

For the reasons given the judgment is reversed.

137 Cal.App.Supp. 788

PEOPLE v. CARDAS.

Cr. 960.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 27, 1933.

1. Lotteries ⇨3.

Elements of "lottery" are disposition of property on contingency determined by chance to person paying valuable consideration for, or hazarding something of value on, chance (Pen. Code, § 319).

[Ed. Note.—For other definitions of "Lottery," see Words & Phrases.]

2. Lotteries ⇨3.

Whether scheme for distribution of prizes to holders of lucky tickets constitutes "lottery" depends on whether such holders paid valuable consideration for chances; not whether distributor received something of value for prizes (Pen. Code, § 319).

3. Lotteries ⇨3.

Gratuitous distribution of property by lot or chance does not constitute "lottery," if it is not resorted to as device to evade law and no consideration is derived directly or indirectly from party receiving chance (Pen. Code, § 319).

4. Lotteries ⇨3.

Motion picture theater operator's scheme to give away steamship excursion tickets as prizes to holders of lucky tickets, distributed in vicinity of, and announced in or at entrance to, theater, *held* not "lottery" (Pen. Code, §§ 319–321).

Appeal from Municipal Court of City of Los Angeles; A. A. Scott, Judge.

Spyros Cardas was convicted of drawing a lottery and disposing of lottery tickets, and he appeals.

Reversed, with directions.

John B. Bertero, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Ernest K. Maine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

FOX, Judge.

Defendant was charged in count 1 with drawing a lottery in violation of section 320 of the Penal Code, and in count 2 with disposing of lottery tickets in violation of section 321 of said Code. Following a plea of not guilty, the case was submitted to the court, without a jury, upon a stipulated

statement of facts, and the defendant was found guilty on both counts. From this conviction he appeals.

The salient facts, as disclosed by the stipulation, are as follows: The defendant was the operator of a motion picture theater, located in the city of Los Angeles. Prior to August 16, 1933, he advertised by means of theater programs, newspapers, placards, and on the screen, that the theater would give away, on the evening of August 16, a prize consisting of two fully paid round trip tickets to Santa Catalina Island, to the holders of the lucky tickets. The prize tickets had printed on them the following: "Winning number will be announced in the theatre and at the entrance, and the winner must be in or just outside the theatre and claim the prize when the announcement is made." The tickets were placed in the hands of the public by the distribution in the vicinity of the theater of five thousand theater programs, each containing one of the tickets, and by handing two thousand tickets to passing motorists. Also, an employee of the theater was stationed between the street and the entrance to the theater, who gave prize tickets to all who asked for them, and offered them to any person who approached within proximity of her. No charge was made for any of these prize tickets, nor was it necessary that an admission ticket to the theater be purchased. Outside the entrance to the theater and within view of all passers-by was a sign reading as follows: "Tonight—Free—Three day vacation trips to Catalina. The winner will be announced in the theater and at the entrance for the benefit of those wishing to wait outside." The cashier in the box office only sold admission tickets and did not have any prize tickets in her possession. A receptacle was placed outside the theater in which were deposited the stubs from the prize tickets. Such stubs were deposited therein by persons who purchased admission tickets, by those who were admitted to the theater free, and by others who did not attend the show.

After the drawing had been held on the stage, the lucky numbers were announced both from the stage and outside the theater doors. Any person outside the theater who held a winning prize number was entitled to enter the theater for the purpose of claiming the prize, without charge. If such a person, however, stayed to see the show, he would be required to pay the regular admission charge. The winner of one of the prizes was a patron who had not purchased an admission ticket.

[1] The question presented is whether or not the defendant was conducting a lottery, as defined by section 319, of the Penal Code, for if he was not he could not be guilty of drawing a lottery in violation of section 320, or disposing of lottery tickets in violation of section 321. A lottery is defined as follows by section 319: "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

An analysis of the section and an examination of the authorities construing it and other similar statutory provisions disclose that there are three elements necessary to constitute a lottery. These elements are: (1) The disposition of property, (2) upon a contingency determined by chance, (3) to a person who has paid a valuable consideration for the chance of winning the prize, that is to say, one who has hazarded something of value upon the chance. People v. Hecht, 119 Cal. App. (Supp.) 778, 3 P.(2d) 399; 17 R. C. L. 1222; 38 C. J. 289.

It will at once be observed that the first and second elements are present in the instant case. The problem thus narrows itself down to the question: Was a valuable consideration paid for the chance of winning the prize by those who stood to win? Stated another way: Was anything of value hazarded upon the chance by them?

[2] Counsel for the people argue that patronage from the ticket holders as a whole constituted consideration for the distribution of the prizes, even though the individual holders of tickets had not parted with consideration for the individual ticket held by them. This argument apparently proceeds upon the theory that the element of consideration is established by showing that the defendant received something of value in return for the distribution of the prizes. The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of prize tickets. The question is: Did the holders of prize tickets pay a valuable consideration for the chance? Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance of getting the prize. They did not hazard anything of value. It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office, but from another employee, could not be said to have paid a consideration for the prize tickets since they could have received them free.

[3] The Supreme Court of Colorado, in Cross v. People, 18 Colo. 321, 32 P. 821, 822, 36 Am. St. Rep. 292, has stated certain principles with respect to lotteries which we believe are sound and, in general, applicable

to the instant case. The court said: "The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived, directly or indirectly, from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent. By the admitted facts it is shown that the plaintiffs in error gave business cards, which entitled the holders to a chance in a piano, to be distributed as the holders of such chances might elect. These tickets or chances were given indiscriminately to persons, whether they purchased goods of plaintiffs in error or not, to those who registered their names at their shoe store, and to those who, from a distance, sent the return postage. While it is admitted that Charles Linton purchased goods to the amount of one dollar at their store, and received one of these cards, it is admitted that such purchase, or any purchase of goods, was not a condition upon which the card was delivered. The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute."

An examination of the cases holding certain schemes, apparently somewhat similar to the one here in question, to be lotteries, discloses vital points of distinction. In general they fall into two groups. In one group it will be found that the prize tickets were only furnished to customers—those who purchased something. The payment made by the customer was for both the article purchased and the prize ticket—part of the consideration was for the ticket. State v. Powell, 170 Minn. 239, 212 N. W. 169, and Matta v. Katsoulas, 192 Wis. 212, 212 N. W. 261, 50 A. L. R. 291, are typical of this group. The decisions, however, are not entirely uniform in holding even such a scheme to be a lottery. Williams Furniture Co. v. McComb Chamber of Commerce, 147 Miss. 649, 122 So. 579, 57 A. L. R. 421, holds it not to be.

In the other group, it will be found that, while the distribution of prize tickets purported to be both to noncustomers as well as to customers, in fact the distribution to the former class was negligible. Featherstone v. Independent Service Station Ass'n (Tex. Civ. App.) 10 S.W.(2d) 124, is typical of this group, where there was no general free distribution of the tickets to the public as in the case at bar.

A word should be said about State v. Danz, 140 Wash. 546, 250 P. 37, 48 A. L. R. 1109, since it was cited by counsel for both sides. In that case the Supreme Court of Washington, by a five to four decision, held a scheme resembling that presented in this case to be a lottery. That case may properly fall in the group last mentioned, since no prize tickets were in fact given to any one who did not buy an admission ticket to the theater. In any event, the reasoning in the minority opinion, to the effect that no consideration was paid by the holders of the prize tickets, is much more persuasive to us.

[4] Our conclusion is that the holders of the prize tickets did not pay a valuable consideration for the chance of winning the prize—did not hazard anything of value upon the chance—and consequently the scheme was not a lottery, and therefore the defendant was not guilty of having violated sections 320 and 321 of the Penal Code.

The judgment of the trial court is reversed, with directions to find defendant not guilty.

BISHOP, P. J., and HAHN, J., concur.

137 Cal.App.Supp. 784

PEOPLE v. MONTOYA.

Cr. 1001.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 27, 1933.

1. Intoxicating liquors ⇐236(9).

Evidence *held* to sustain conviction for conducting beer parlor in manner constituting it public nuisance.

2. Nuisance ⇐61.

Public meeting place is "public nuisance" if so conducted that crowds in it are allowed to upset neighborhood by noise they make or offensive language they use (Pen. Code, § 370).

[Ed. Note.—For other definitions of "Public or Common Nuisance," see Words & Phrases.]

3. Intoxicating liquors ⇐143.

One operating place where liquor is sold is criminally liable if, as result of operation,

patrons either within or congregated without its limits conduct themselves so as to be public nuisance (Pen. Code, § 370).

Appeal from Justice's Court, Los Angeles County; Barry Sullivan, Judge.

Mrs. Rose Montoya was convicted of conducting a beer parlor in a manner which constituted it a public nuisance, and she appeals.

Affirmed.

Robert J. Adcock, of Los Angeles, for appellant.

Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, Presiding Judge.

Appellant was convicted of conducting a beer parlor in a manner which constituted it a public nuisance. We are of the opinion that the evidence which portrayed drunken, disorderly crowds on the sidewalks in front of appellant's place of business was sufficient to sustain the judgment.

[1] But little appeared in the evidence as to the conditions prevailing inside the beer hall, but from several witnesses the jury learned that the sidewalk outside was frequently so crowded with drinking and drunken men that those passing by had to step out into the street; that the sidewalk was obstructed, not only by the number of persons congregated on it, but by their lack of cooperation in letting others pass; that drunken men were milling around, going into and coming out from appellant's place; that those outside used profane and obscene language, and were loud and boisterous, frightening women and children who had occasion to pass by.

[2] A public meeting place, such as a dance hall or beer parlor, is a public nuisance if so conducted that the crowds in it are allowed to upset the neighborhood by the noise they make or the offensive language they use. Such a condition falls within the definition of public nuisance given by section 370, Penal Code: "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance." There can be no serious doubt, and there is no contrary contention, that appellant would have been properly convicted of maintaining a public nuisance, had the drunken crowds been within the beer hall, and their offensive language reached those passing by on the sidewalk or living in the neighborhood. State v. Bertheol (1843) 6 Blackf. (Ind.) 474, 39 Am. Dec. 442; Palestine Bldg. Ass'n v. Minor (1905) 86 S. W. 695, 27 Ky. Law Rep. 781; People v. Tendetnick (1932) 237 App. Div. 9, 260 N. Y. S. 777. She took the position at the trial, however, and now contends that she was not responsible for what went on in front of her hall.

Appellant cites no authority in support of her position, and those known to us are all against it. In Cable v. State (1847) 8 Blackf. (Ind.) 531, the court framed one of the questions before it as follows: "Could the defendant be liable, if the quarreling, fighting, &c., were in the street where he could not control the offenders?" To this question the court gave an affirmative answer, and then made this comment: "If the defendant voluntarily raised the storm as charged in the indictment, it is no excuse for him that he could not afterwards quell it."

The defendant corporation was charged with maintaining a public nuisance in Jung Brewing Co. v. Commonwealth (1906) 123 Ky. 507, 96 S. W. 595, 596, 124 Am. St. Rep. 376. The defendant's activity consisted in selling beer in wholesale quantities, making no provision for the consumption of any of it on its property. Sometimes the beer was delivered elsewhere, but it was usually divided up at once among those who had joined in the pot to buy it, who then drank it in front of defendant's place of business. In affirming the conviction the court stated: "Conceding that it had a right to sell liquor * * * it had no right to allow the assembling around its premises of noisy, drunken, boisterous crowds, whose 'swilled insolence' and profanity made the use of the highway in that neighborhood, by women, always unpleasant and sometimes dangerous."

In two cases some of the disorder was located inside the hall, much or most of it outside. In one of these cases, Blanton v. State (1927) 38 Okl. Cr. 149, 259 P. 655, 657, the Oklahoma Criminal Court of Appeals declared: "A dance hall is not per se a nuisance, but may become such by the manner in which it is conducted and by the conduct of the persons assembled in and around it. The proof is not restricted to what occurs within the building at which the nuisance is charged to be maintained, but acts constituting a nuisance and having an evident connection and relation to the offensive matter charged as a nuisance occurring adjacent to and about the building so near as to constitute a part of the nuisance charged are competent." In State v. Everhardt (1932) 203 N. C. 610, 166 S. E. 738, a conviction that the defendant had maintained a common nuisance was upheld, the evidence consisting in the main of a description of the disgraceful scenes taking place outside of the dance hall with which defendant was identified.

[3] We conclude, therefore, that one who operates a place where liquor is sold is criminally liable if, as a result of its operation, the patrons, either within or congregated without its limits, conduct themselves so as to be a public nuisance.

We have considered the other points raised by appellant and find it unnecessary to comment on them other than to say that none present prejudicial error.

The judgment is affirmed.

FOX and SHINN, JJ., concur.

219 Cal. 542

ROLLER et al. v. DALEYS, Inc., et al.

L. A. 13188.

Supreme Court of California.

Dec. 21, 1933.

1. Automobiles ⇐245(61).

Whether plaintiff's automobile was overturned by her own independent act or whether automobile was struck by defendant's truck at street intersection *held* for jury.

2. Automobiles ⇐245(14, 80).

Whether truck driver was negligent and plaintiff contributorily negligent when truck and automobile collided at street intersection *held* for jury.

3. Appeal and error ⇐1064(1).

Instruction that driver, as ordinarily prudent woman, was not required before proceeding across street intersection, to ascertain that there were no vehicles traveling over intersecting street other than that portion over which vehicles would legally travel, *held* prejudicially erroneous under evidence (St. 1923, p. 557, § 123, and § 122, as amended by St. 1929, p. 540, § 50).

4. Appeal and error ⇐1064(1).

Instruction that, if street intersection was clear when automobile entered it, then driver could assume that no truck would enter intersection from wrong side of intersecting street, *held* prejudicially erroneous under evidence (St. 1923, p. 557, § 123, and § 122, as amended by St. 1929, p. 540, § 50).

5. Automobiles ⇐245(80).

Whether motorist, in making boulevard stop and in acting with ordinary prudence, should have observed full width of boulevard to her left before entering boulevard from intersecting street, and should have seen defendant's truck on wrong side of boulevard, *held* for jury.

6. Appeal and error ⇐1064(1).

Instruction that, if driver was not driving truck on right half of street, and it was practicable to travel there, and street was not one-way street, he was negligent as matter of law, *held* not prejudicial, absent evidence of condition of street (St. 1923, p. 557, § 123, and § 122, as amended by St. 1929, p. 540, § 50).

7. Automobiles ⇐242(3).

Plaintiff made prima facie case of truck driver's negligence by evidence that truck proceeded on wrong side of intersecting street when it struck plaintiff's automobile, and defendant then had burden of going forward with evidence that truck was legally there (St. 1923, p. 517, as amended).

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Henry W. Roller and Emma F. Roller, against Daleys, Inc., and another. From a judgment in favor of plaintiffs, named defendant appeals.

Reversed.

Prior opinion, 17 P.(2d) 743.

Fred Wilson, of San Bernardino, and Hindman & Davis, Clive W. Johnson, Gibson, Dunn & Crutcher, Norman S. Sterry, and Joe Crider, Jr., all of Los Angeles, for appellant.

O'Connor & Findlay, of Colton, for respondents.

SHENK, Justice.

Appeal from a judgment entered on a verdict for the plaintiff in an action to recover damages for personal injuries.

The injuries were sustained by Emma F. Roller, who will be referred to herein as the plaintiff, in an automobile accident which occurred at the intersection of D street and Highland avenue in the city of San Bernardino. D street runs in a northerly and southerly direction, and intersects Highland avenue at right angles. The roadway of D street north of Highland avenue is thirty feet wide. Highland avenue is sixty feet wide from curb to curb, except that at the southeast corner of the intersection its area is increased by the diagonal lopping off of the corner of the property line and sidewalk, thus giving extra street area for the street car turn at that corner.

An ordinance of the city required motorists entering the intersection from D street north of Highland avenue to come to a full stop before proceeding into the intersection. A boulevard stop sign was maintained at an appropriate place. After midnight of December 11, 1929, the plaintiff was driving alone south along D street in a Ford sedan. She testified that as she approached Highland avenue she came to a full stop, at the same time edging more to the right in order to allow a car which was making a short left turn northerly into D street from Highland avenue to pass her car. According to the plaintiff's testimony, she looked to the west and saw no traffic, and then looked to the east and saw no traffic, and specifically that, looking easterly, she saw no traffic in the northerly half of Highland avenue. There is a clear view down Highland avenue to the east from where the plaintiff said she stopped. She did not look to the east again, and proceeded south across the intersection. Somewhere at or south of the center line of Highland avenue she testified that her car was struck by a truck and was turned over. The

serious injuries received by the plaintiff were principally in the right knee, and resulted in a permanent stiffening of the kneejoint and shortening of the right leg, causing a noticeable limp. Issues were raised on the questions of the defendant's negligence and the plaintiff's contributory negligence. The jury returned a verdict of $30,000.

[1, 2] The main contentions on the appeal are that certain instructions were prejudicially erroneous and that the evidence does not support a finding of negligence on the part of the defendant, nor a finding that the plaintiff was not contributorily negligent, nor a finding that the truck collided with the Ford. However, on the last point, there is evidence, including an admission of the defendant, that its truck and driver were in the vicinity at the time, and it was a question for the jury to determine from all the facts and circumstances as testified to by the plaintiff and other witnesses, including their testimony as to the relative positions of the two vehicles after the accident, whether the plaintiff's car was overturned by an independent act of her own or whether she was struck by the defendant's truck. We cannot say that under the facts disclosed the questions of negligence and contributory negligence, although close, were not properly for the jury.

[3, 4] The trial court, by instruction numbered 3, stated to the jury that "the duty devolving upon plaintiff * * * as an ordinarily prudent woman to look in the direction from which danger was to be anticipated did not require that before proceeding across Highland avenue * * * she first ascertain that there were no vehicles traveling westerly over and along any portion of Highland avenue east of D street other than that portion over which vehicles would ordinarily and legally travel while going in a westerly direction." By instruction 4, after reading the applicable portions of sections 122 (as amended by St. 1929, p. 540, § 50), and 123 of the California Vehicle Act relating to the duty of drivers to keep on the right unless the right is obstructed or impassable, the court stated: "If you find from the evidence in this case that Frank A. Hamilton was not at the time of and immediately prior to the accident driving the truck * * * upon the right half of the street and that it was practicable to travel upon the right half of said street, and that such street was not a one-way street, then you are instructed that he was guilty of negligence as a matter of law." Instruction numbered 7 was as follows: "If you find from the evidence that the accident and collision, if any, occurred south of the middle line of Highland avenue, and you find from the evidence that the intersection of Highland avenue and D street was clear at the time Mrs. Roller entered it, then I instruct you that she had a right to assume that no car or truck would enter the intersection from the east and south of the medial or middle line of Highland avenue and collide with her south of such line in the intersection, and if you find from the evidence that Frank A. Hamilton entered the intersection from the east and south of the middle line of Highland avenue, then you are instructed that the defendant * * * was guilty of negligence as a matter of law, and if you find that such negligence, if any, was the proximate cause of Mrs. Roller's injuries and that she was not guilty of negligence contributing proximately thereto, your verdict must be for the plaintiffs."

By the foregoing instructions the jury was told that, if the truck was traveling on its left side of the street when no obstruction compelled it to do so, it was guilty of negligence as a matter of law. There was no evidence of the condition of the street. The jury was instructed further that, if the entire street was passable, the plaintiff need look to the east only along the northerly half of Highland avenue for vehicles traveling in a westerly direction; and further that, if the intersection was clear when she entered it, she could assume that no truck or vehicle would enter the intersection from the east along the south half of Highland avenue. These instructions, viewed in the light of the close questions of fact and the large amount of the verdict, demonstrate error of a prejudicial nature. It has unequivocally been held that instructions of the character of those complained of are prejudicially erroneous because they take from the jury an issue which under the evidence raises a question of fact for it to determine. In this case it was a question for the jury whether the plaintiff observed that care and caution which an ordinarily prudent person would have observed under the circumstances.

"Any instruction from which the jury might fairly infer that conduct of the plaintiff which amounts to contributory negligence may become free from negligence because of any act of neglect on the part of defendant is contrary to the doctrine of contributory negligence, and for that reason cannot be upheld. * * * It is common knowledge that the traffic upon our highways is so great, involving as it does continual streams of powerful vehicles of many classes, proceeding at varying rates of speed and not bound to follow any particular track, that such thoroughfares have become places of danger, where one who is himself driving a motor vehicle and who fails to continually take into account the conduct of others and to anticipate their movements as far as possible is negligent. Such anticipation is demanded without regard to the Motor Vehicle Act. Zarzana v. Neve Drug Co., supra [180 Cal. 32, 179 P. 203, 15 A. L. R. 401]. At least one who is himself violating that act must then proceed with such caution as to avoid another vehicle whether its driver discharge [his] duty or not.

If he fails to do so and is injured through a collision and his own negligent violation of the law is a proximate contributing cause, he cannot recover; his contributory negligence will bar his right of action; under such circumstances he had no right to assume that the other driver would not be negligent and would discharge his duty." McPherson v. Walling, 58 Cal. App. 563, 568, 569, 209 P. 209, 211.

The case of White v. Davis, 103 Cal. App. 531, 284 P. 1086, involved an instruction to the effect that every person was entitled to rely on the presumption that every other person would perform his duty to obey the law, and, in the absence of reasonable ground to think otherwise, it was not negligence to assume that he was not exposed to danger which comes from a violation of such law or duty. On page 545 of 103 Cal. App., 284 P. 1086, 1092, the court stated: "The rule does not apply to 'every person,' but applies to one who is himself not negligent. 19 Cal. Jur. 596, and cases there cited. Reliance upon this presumption will not excuse one who is himself negligent, for such a rule would abrogate the doctrine of contributory negligence. McPherson v. Walling, 58 Cal. App. 563, 209 P. 209. A person may not blindly rely upon the unaided care of another, but must use reasonable care to observe the conduct of such other person, so far as this may affect his own safety. Simonsen v. L. J. Christopher Co., 186 Cal. 786, 200 P. 615; Harris v. Johnson, 174 Cal. 55, Ann. Cas. 1918E, 560, L. R. A. 1917C, 477, 161 P. 1155. Whether or not reasonable care is used under the circumstances, in relying upon this presumption, is a question for the jury. Mann v. Scott, supra [180 Cal. 550, 182 P. 281]; Scott v. San Bernardino Valley Co., 152 Cal. 604, 93 P. 677. The effect of this instruction was to tell the jury that in this case the plaintiff had a right to rely upon the rule stated, irrespective of whether or not he himself was negligent, and that he had a right to assume that he was not exposed to danger, even though he might know he was in a perilous position. The negligence of the defendant and the contributory negligence of the plaintiff were questions which should have been left to the jury, and this instruction should not have been given, without qualification."

[5] The vice of the instructions in the present case is accentuated by the only qualification stated upon the right of the plaintiff to act on the assumption that the defendant would not enter the intersection from the east and south of the center line of Highland avenue, viz., that the intersection was clear at the time the plaintiff entered it. It is obvious that under the facts and circumstances in the present record the jury might have found that the plaintiff entered the intersection without looking to the east. It is a question for the jury whether the plaintiff in making a boulevard stop and in acting with ordinary prudence should have observed the full width of Highland avenue to the east before entering the intersection and should have seen the defendant's truck. The cases relied upon by the plaintiff to illustrate that, having entered the intersection from the right of any approaching vehicle, she had the right of way and the right to rely upon the presumption, do not apply in cases where the driver is required to make a boulevard stop. In such a case it is for the jury to determine whether the exercise of ordinary care imposed upon the driver the duty to observe and give the right of way to a vehicle approaching the intersection from the driver's left. The effect, however, of the court's instructions was to absolve the plaintiff from any breach of duty committed by her and to take from the jury the issue of contributory negligence under a state of facts where otherwise a finding by the jury that the plaintiff was guilty of negligence which proximately contributed to her injuries would necessarily have to be upheld. We conclude that the principles of the foregoing cited cases are applicable here, and that instructions numbered 3 and 7 were prejudicially erroneous and entitle the defendant to a retrial of the issues.

[6, 7] We are not, however, persuaded that the plaintiff was not entitled to have instruction numbered 4 given to the jury in the absence of any evidence at all of the condition of the street. If from the evidence on behalf of the plaintiff the jury could find that the truck proceeded from the east, south of the center line of Highland avenue and struck the plaintiff's vehicle, the plaintiff under the provisions of the California Vehicle Act (St. 1923, p. 517, as amended) has made out a prima facie case of negligence on the part of the defendant. It is then incumbent upon the defendant to go forward with evidence that its truck was legally on that side of the street.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

219 Cal. 572

In re SMEAD'S ESTATE.

L. A. 13402.

Supreme Court of California.

Dec. 28, 1933.

1. Evidence ⇐236(1).

Statements by deceased wife during her lifetime that certain property was community property would be admissible against legatees under wife's will claiming that property was her separate property.

2. Trial ⇐48.

Where evidence is inadmissible for purpose for which it was offered, exclusion of evidence does not constitute error, even though competent for other purposes.

3. Appeal and error ⇐1056(1).

In accounting proceedings by husband as executor of deceased wife involving question whether certain property was community property, exclusion of judgment claimed to contain admission by wife against legatees' contention, if error, *held* not prejudicial, where judgment contained no admission.

4. Judgment ⇐634.

Estoppel by judgment can only arise in subsequent actions wherein subject-matter of litigation and parties are same.

5. Judgment ⇐687.

In accounting proceedings by husband as executor of deceased wife, judgment in inheritance tax proceeding against wife alleged to contain admission that certain property was community property *held* inadmissible as basis for estoppel against legatee's claim that property was wife's separate property.

SHENK and THOMPSON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceedings in the matter of the estate of Lillian C. Smead, deceased, wherein Chester R. Smead, as executor of the last will of Lillian C. Smead, deceased, filed a final account. From an order refusing to settle the final account and directing the executor to account to the estate for the proceeds of certain real property, the executor appeals.

Order affirmed.

Prior opinion 19 P.(2d) 987.

See, also, 215 Cal. 439, 10 P.(2d) 462.

Richard Hartley and Freston & Files, all of Los Angeles, for appellant.

M. C. Spicer, of Los Angeles, for respondents.

CURTIS, Justice.

This is an appeal from an order refusing to settle the final account of Chester R. Smead, as executor of the last will of Lillian Charnock Smead, deceased, and ordering said executor to account to the estate of said decedent for the proceeds of two pieces of real property owned by said decedent and sold by her during her lifetime. The whole controversy hinges upon the question as to whether said two pieces of real property were acquired by said decedent as a gift, and were therefore her separate property, or whether she acquired them under such circumstances as to make them the community property of herself and her husband, the said Chester R. Smead. If said property was community property, then, upon her death, the whole descended to her husband, as it was acquired after her marriage and prior to the effective date of the amendment to section 1401 of the Civil Code in 1923 giving the wife testamentary disposition over one-half of the community property. If, however, said property was the separate property of the decedent, it was subject to her testamentary disposition. By her will she left devises amounting to $35,000 to which the respondents are entitled, if said property was the separate property of said decedent.

Practically the only question involved in this appeal concerns the action of the trial court in refusing to admit in evidence certain of the proceedings in the case of Hunt v. Price, offered on behalf of the appellant. That case was instituted by the county treasurer of the county of Los Angeles against the decedent under her maiden name of Lillian Charnock Price to recover an inheritance tax from Lillian Charnock Price on the ground that said two pieces of real property were acquired by her as a gift from her uncle, John J. Charnock, and that said gift was made by said John J. Charnock in contemplation of his death. The deed by which said real property was conveyed to decedent ran to her in her maiden name, although she was then, and for more than two years prior thereto had been, married to the appellant herein.

Collateral to this question is the further question whether the error of the court in rejecting this evidence, if it be held to be error, was of so serious a character as to prejudicially affect the rights of the appellant. In this connection the appellant contends that, had this evidence been admitted then, with the other evidence before the court, the proof in favor of appellant would have been so overwhelming that the court would have been in duty bound to make findings favorable to appellant. We are of the opinion that the proffered evidence was inadmissible for any purpose, and it will be necessary, therefore, for us to consider only the first of the above-stated questions.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[1-3] There seems to be considerable confusion as to just what evidence was rejected by the court when it refused the offer of appellant to introduce certain of the proceedings in the case of Hunt v. Price. The argument of appellant is based almost entirely upon the assumption that appellant offered in evidence the judgment roll and the entire record, including the evidence of the decedent in that case. Upon this assumption, the appellant argues that the answer of the deceased, who was the defendant in the case of Hunt v. Price, and her evidence given at the trial of said action, are admissible as admissions against interest made by her during her lifetime, and therefore they (both the answer and her evidence) are admissible against the respondents who seek to succeed to an interest in her estate. If appellant's premise were correct, there would be no doubt regarding the correctness of his conclusions. The respondents claim under the will of the decedent, and therefore any statement made by the decedent during her lifetime to the effect, directly or indirectly, that said two pieces of real property were the community property of herself and husband, whether contained in her answer in the Hunt v. Price case, or in the evidence given in said case, or elsewhere, would be admissible against the respondents who are claiming that said real property was the separate property of decedent. Donnelly v. Rees, 141 Cal. 56, 74 P. 433; Estate of Hill, 167 Cal. 59, 138 P. 690. But the record in this case shows that neither the judgment roll nor the evidence of the defendant in Hunt v. Price was offered in evidence in this case. The matter came before the trial court on two different occasions during the trial. On the first of these occasions, the attorney for the appellant, in an informal manner, offered in evidence the "decree" in the case of Hunt v. Price. After some discussion, the court stated that it would reserve its ruling upon the offer until the papers in the case of Hunt v. Price could be examined out of court by the attorney for the respondents in the present action. Thereupon the attorney for the appellant stated that he wished to complete his offer, which he did by expressly stating that, "It is the decree of the Superior Court of the State of California, in and for the County of Los Angeles, Case No. 74804, entitled," Hunt v. Price. On the other occasion, which was toward the close of the trial, the offer was made by the appellant's attorney in the following manner: "There is one further thing which was an oversight, your Honor. The judgment roll, the judgment decree in the case of Hunt v. Price, that was offered during the time when the objectors [respondents] were putting on their case. Now, we have proceeded on the case in defense and we would like to offer that judgment again as a part of the evidence for the defense on the ground of estoppel on the part of the objectors to raise * * * as evidentiary, at least, of estoppel to the objections that are now being made by the objectors in this case." Upon the objection of the respondents that said judgment was incompetent to show any estoppel, the court refused the offer and excluded the evidence. That counsel intended to limit his offer to the judgment alone in the Hunt v. Price Case clearly appears from his statements and argument made to the court in support of his said offer. No mention was made of the judgment roll nor of the evidence, except in the single instance appearing above, where appellant's attorney, referring to his previous offer of the judgment, erroneously spoke of it as the judgment roll, but immediately corrected himself, as appears from his statement quoted above. Neither was any claim made at that time that the evidence was admissible as declarations of the deceased against interest. On the other hand, it was stated and restated that the judgment in the former case was a complete estoppel in the present action to any claim made by the respondents; that it was an adjudication in rem, and, even if not an adjudication in rem, the respondents could not question its determination. From the record in this case, and particularly from the references thereto just mentioned, it seems clear and beyond dispute that the only offer made by the appellant, and consequently the only evidence which the trial court refused to admit, was the judgment in the case of Hunt v. Price, and that it was offered for the sole purpose of an estoppel as against the respondents to claim that said two pieces of real property were the separate property of the decedent. The rule is well established that, when evidence is not admissible for the purpose for which it is offered, it is not error for the trial court to refuse to admit it even though it may be competent for some other purpose. Estate of Parkinson, 190 Cal. 475, 213 P. 259; Roberts v. Roberts, 168 Cal. 307, 309, 142 P. 1080, Ann. Cas. 1916A, 886; Cheda v. Bodkin, 173 Cal. 7, 19, 158 P. 1025; Estate of Boyes, 151 Cal. 143, 149, 90 P. 454. But, even assuming that this evidence was competent for some other purpose than estoppel, appellant was not injured by its rejection. The only purpose (other than estoppel) for which the appellant contends it was admissible, was that it constituted an admission of the deceased against her interest, and was therefore binding upon the respondents. But there was nothing in the judgment of Hunt v. Price which could be construed as an admission against interest by Mrs. Smead. The judgment emanated from the court and was signed by the trial judge. It in no way purported to contain any statement or admission of Mrs. Smead or of any other person, except possibly of the judge who directed its entry. Said judgment, therefore, was entirely ineffective as proof of any admission against interest by Mrs. Smead. Appellant's posi-

tion, however, would not be materially improved if we should hold that his offer included the judgment roll in the case of Hunt v. Price. While the answer in that action would have been admissible as a declaration by the deceased against her interest had it been offered for that purpose, yet, as we have seen, it was not offered for that purpose. Therefore, under the rule announced in the case of Estate of Parkinson, supra, and kindred cases cited above, it was not error for the trial court to refuse to admit it.

[4, 5] We now come to the consideration of the question as to whether the judgment in the case of Hunt v. Price was admissible in evidence as an estoppel against the respondents. That action, as we have already seen, was between the county treasurer of Los Angeles county and the decedent. The present controversy is between the successors in interest of the decedent and the appellant. The appellant was not a party to the former action, nor is he a privy to any person who was a party to said action. The judgment in said action has no binding effect upon him, and he is in no position to claim as to himself that said judgment has any binding effect upon any of the parties to said action, or upon their privies. Estoppel by judgment can only arise and be invoked in subsequent actions where the subject-matter of the litigation and the parties are the same. People v. Rodgers, 118 Cal. 393, 46 P. 740, 50 P. 668; De Bock v. De Bock, 43 Cal. App. 283, 184 P. 890.

Appellant complains of the hardship the order of the court will entail upon him by compelling him to account for the proceeds of the sale of said two pieces of property which were received by him over a period of more than twenty years prior to the death of his wife. The evidence shows that the proceeds of the sale of these two pieces of property amount to over $250,000. By the will of the decedent all of said property was devised to appellant, except the sum of $35,000, which decedent devised to certain of her relatives, now represented by respondents. As far as this proceeding is involved, unless further claims intervene, the appellant will be required to account only for sufficient property to satisfy the claims of the respondents with interest and costs. Taking into consideration the large amount of property received by appellant from the decedent when compared with the relatively small amount the respondents are entitled to receive, the task of accounting for sufficient property to meet respondents' demands does not appear to this court to be unduly burdensome.

The order is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

SHENK, Justice.

I dissent.

It was of the utmost importance to the appellant as the surviving husband to establish the status of the real property involved as community property. In his endeavor to prove it to be such, he offered in evidence certain records in the case of Hunt v. Price, which was a prior action brought by the county treasurer against the deceased wife in her lifetime to have it established that said real property was her separate property and therefore subject to the state inheritance tax. In her answer to the petition of the county treasurer, the wife denied that the conveyance of said real property to her by John J. Charnock was a deed of gift, and affirmatively alleged that said conveyance was made to her for a valuable and valid consideration. She prevailed in that proceeding, and the trial court, in its decree therein, found that "said deed was made upon a valuable consideration." The decree described the consideration in detail, which consideration would constitute the property the community property of the spouses, and further found that "all the allegations in the answer of said respondent herein are true." Based upon its findings in the decree itself, the court necessarily concluded that the real property was community property, and that no inheritance tax was due.

The allegation of the decedent in her answer in the case of Hunt v. Price was a declaration against her interest in respect to said real property, and the same was admissible against her successors in interest. Section 1853, Code Civ. Proc; Subdivisions 2 and 4, § 1870, Code Civ. Proc.; Donnelly v. Rees, 141 Cal. 56, 74 P. 433; Steinberger v. Young, 175 Cal. 81, 165 P. 432; 10 Cal. Jur. p. 1098, and cases there cited.

The opinion of the majority sufficiently shows that the appellant in his offer to prove the declaration against interest of the decedent was endeavoring to offer the "judgment roll" in Hunt v. Price. Furthermore, the record discloses that it was the judgment roll which was offered. Not only did counsel refer to the "judgment roll" in his offer, but the entire judgment roll is printed in the transcript as the judgment roll offered in evidence. From this record I am convinced that both counsel and the court considered that the judgment roll in that proceeding had been offered in evidence. True, in one place in the record, counsel referred to his offer as of the "judgment decree." But it seems to me to be a too narrow construction of the language of counsel to confine his offer to that of the decree alone.

Furthermore, assuming that the offer was of the decree alone, the decree itself combines findings of fact, conclusions of law, and the judgment. It is therein found that all of the allegations of the answer are true.

To interpret the decree in this respect, reference might well be made to the answer and to the declaration relied upon. But, if this be not strictly so, the decree in that proceeding established the status of the real property at the behest of the decedent. Said decree was invited by her own sworn statement, and those relying on her asserted title contrary to her former solemn averment should not be relieved from the effect of her declaration. See Estate of Hill, 167 Cal. 59, 138 P. 690. To allow the respondents here to prevail is to permit them to belie the sworn statement of their predecessor in interest pursuant to which the decedent obtained a favorable judgment from the superior court.

The present case, without the declaration against interest, is a close one on the facts. That is to say, with the declaration excluded, a decree in favor of either party would find ample support in the evidence. With the declaration in evidence it is probable that the order from which this appeal was taken would not have been made. The refusal to receive it in evidence was highly prejudicial, and in my opinion the order should be reversed.

I concur: IRA F. THOMPSON, J.

219 Cal. 656

WILLIAMS v. KOENIG et al.

S. F. 14900.

Supreme Court of California.

Jan. 5, 1934.

As Modified Jan. 24, and Feb. 21, 1934.

Hearing Denied by Supreme Court Feb. 21, 1934.

1. Trial ⇐400(1).

In action to set aside sale under trust deed, where defendants' answer referred to recordation of deed in liber 1095 instead of liber 1691, and discrepancy became impliedly incorporated in findings, under general finding that certain allegations of answer were true, trial court properly ordered correction of misprision.

2. Trial ⇐400(1).

Trial court has inherent power, even after judgment, to correct clerical misprision in findings.

3. Mortgages ⇐354.

Notice reciting beneficiary's election to exercise power of sale in trust deed sufficiently complied with statute, where stating that property would be sold as provided in trust deed, although signed by trustees alone (Civ. Code, § 2924).

Civ. Code, § 2924, provides that, when power of sale is to be exercised, "the trustee, mortgagee, or beneficiary" shall first file for record a notice identifying the deed of trust and containing a statement that a breach of the obligation for which such transfer in trust is security has occurred, and of "his" election to sell the property to satisfy the obligation.

4. Mortgages ⇐354.

Notice of election to exercise power of sale in trust deed *held* not defective because reciting breach of "obligations thereunder," rather than breach of terms of note secured, where trust deed specifically obligated grantor to repay specified sum according to terms of note (Civ. Code, § 2924).

5. Mortgages ⇐354.

Substantial compliance with statute requiring notice of election to exercise power of sale in trust deed is sufficient (Civ. Code, § 2924).

6. Mortgages ⇐354.

Notice of election to exercise power of sale in trust deed declaring, in addition to default in interest payments, breach of obligation of trust deed, authorized sale to satisfy entire indebtedness (Civ. Code, § 2924).

In Bank.

Appeal from Superior Court, Alameda County; F. M. Ogden, Judge.

Action by Le Roy R. Williams against Max W. Koenig and another, as trustees, and Morris Berger, wherein last-named defendant filed a cross-complaint. From an order correcting findings and denying motion to vacate judgment plaintiff appeals.

Affirmed.

Alfred J. Hennessy, George D. Collins, Jr., and K. B. Dawson, all of San Francisco, for appellant.

Robinson, Price & Macdonald, of Oakland, for respondents.

PRESTON, Justice.

On January 22, 1932, plaintiff became the owner of certain real property incumbered by a deed of trust given to secure a five-year promissory note executed October 14, 1927, in the principal sum of $30,000. No payment was made of the installment of taxes due on the property in December, 1931, and interest payments for that month and for January, 1932, were also in arrears. Defendants therefore invoked the acceleration clause of the note to declare the entire indebtedness due and payable. Thereafter, and on January 28, 1932, notice of default was filed for record. After further proceedings duly had, and

on May 25, 1932, the trustees named in the deed of trust, defendants Koenig and Kroll, sold the property at public auction to the beneficiary, defendant Berger, for the sum of $25,000. Almost immediately, to wit, on June 10, 1932, plaintiff brought this action to set aside said sale as illegal because of errors in the notice of default and other technical defects hereinafter discussed. Defendants answered; defendant Berger also cross-complained to quiet his title to the property. The cause was heard by the court without a jury. Thereafter findings of fact were rendered upholding the legality of the sale, followed by judgment in favor of defendants. Plaintiff then made a motion under sections 663 and 663a of the Code of Civil Procedure to vacate said judgment and to enter judgment in his favor. This motion the court denied and ordered correction of a clerical misprision in the findings in order that they might properly show recordation of the deed of trust in liber 1691 of official records rather than erroneously imply recordation thereof in liber 1095. Plaintiff did not appeal from the judgment, but has appealed from said special order made after final judgment.

[1, 2] The error above mentioned crept into the findings in the following manner: Defendants' answer referred to recordation of the deed of trust in liber 1095, instead of liber 1691. The deed of trust was in evidence, bearing correct indorsement of recordation in liber 1691, and the notice of default also made proper reference to liber 1691. However, the mistake in the answer was not called to the court's attention, and, under a general finding that certain allegations of said pleading were true, the discrepancy became impliedly incorporated in the findings. Upon the hearing of appellant's aforesaid motion, the court concluded that the error was purely clerical and, as above stated, ordered the findings corrected. Appellant claims that, although, as to the answer, it was perhaps a clerical error of the parties defendant, when carried into the findings it became a judicial error which could not be summarily corrected, for findings may be changed by a trial court after judgment only by the granting of a motion for new trial. Appellant's position is untenable. To us it is apparent that the error was purely clerical; it had no effect whatsoever upon any of the substantial rights of the parties, and appellant is in no position to complain of the correction. Furthermore, a trial court has inherent power, even after judgment, to correct clerical misprision in findings. 24 Cal. Jur. pp. 1005–1007, and cases cited.

[3] Considering briefly the merits of this cause, we likewise find appellant's points to be unworthy of prolonged consideration. Section 2924 of the Civil Code provides that, when power of sale is to be exercised, "the trustee, mortgagee, or beneficiary, shall first file for record * * * a notice identifying the * * * deed of trust * * * and containing a statement that a breach of the obligation for which such * * * transfer in trust is security has occurred, and of his election to sell or cause to be sold such property to satisfy the obligation. * * *" The "Notice of Breach and election to sell under deed of trust" here involved was signed by the "trustees" and recited the election of the "beneficiary" to cause the property to be sold. Appellant claims that the notice failed to conform to the statute, because, although the beneficiary recited the election to sell, he did not sign the notice, whereas the statute requires the "trustees" or "beneficiary" to file a notice of "his" election to sell. It is unnecessary to enter into a discussion of the reference made by use of the pronoun "his" in said statute. The substance of the statute is to require either the trustee or the beneficiary to file for record a sufficient notice of default. The notice here stated that the property would be sold as provided in the deed of trust; hence its effect was to declare both the election of the beneficiary and of the trustees to sell, and there can be no real objection to signature by the latter. Furthermore, the court particularly found that the notice was executed and recorded at the request and election of the beneficiary.

[4, 5] Appellant claims that the notice was defective in that it recited "that a breach of the obligations thereunder (under the deed of trust)" had been committed and a default existed in interest payments, whereas, to conform to said statute, it should have recited that a "breach of the obligation for which such transfer in trust" was "security" had occurred. In other words, appellant claims that the notice should have recited that the terms of the note, rather than those of the deed of trust, had been breached. There is nothing in this contention. The deed of trust specifically obligated the grantor to repay $30,000 according to the terms of the promissory note which it secured, thus in effect incorporating therein the obligation of the note. There is no requirement that the wording of a notice of default follow literally the wording of the statute; a substantial compliance in accord with the spirit and purpose of the statute is sufficient.

[6] Appellant complains that, as the notice of breach was expressly limited to a default in payment of two months' interest, a sale to satisfy the entire indebtedness was not authorized. This criticism is not warranted. The notice not only mentioned the specific default in interest payments, but it also declared a breach of the obligation of the deed of trust—in other words, a breach of the entire obligation to pay principal, interest, and taxes.

In closing we may say that, while appellant

has asked to have said sale set aside on purely technical and nonmeritorious grounds, he has made no effort to place himself in a position to receive equity. The above conclusion renders immaterial the motion to have this court make findings. It is denied.

The order correcting findings and denying motion to set aside and vacate judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

219 Cal. 536

REYBURN v. YOUNG et al.

L. A. 14291.

Supreme Court of California.

Dec. 20, 1933.

1. Time ⇐10(9).

Where last day for filing notice of appeal fell on March 6, 1933, proclaimed by Governor as general holiday, time for filing *held* extended one day; such general holiday being "holiday" within Code section (Pol. Code, § 10, as amended by St. 1933, c. 28).

Pol. Code, § 10, as amended by St. 1933, c. 28, effective March 6, 1933, provides that time in which any act provided by law is to be done is computed by excluding first day and including last, unless last day is holiday, and then it is also excluded, and that "holidays" within meaning of Code are every Sunday and every day appointed by Governor for public fast, thanksgiving, or general or special holiday, except that, on any day appointed by Governor as special holiday, all public offices and courts shall be open for transaction of business as on days which are not holidays.

[Ed. Note.—For other definitions of "Holiday," see Words & Phrases.]

2. Appeal and error ⇐336(1).

Fact that appeal was taken in name of appellant as special administratrix and that, at time of filing of notice of appeal, appellant was general administratrix, *held* not to require dismissal of appeal; irregularity being curable by order of substitution.

In Bank.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Proceeding by Rose B. Reyburn against Adah Hunt Young and others. From an adverse judgment, defendants appeal. On motion to dismiss the appeal.

Motion denied.

H. E. Gleason, of Los Angeles, for appellants.

Barry Sullivan, of Los Angeles, for respondent.

WASTE, Chief Justice.

[1] This is a motion to dismiss. The notice of appeal herein was filed March 7, 1933, sixty-one days after the entry of judgment. We cannot agree with respondent that the notice was filed one day late.

On March 1, 1933, and because of conditions now well known, the Governor of this state proclaimed March 2, 3, and 4, 1933, to be public holidays; the proclamation reading: "Said days to be recognized, classed and treated and to have the same effect as other legal holidays under the laws of this state." On March 4, 1933, the Governor issued a second proclamation continuing said general holidays up to and including March 6, 1933, and declaring March 7th and 8th to be special holidays.

Inasmuch as the last day for the filing of the notice of appeal herein fell on March 6, 1933, one of the general holidays proclaimed by the Governor, the time for such filing was thereby extended one day under and by virtue of the provisions of section 12 of the Political Code, which section reads: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." Sections 10 and 12 of the Civil Code and Code of Civil Procedure, respectively, are to the same effect. That March 6, 1933, one of the general holidays proclaimed by the Governor, and the sixtieth day after the entry of the judgment herein, was a "holiday" within the meaning of these Code sections is very definitely indicated by the amendment of section 10 of the Political Code, effective March 6, 1933 (St. 1933, c. 28), which section now provides that "Holidays within the meaning of this code are every Sunday, * * * and every day appointed * * * by the governor of this state for a public fast, thanksgiving or general or special holiday, except that on any day appointed by the governor as a special holiday all public offices and courts * * * shall be open for transaction of business as on days which are not holidays." It necessarily follows that the appeal herein was prosecuted within time. Estate of Rose, 63 Cal. 346; People v. Malone, 213 Cal. 406, 408, 2 P.(2d) 332; 2 Cal. Jur. 398, § 166. In substance, the statutory time within which the appeal might have been taken was extended

by section 12 of the Political Code already quoted.

[2] The appeal is taken in the name of Adah Hunt Young, Adah Hunt Young as special administratrix of the estate of Joseph Stuart Reyburn, deceased, and Adah Hunt Young as guardian of the person and estate of Edna Reyburn. Respondent now urges that at the time of filing the notice of appeal Adah Hunt Young had been divested of her authority as special administratrix by the issuing to her of general letters of administration in the estate of the above-named decedent. The point is technical and without substantial merit. Any irregularity in this particular may readily and properly be cured by an order of substitution.

The motion to dismiss is denied.

We concur: SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

219 Cal. 661

In re GARLAND.

S. F. 14964.

Supreme Court of California.

Jan. 8, 1934.

1. Attorney and client ⇐7.

That applicant for admission to practice law was placed on probation after conviction of forgery, and charge subsequently dismissed, *held* not to relieve applicant of duty to disclose incident.

2. Attorney and client ⇐7.

Applicant for admission to practice law has burden of establishing good moral character.

3. Attorney and client ⇐4.

Facts disclosing applicant had been disbarred in another state, convicted of forgery, and adjudged in contempt for practicing law without license, *held* to negative good moral character, precluding admission to practice of law.

In Bank.

Original application of Charles W. Garland for admission to practice law after refusal of Committee of Bar Examiners to recommend admission.

Application denied.

Charles W. Garland, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

WASTE, Chief Justice.

Petitioner requests that this court exercise its inherent power and admit him to the practice of the law in all the courts of this state. The state bar of California opposes the extension of this privilege to the petitioner, and by way of return to the order to show cause heretofore issued presents a record which indicates that petitioner fails to possess the essential prerequisite of a good moral character.

[1-3] It appears that petitioner in 1927 first made application to practice in this state. At that time petitioner represented that he had been admitted in Illinois in 1907 and "in Federal Courts." He failed to point out, however, that he had been admitted to practice in Oregon in 1913, that he had been disbarred therein in 1915 (see State v. Garland, 77 Or. 92, 150 P. 289), temporarily reinstated on probation in 1922, and finally disbarred again in 1923.

It also appears that petitioner failed to disclose that in 1923 he had been convicted of forgery, a felony, in the superior court of this state in and for the county of Los Angeles. The fact that petitioner was placed on probation rather than incarcerated, and the charge subsequently dismissed because of compliance with the terms of his probation, did not relieve him of the duty to disclose the incident. Spears v. State Bar, 211 Cal. 183, 187, 294 P. 697, 72 A. L. R. 923.

The record further reveals that petitioner on divers occasions and over an extended period of time improperly held himself out to the public as an attorney at law and actively engaged in the practice of law in this state without a license, for which unlawful practice he was, on at least one occasion, adjudged in contempt of the superior court in and for the county of Los Angeles.

It should also be added that, without disclosing his prior disbarment and conviction, the petitioner procured letters of indorsement, which accompany his present application, from several attorneys of this state. Upon being apprised of the true facts, the authors of these letters have retracted and withdrawn their respective indorsements.

The burden of establishing good moral character rests upon the applicant. Spears v. State Bar, supra. On the present record, it must be held that petitioner has failed to satisfy that burden.

The order to show cause is therefore discharged, and the application for an order admitting petitioner to practice law in this state, notwithstanding the refusal of the committee of bar examiners to recommend him for admission, is denied.

We concur: SHENK, J.; IRA F. THOMPSON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

219 Cal. 663

HAMILTON et al. v. REGENTS OF UNIVERSITY OF CALIFORNIA et al.

L. A. 14573.

Supreme Court of California.

Jan. 8, 1934.

1. Colleges and universities ⇐9.

Military tactics must be taught at University of California, and regents must prescribe nature and extent of courses to be given on such subject and determine what students shall be required to pursue them (St. 1868, p. 248, § 6; Const. art. 9, § 9).

2. Colleges and universities ⇐9.

Suspension by Regents of University of California of students for refusal to pursue compulsory courses in military training *held* not infringement of students' rights under Federal Constitution (St. 1868, p. 248, § 6; Const. art. 9, § 9).

In Bank.

Application for writ of mandate prayed to be directed to the Regents of the University of California to compel the reinstatement of petitioners suspended for refusal to pursue certain compulsory courses in military training. Writ denied.

Original application by Albert W. Hamilton, etc., and another for writ of mandate to be directed to the Regents of the University of California to require defendants to readmit applicants to such university as students.

Application denied.

John Beardsley, of Los Angeles, for petitioners.

John U. Calkins, Jr., of San Francisco, for respondents.

WASTE, Chief Justice.

This court denied an application of the petitioners, Albert W. Hamilton and W. Alonzo Reynolds, Jr., for a writ of mandate to require the Regents of the University of California to readmit them to the University of California at Los Angeles as students, they having been suspended from the university by reason of their failure and refusal to pursue therein certain compulsory courses in military training prescribed by the Regents of the University of California. Petitioners have filed a petition for rehearing.

[1] The Constitution of the State of California (art 9, § 9) reposes in the Regents of the University of California full powers of organization and government of the university, "subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds."

By the provisions of the organic act creating the university (St. 1868, p. 248, § 6), and by the above section of the Constitution, military tactics is expressly required to be included among the subjects which shall be taught at the university. The regents have full power and authority, and it is their duty, to prescribe the nature and extent of the courses to be given, and to determine the question of what students shall be required to pursue them.

[2] We find involved in the cause no violation of rights assured to the petitioners by the Constitution of the United States. Pearson v. Coale et al. (Md.) 167 A. 54; Coale v. Pearson, 54 S. Ct. 131, 78 L. Ed. ——.

The petition for rehearing does not contain facts sufficient to entitle petitioners to the relief sought.

Petition for rehearing is denied.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; THOMPSON, J.

219 Cal. 529

In re HERRIOTT'S ESTATE.

HILL, Public Administrator, v. HERRIOTT.

S. F. 14612.

Supreme Court of California.

Dec. 15, 1933.

Rehearing Denied Jan. 12, 1934.

1. Executors and administrators ⇐17(1).

Status of parties applying for letters of administration when letters are granted controls in determining which party is entitled thereto (Probate Code, § 422).

2. Executors and administrators ⇐24.

Sister of unmarried soldier, dying intestate without issue, *held* entitled to letters of administration on his estate, consisting of remainder value of war risk insurance policy, in preference to public administrator after death of decedent's parents, in absence of administration on their estates (Probate Code, §§ 422, 1023; 38 USCA § 514).

Word "succeed" in Probate Code, § 422, declaring intestate's relatives entitled to priority in granting of letters of administration only when entitled to succeed to estate or portion thereof, includes intes-

tate's brothers and sisters as heirs at law of their parents after latters' death.

[Ed. Note.—For other definitions of "Succeeding," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Alameda County; E. O. Robinson, Judge.

In the matter of the estate of Paul Herriott, deceased. From an order awarding letters of administration to Anna Grace Herriott and denying the petition of Albert E. Hill, Public Administrator of Alameda County, for such letters, the Public Administrator appeals.

Affirmed.

Prior opinion, 21 P.(2d) 651.

Earl Warren, Dist. Atty., and Nathan Harry Miller, Deputy Dist. Atty., both of Oakland, for appellant.

Roscoe D. Jones, of Oakland, for respondent.

PRESTON, Justice.

Paul Herriott, a member of the Expeditionary Forces of the United States, died intestate in France on May 2, 1918, unmarried and without issue, being at the time a resident of the county of Alameda, and leaving as his sole estate his right as a soldier under a war risk policy of insurance in the sum of $10,000, issued pursuant to the Act of Congress approved September 2, 1914, and acts amendatory and supplementary thereto (title 38, U. S. Code Ann., § 514). He left surviving him a father and mother, two brothers and two sisters. The father died intestate and without estate or indebtedness on December 18, 1923. The mother died in like situation and condition on February 13, 1931. The mother had been named as beneficiary under the war risk policy, and had received monthly payments thereunder until the date of her death, following which, under said act of Congress, the remainder value of the policy reverted to the estate of the deceased soldier. The value of such unpaid residue is now $4,389, and this sum admittedly belongs to the brothers and sisters of said decedent subject to administration by the probate court, and distribution will be made to them directly upon the conclusion of the administration of said estate. Section 1023, Probate Code; McClellan v. Downey, 63 Cal. 520; In re Estate of Horman, 167 Cal. 473, 140 P. 11.

In this state of the case a contest has arisen between the public administrator of Alameda county on the one hand and a sister of the deceased soldier on the other, for letters of administration. The petition of the sister, Anna Grace Herriott, was filed on May 8, 1931; that of the public administrator on May 19, 1931. The court below on December 30, 1931, awarded letters of administration to the sister and denied the petition of the public administrator, who has now appealed.

[1, 2] The right to letters is statutory, and is determined by proper interpretation of section 422 of the Probate Code (formerly section 1365 of the Code of Civil Procedure), which in this behalf reads as follows: "Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof: * * * (4) The parents. (5) The brothers and sisters. * * * (8) The public administrator."

It is clear at the outset that, when the decedent died, neither of the parties here concerned could have successfully applied for letters of administration upon his estate, for, until the death of the father, both mother and father would have been preferred to them under the statute had they applied for said letters. This right continued in the mother until her death. So until February 13, 1931, neither of these parties contestant had a preferential right to letters of administration. We reason, therefore, that, in order to prevail, appellant must concede that the status of the parties at the time letters are granted must control. In re McLaughlin, 103 Cal. 429, 37 P. 410; In re Pingree, 100 Cal. 78, 34 P. 521; In re Estate of Engle, 124 Cal. 292, 56 P. 1022; In re Estate of Connick, 189 Cal. 498–501, 209 P. 356. At this point of time, in the absence of administration upon the estates of the deceased parents, the brothers and sisters were entitled, under the facts here present, to have distributed to them, as heirs at law of their parents, the whole of the estate of the decedent. The word "succeed" as used in the above-quoted provision seems broad enough to include one in their class.

The case of In re Estate of Wakefield, 136 Cal. 110, 68 P. 499, so strongly relied upon by appellant, is distinguishable from the instant cause. There the daughter and mother met their death on the ill-fated steamer Rio Janeiro in 1901. The daughter predeceased the mother. A contest arose for the right to letters of administration between the brothers of the deceased daughter and the public administrator. It was there held that it was through the decree of distribution in the estate of the mother that the sons took the property left by their sister, and not as heirs at law. But in that case the mother not only left other estate than that inherited from her daughter, but she also left a will disposing of all of her estate. Necessarily, therefore, the line of succession was interrupted by the testamentary act of the mother. In the instant case the right to inherit comes by operation of law from kinship to decedent, and, by reason of the peculiar facts, no right in the moth-

er's or father's estate is involved. The Wakefield Case is not authority for what the holding of the court would have been therein had the mother died intestate and without indebtedness or other estate than the right as heir of the daughter.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

219 Cal. 625

LUSE v. PETERS et al.

L. A. 13174.

Supreme Court of California.

Dec. 30, 1933.

1. Appeal and error ⇐110.

Order denying new trial is not appealable.

2. Continuance ⇐22.

Where plaintiff's bookkeeper produced paper which was excluded because not account of original entry, refusal to continue such portion of plaintiff's case pending taking of evidence on other points, so as to permit plaintiff to procure original account book, which could have been produced by 2 o'clock on same afternoon, *held* abuse of discretion.

3. Account stated ⇐6(2).

If account is sent to debtor and he does not object thereto within reasonable time, debtor's acquiescence is deemed admission that account is truly stated.

4. Bankruptcy ⇐435.

Where defendants made no reference to bankruptcy proceedings in their pleadings, exclusion of account stated on strength of remarks respecting bankruptcy by defendants' attorney who did not profess to have definite knowledge of bankruptcy matter *held* error.

5. Evidence ⇐317(2).

In action for goods sold, remarks of defendants' attorney which he saw were only hearsay respecting bankruptcy of defendants or partnership composed by them *held* not evidence.

6. Bankruptcy ⇐69.

Under Bankruptcy Act, partnership may be adjudged bankrupt, regardless of adjudication of individual partners, and individual partners may be adjudged bankrupt independently of firm (Bankr. Act § 5 [11 USCA § 23]).

7. Bankruptcy ⇐435.

In action for goods sold, bankruptcy discharge or pending bankruptcy proceedings affecting liability *held* matter of defense to be affirmatively alleged and established by defendants by competent evidence.

8. Pleading ⇐150.

Counterclaim is part of defendant's answer, and is not required to be controverted by plaintiff (Code Civ. Proc. § 462).

9. Pleading ⇐138.

Cross-complaint is pleading separate and apart from answer, and is required to be complete and sufficient in itself, and cannot be aided by averments of answer.

10. Set-off and counterclaim ⇐34(1).

Under 1927 amendment to Code, there need be no connection between cause of action set up in complaint and that which forms basis of counterclaim (Code Civ. Proc. § 438).

Code Civ. Proc. § 438, as amended in 1927, provides that counterclaim must tend to diminish or defeat plaintiff's recovery, and must exist in favor of defendant and against plaintiff between whom several judgment might be had in the action, but sets up no additional requisites of counterclaim.

11. Pleading ⇐49.

Nature of pleading will be determined from allegations thereof, regardless of its designation.

12. Pleading ⇐150.

In action for goods sold, where defendants, "for third defense and by way of cross-complaint," sought damages because plaintiff allegedly misrepresented product, such claim, intelligible only by reference to allegations of other defenses, *held* not "cross-complaint" which plaintiff was required to answer.

[Ed. Note.—For other definitions of "Cross-Complaint," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by O. P. Luse against Charles W. Peters and another, doing business under the fictitious name of the Luseaux Company, and another, in which defendants filed a pleading claimed to be a cross-complaint. From two judgments for defendants, an order denying plaintiff's motion to vacate and set aside default for failure to answer the alleged cross-complaint, and an order denying plaintiff's motion for a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed. Judgments and order denying motion to vacate reversed.

Albert Sidney Brown, of Los Angeles, for appellant.

Leonard Evans, of Anaheim, for respondents.

SEAWELL, Justice.

[1] Plaintiff appeals from two judgments entered in favor of defendants in an action brought by plaintiff to recover the sum of $5,041.64. By a judgment rendered on March 30, 1931, the court adjudged that defendants recover from plaintiff the sum of $6,000 upon a pleading which the court held to constitute a cross-complaint, and upon which defendants had procured the default of plaintiff to be entered for failure to answer. By a judgment rendered on April 4, 1931, said court decreed that plaintiff take nothing upon his complaint. Plaintiff also appeals from the order of said court denying his motion after judgment to vacate and set aside said default, and from an order denying his motion for a new trial. No appeal lies from an order denying a new trial, and the attempted appeal therefrom is dismissed.

Respondents have failed to file a brief on this appeal. They filed a two-page reply to a supplemental observation filed by plaintiff, but this reply does not aid our consideration of the questions on this appeal.

It appeared upon the trial that plaintiff, O. P. Luse, manufactured a poultry food and remedy to which he had given the name "Luseaux." On January 19, 1927, he entered into an agreement with defendants Charles W. Peters and John W. Campbell, by the terms of which said defendants were to purchase said product from him, and to have the exclusive right to sell and distribute it in the state of California for twenty-five years. On December 15, 1927, they had become indebted to plaintiff in the sum of $7,737.91 for quantities of said product delivered to them for resale. On that date they assigned to plaintiff all existing accounts receivable from their customers in the sum of $5,300, and all accounts which might thereafter arise, as security for their existing and future indebtedness to plaintiff. On or about February 15, 1928, they ceased to market plaintiff's product. Plaintiff thereafter received collections on the accounts assigned to him. The sum of $5,041.64, prayed for in the complaint, is the balance claimed by plaintiff to be due him from defendants after crediting them with the payments received by him on the assigned accounts. At the time of trial plaintiff testified that said balance had been further reduced to $4,619.90 by payments received on the assigned accounts.

The complaint is in two counts, one on an open book account, and the other on an account stated. Defendants filed a single pleading denominated Answer and Cross-Complaint. As a first defense they denied generally the allegations of the complaint. As a second defense they set forth the agreement of January 19, 1927, and the assignment of their accounts receivable to plaintiff, and alleged that plaintiff had refused to give them an accounting as to the amounts collected thereon. "For a third defense to said complaint and by way of cross-complaint," they alleged that plaintiff made false and fraudulent statements concerning said product upon which they relied in entering into said contract, and that plaintiff had furnished them with untrue information for use in advertising and labeling; that they are informed that many of the persons whose accounts were assigned by them to plaintiff had refused payment on the ground that the advertising and labeling misrepresented the product, and that the federal authorities, acting under the Food and Drug Act (21 USCA § 1 et seq.), had ordered the label changed. By reason of said false statements and the expenditure by them of money and labor in the advertising, sale, and distribution of said product, defendants claim to have suffered damages in the sum of $10,000, for which they pray. The court heard evidence offered by defendants upon these allegations set forth "by way of cross-complaint," upon which they had caused the clerk to enter the default of plaintiff five days before trial, and entered judgment thereon in favor of defendants for $6,000. Defendants testified that they had expended this amount in advertising.

[2] When plaintiff sought to establish his case upon his complaint, it developed that Mrs. Lokka, plaintiff's bookkeeper, had brought to the courtroom an account book of original entry showing the transactions had prior to February 15, 1928. But she had listed on a separate paper, from the account book in which she had made the original entries, the payments received after February 15 on the assigned accounts, and she brought to court this paper, which she thought would be sufficient. The court sustained defendants' objection to the admission of said paper in evidence, and to plaintiff or Mrs. Lokka testifying by reference thereto, on the ground that it was not an account of original entry. 10 Cal. Jur. 911, and cases there cited; Jones on Evidence (3d Ed.) pp. 884, 888. Plaintiff asked for a continuance to enable him to bring the book of original entry into court, but the court denied this request. The missing account book was in plaintiff's office in Los Angeles, and he could have produced it in the courtroom in Santa Ana, Orange county, by 2 o'clock of the same afternoon. The court contemplated hearing evidence of defendants upon the pleading filed by them "by way of cross-complaint." We are of the view that the court abused its discretion in refusing to continue this portion of plaintiff's case

pending the taking of evidence on other points, in order to enable plaintiff to procure the original account book.

[3-7] Plaintiff also sought to establish his case by relying on the account stated count of his complaint. He offered in evidence a statement of account made out by him at the request of defendants and at their direction sent to their attorney on August 9, 1929. He testified that defendants had never made any objection to said account. If an account be sent to the debtor and he does not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. 1 Cal. Jur. 197, and cases there cited. At this point some discussion was had between the court and counsel as to whether the Luseaux Company, or defendants Peters and Campbell, the individuals composing it, had been adjudicated bankrupt, and thereupon the court refused to admit the statement of account in evidence.

Defendants' counsel stated that the bankruptcy matter was "mixed up." He first stated that he was under the impression that the federal court declined to adjudicate the bankruptcy of the partnership as a partnership, but immediately thereafter remarked that he thought only the firm was adjudicated bankrupt. The remarks of said attorney were not evidence. He did not even profess to have definite knowledge of the bankruptcy matter, but said that his remarks were only hearsay. Under the Federal Bankruptcy Act (11 USCA), a partnership is recognized as a distinct entity separate from the individuals composing it, and a partnership may be adjudged bankrupt irrespective of an adjudication of the individual partners, or the individual partners may be adjudged bankrupt independently of the firm. USCA, title 11, § 23, with annotation, particularly at pages 278–285, and 298; Collier on Bankruptcy (1926 Ed.) 249. If any liability in the case herein was affected by a discharge in bankruptcy, or by the pendency of bankruptcy proceedings, this was a matter of defense, to be alleged and established by defendants by competent evidence. The court should not have excluded the statement of account rendered by plaintiff by reason of said remarks of defendants' attorney. Defendants made no reference to bankruptcy proceedings in their pleadings. A discharge in bankruptcy is an affirmative defense which should be specially pleaded. Tuttle v. Scott, 119 Cal. 586, 51 P. 849; Security Tr. & Sav. Bank v. Carrier, 107 Cal. App. 333, 290 P. 458; 4 Cal. Jur. 86.

[8, 9] The judgment that plaintiff take nothing upon his complaint must be reversed because of the rulings of the trial court, which prevented plaintiff from proving his case by introducing in evidence the account stated, and establishing payments received upon the assigned accounts after the date of the account stated by reference to the original account book, which plaintiff could have produced within a few hours. Nor can the default judgment for $6,000 which the court rendered in favor of defendants on their so-called cross-complaint be sustained. Upon the trial plaintiff contended that the matters which defendants averred "by way of cross-complaint" as a matter of law constituted a counterclaim, upon which his default should not have been entered. A counterclaim is part of a defendant's answer, and is not required to be controverted. Hanson v. Brininstool, 192 Cal. 773, 178 P. 520; section 462, Code Civ. Proc. A cross-complaint is a pleading separate and apart from the answer, and is required to be complete and sufficient in itself. It cannot be aided by averments of the answer. In the case herein the so-called cross-complaint is included in the answer "for a third defense and by way of cross-complaint." Reference must be had to the allegations of the other defenses to render the third defense intelligible. In the early case of Shain v. Belvin, 79 Cal. 262, 21 P. 747, matter claimed to constitute a cross-complaint was introduced thus: "And, for a further and separate answer and defense to said action, defendant avers, by way of cross-complaint." It was held that this matter was pleaded by way of defense, rather than cross-complaint. See, also, to the same effect, Coulthurst v. Coulthurst, 58 Cal. 239; Goldman v. Bashore, 80 Cal. 146, 22 P. 82.

[10-12] Under the 1927 amendment to section 438, Code of Civil Procedure, the sole requisites of a counterclaim are that it "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Under this amendment it is not necessary that there be any connection between the cause of action set up in the complaint and that which forms the basis of the counterclaim. Terry Trading Corp. v. Barsky, 210 Cal. 428, at page 435, 292 P. 474, 477. The facts of the cited case are particularly germane to the case now before us. In that case plaintiff sued on a note given for services performed by virtue of a written contract. In the instant case the plaintiff sued for the price of goods sold under a written contract. There, as here, the defendants averred an assignment to plaintiff of accounts receivable and prayed for an accounting. Defendants therein also prayed for damages for failure of the services performed by plaintiff to comply with the contract. In the instant case defendants seek damages because, they allege, the product sold to them was not as represented by plaintiff. In disposing of the appeal in Terry Trading Corp. v. Barsky, we held that obviously the claims for accounting and damages were the subject of counterclaim under the section as amended, and, further, that even prior to the amendment the matters alleged

would have been a valid counterclaim not only as a "cause of action arising also upon contract" under subdivision 2 of section 438, but also a cause "arising out of the transaction set forth in the complaint," under subdivision 1 as it formerly read. The nature of the pleading will be determined from its allegations regardless of its designation. Terry Trading Corp. v. Barsky, supra, at page 434 of 210 Cal., 292 P. 474; Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065. "The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction." California Trust Co. v. Cohn, 214 Cal. 619, 625, 7 P.(2d) 297, 299; Terry Trading Corp. v. Barksy, supra, at page 436 of 210 Cal., 292 P. 474; Martin v. Hall (Cal. Sup.) 26 P.(2d) 288. It follows that the court erred in entering judgment against plaintiff by default for $6,000.

The judgments and the order denying motion to vacate are reversed.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.

ADOLPH RAMISH, Inc., v. WOODRUFF.*

L. A. 14273.

Supreme Court of California.

Jan. 2, 1934.

1. Alteration of instruments ⇐12.

Payee's written extension of time written on note, if material alteration, did not defeat recovery against maker, where note provided that maker and others thereby consented to extension of time and extension was made in maker's presence (Civ. Code, § 3205).

2. Bills and notes ⇐160.

Provision of note for attorney's fees which might be incurred in collection did not make note nonnegotiable because not specifically limiting attorney's fees to event that payment was not made at maturity (Civ. Code, § 3083, subd. 5).

Provision in note that maker promised to pay all costs of collection, including attorney's fees, which might be incurred in collection of note or any portion thereof, and that, in case suit was instituted for such purpose, amount of attorney's fees should be such amount as court should adjudge reasonable, did not render note nonnegotiable on ground such provision was not authorized by Civ. Code, § 3083, subd. 5, because such provision did not limit payment of costs of collection and attorney's fees to event that payment was not made at maturity, since, if note were paid promptly at maturity, no attorney's fee could accrue, and provision meant only that, if note was collected by attorney after maturity, maker agreed to pay reasonable attorney's fee.

3. Bills and notes ⇐211, 288.

Blank indorsement on note by implication of law passes title to transferee, and is also promise to pay instrument on default of maker on condition that proper steps are taken to charge him.

4. Bills and notes ⇐330.

Finding that note had been indorsed in blank so as to cut off defenses of maker against original payee *held* warranted, though indorsement recited that indorser guaranteed payment.

Indorsement recited in substance that for value received indorser thereby waived presentation of note to maker, demand of payment, protest, and notice of nonpayment, and guaranteed payment of same and of all expenses of collection including attorney's fees incurred in enforcing guaranty, and did thereby without notice expressly consent to delay or indulgence of enforcing payment and to express extension of time of payment, followed by indorser's signature.

5. Bills and notes ⇐523.

In action on note, note *held* properly admitted against objection that no transfer had been shown, where indorsement, which in legal effect was blank indorsement, was admitted (Civ. Code, § 3140).

6. Bills and notes ⇐211, 524.

Note payable to order may be negotiated by mere delivery when indorsed in blank by payee, and presumption of ownership arises from mere fact of possession of such instrument (Civ. Code, § 3140).

7. Bills and notes ⇐357, 525.

In action on note, evidence justified trial court's finding that plaintiff took note as collateral security, and hence for value.

8. Bills and notes ⇐358.

Antecedent debt constitutes valuable consideration for transfer of note as security, and holder of security is "purchaser for value" as to third persons.

[Ed. Note.—For other definitions of "Purchaser for Value," see Words & Phrases.]

9. Bills and notes ⇐509.

In pledgee's action on note held as collateral security, evidence that, although face value of pledgor's note to pledgee was $13,-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 40 P.2d 509.

500, pledgee had in fact only advanced sum of $6,820, which was amount of actual indebtedness which note sued on was given to secure, *held* improperly excluded.

10. Pledges ⇐58(6).
Bills and notes ⇐357.

Pledgee of note may recover full amount thereof from maker and hold any surplus over debt for benefit of pledgor, when there are no equities between maker and pledgor, but, if there is defense available to maker against pledgor, pledgee is only "holder in due course" to amount of his debt, and can recover only amount for which note was pledged (Civ. Code, § 3108).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words & Phrases.]

11. Appeal and error ⇐891.

Petition to take additional evidence in Supreme Court would be denied where judgment must be reversed and evidence offered was not such that it appeared from record that on no theory grounded in reason and justice could party defeated on appeal make further substantial showing in support of cause (Code Civ. Proc. § 956a; Rules of Supreme Court, Rule 38).

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Adolph Ramish, Inc., against Leonard J. Woodruff. From a judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal or affirm the judgment, and defendant also presented a petition to take additional evidence in the Supreme Court.

Petition to take additional evidence denied, motion to dismiss appeal or affirm judgment denied, and judgment reversed.

Francis B. Cobb, of Los Angeles, and Earl J. Opsahl, of Hollywood, for appellant.

Harris & Field, of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an appeal from a judgment rendered in a suit upon a promissory note for $10,000 executed by the defendant, Leonard J. Woodruff, payable to Gavin W. Craig and delivered by Murrey M. Somerfield as Craig's agent to Adolph Ramish, president of Adolph Ramish, Inc., the plaintiff herein. There is also before us a motion to dismiss the appeal or affirm the judgment as well as a motion to take further evidence.

Simultaneously with the execution and delivery of the note sued upon, Gavin W. Craig executed and delivered to Woodruff his promissory note for $10,000. Both notes were dated February 19, 1932, and matured ninety days after date, bearing interest at 7 per cent. per annum. It was stipulated at the trial that nothing had been paid on the note from Craig to Woodruff. At the time of the execution of these notes, the plaintiff held the promissory note of Gavin W. Craig for $13,500. This note was not put in evidence, but testimony was given showing that it matured in February, 1932, and that a thirty-day extension had been given in that month. Craig indorsed the Woodruff note, and extended the time of payment thereon, and on May 7, 1932, it was delivered to the plaintiff as stated above, but whether as collateral security for the indebtedness of Craig to the plaintiff was one of the issues in the case. The facts will appear with more particularity in connection with the discussion of the points raised by this appeal, but the note sued upon reads as follows:

"$10,000.00 Los Angeles, California,
"February 19, 1932.

"Ninety days after date, for value received I promise to pay to Gavin W. Craig or order at Los Angeles, California, the sum of Ten Thousand and 00/100 Dollars with interest from date until paid at the rate of seven per cent per annum, payable maturity.

"Should the interest not be so paid, it shall thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. The undersigned (jointly and severally) further promise to pay all costs of collection, including attorney's fees, which may be incurred in the collection of this note, or any portion thereof, and in case suit is instituted for such purpose, the amount of attorney's fees, shall be such amount as the court shall adjudge reasonable. Principal and interest payable in gold coin of the United States of the present standard. The makers, sureties, guarantors and endorsers of this note hereby consent to extensions of time at or after the maturity hereof, and hereby waive diligence, protest, demand and notice of every kind. Should this note be signed by more than one person, firm or corporation, all of the obligations herein contained shall be considered joint and several obligations of each signer hereof.

"[Signed] Leonard J. Woodruff."

On the back of the note are two indorsements; the second is set out later on in this opinion; the first is as follows: "Interest paid to May 19-1932. Time for payment of principal extended to July 19th, 1932. Gavin W. Craig."

The defendant in his answer admitted the execution and delivery of the note to Craig, but denied the title of the plaintiff on the ground that the note was delivered to him for inspection and investigation only, and set up as defenses that the plaintiff's lien was, at most, for the sum of $6,820 only, that defendant had an offset as against Craig, and that plaintiff was not the holder in due course of the note sued upon.

[1, 2] We will first consider the arguments that the note was rendered nonnegotiable by the inclusion of the provision with regard to attorney's fees, and that it had been materially altered before its delivery to the plaintiff by the extension of time indorsed on the back. On the latter point it is sufficient to point out that the note contained a stipulation that the "makers, sureties, guarantors and endorsers of this note hereby consent to extensions of time at or after the maturity hereof," and that Craig testified that the extension was in his handwriting and that he made it in the presence of Woodruff. So, if the extension did amount to a material alteration, it was consented to and authorized by the defendant. Cal. Civ. Code, § 3205. With respect to the provision for attorney's fees, the contention is made that it does not limit the payment of the costs of collection and attorney's fees to the event that payment is not made at maturity, but provides for their payment in any event, and since such a provision is not authorized by the Negotiable Instruments Law (Cal. Civ. Code, § 3083 [5]), the note is nonnegotiable. We are cited to no California cases directly in point, but we are satisfied the rule must be, as set forth in Hutson v. Rankin, 36 Idaho, 169, 213 P. 345, 347, 33 A. L. R. 91, that, "if a note is paid promptly at maturity no attorney fee or other costs of collection could accrue, and if the clause here under consideration is to be given its natural and ordinary construction, it means that if the note is collected by an attorney after maturity, the maker agrees to pay a reasonable attorney fee." See, also, Pugh v. Dawson, 95 Cal. App. 505, 273 P. 39, upholding, but without discussion of the point, a similar clause which was not in the exact words of the Code and did not contain the express limitation "after maturity."

[3, 4] Complaint is made of the finding in paragraph III of the findings of fact and conclusions of law that "said Gavin W. Craig, endorsed, said note in blank," and that plaintiff was "the holder of the note herein sued upon for value and in the usual course of business, as collateral security." The second indorsement on the back of the note is as follows: "* * * California. * * * For value received, I hereby waive presentation of the within note to the maker, demand of payment, protest and notice of non-payment, and do guarantee payment of the same, and of all expenses of collection thereof including attorney's fees, incurred in enforcing this guaranty and do hereby without notice, expressly consent to the delay or indulgence of enforcing payment and to the express extension of the time of payment of the same. [Signed] Gavin W. Craig." The appellant takes the position that the quoted inscription does not amount to a commercial indorsement, but is a mere guaranty and does not operate as a transfer which cuts off the defenses of the maker.

The problem of whether a transfer by guaranty instead of by the usual form of indorsement operates as an ordinary commercial indorsement has two aspects: First, the passage of title to the transferee; and, second, the liability incurred by the transferor who has made the guaranty. We are here concerned with the first only, since this is a suit by the transferee against the maker, who has set up as a defense his right of offset against the original payee who is also the maker of the guaranty.

The cases throughout the country are in conflict upon this question, and this jurisdiction is not as yet definitely aligned with either group. The respondent cites in its brief Bank of Italy, etc., Ass'n v. Symmes, 118 Cal. App. 716, 5 P.(2d) 956, which recognizes the conflict but does not decide the point. The issue therein litigated was the release of the party secondarily liable; it being held that it was immaterial whether he was considered as a guarantor or as an indorser, although the case contains dictum to the effect that the engagement was intended as a guaranty and not as an indorsement. While the wording of the undertaking there involved was substantially the same as that here under consideration, it was placed upon the note as an accommodation and before delivery to the original payee; hence the problem of negotiation was not presented to the court. It should, perhaps, be noticed in passing that a recent Connecticut case, Jaronko v. Czerwinski, 117 Conn. 15, 166 A. 388, has held that accommodation indorsers who employ the form of a guaranty incur the successive liability of indorsers rather than the contributive liability of guarantors. In Thurber v. Fisher, 124 Cal. App. 312, 12 P. (2d) 481, the District Court of Appeal indicated its willingness to follow those cases which hold such a guarantor to be an indorser with enlarged liability. However, this court has held that an intention not to be bound as a general indorser might be shown where the indorsement contained the following expression: "I hereby sell, set over and assign the within note, * * * and hereby guarantee that this is a good, valid and subsisting promissory note," and that, where such intention existed, the indorsement was qualified. Cristina v. Mattenberger, 212 Cal. 670, 300 P. 450, citing Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 P. 404; and see note, 19

Cal. Law Rev. 324. In all of these cases the action was instituted for the purpose of enforcing the liability of the indorser, so the aspect of indorsement with which we are primarily concerned was not immediately involved. Nevertheless, the two cases last cited recognize and utilize, as the test of whether the undertaking constitutes a general indorsement, the intention of the transferor to assume the obligations of a general indorser. It would seem that this test could equally well be applied to an undertaking which operated to extend the liability of the transferor beyond that of the ordinary indorser in blank. Words of guaranty being words of enlargement rather than words of limitation, it may fairly be inferred that the transferor's intent was to assume the burdens of indorsement and, in addition, the unconditional liability of one who guarantees payment. This is the view of the majority and of the more recent cases. To recapitulate, the signature of the payee is a blank indorsement which, by implication of law, passes title to the transferee and is also a promise to pay the instrument on default of the maker on condition that the proper steps are taken to charge him. The signed guaranty is the same contract with one-half of the obligation (the promise to pay) expressed and made unconditional, and nothing therein restricts or negatives the implication of the blank indorsement created by the signature; that is, that portion of the contract relating to the transfer of the instrument rests in parol, as always; therefore title passes as by a blank indorsement free of the equities of the maker against the original payee. In Rawlins County State Bank v. Rummel, 114 Kan. 597, 220 P. 255, 256, where the indorsement was made in the form of a guaranty, the court quotes the Kansas enactment of the Uniform Negotiable Instruments Law, and says:

"Section 6557 of the General Statutes of 1915 reads:

"'An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery.'

"The note in controversy was transferred to the plaintiff in such a manner as to constitute it the owner and holder of the note.
* * *

"There was nothing on the face of the note or in the indorsement to show that the plaintiff was not a holder in due course. So far as the note in controversy was concerned, the writing on the back of it transferred it to the plaintiff. If that writing contained matter unnecessary in an indorsement, the rights of the purchaser could not be affected thereby, unless the additional matter was such as to give him notice of a defect in the note as between the parties thereto. The guaranty of payment of the note and of others given in renewal of it did not give any notice of any defect in the note or in the title of the holder thereof.

"In Kellogg v. Douglas County Bank, 58 Kan. 43, 48 P. 587, 62 Am. St. Rep. 596, the following language was used:

"'An indorsement made on the back of promissory note in the following language: "For value received, we hereby guarantee payment of within note at maturity, waiving demand, protest, and notice of protest," signed by the payee of the note, is a commercial indorsement as well as a guarantee of payment; and the note, being negotiable in form, is sufficient to pass a valid title to the paper and protect an innocent purchaser thereof.'"

It has also been said: "There is a wide difference between writing on a separate piece of paper and a payee's writing something over his name on the back of a promissory note. If he should simply write his name on a separate sheet of blank paper, it would bind him to nothing; but if he writes his name on the back of a promissory note payable to his order, he becomes an indorser. So, if he should write an assignment, or a guaranty, or some other agreement, on a separate sheet of paper, and sign it, that would be a distinct contract; but when he writes his name upon the back of a note payable to his order, the addition of words which either limit or enlarge the usual liability on his part which would arise from a blank indorsement does not destroy the fact that the entry is an indorsement upon a negotiable paper, or prevent its efficacy as a method of passing the legal title upon negotiation, at least unless there is something in the indorsement to show an intention to destroy the negotiable character of the paper." Hendrix v. Bauhard Bros., 138 Ga. 473, 75 S. E. 588, 592, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688. Other cases which support this view are: First National Bank of Dalton, Ohio, v. Cummings, 69 Okl. 216, 171 P. 862, L. R. A. 1918D, 1099; Jones County Bank v. Kurt, 192 Iowa, 965, 182 N. W. 409, 16 A. L. R. 1286; National Bank of the Republic v. Price, 65 Utah, 57, 234 P. 231; Cady v. Bay City Land Co., 102 Or. 5, 201 P. 179, 182, 21 A. L. R. 1367; First National Bank of Durand v. Shaw, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342; Hoosier Mutual Ins. Co. v. Citizens' Trust & Savings Bank, 89 Ind. App. 5, 165 N. E. 446; Hutson v. Rankin, 36 Idaho, 169, 213 P. 345, 33 A. L. R. 91; Richmond Guano Co. v. Walston, 191 N. C. 797, 133 S. E. 196, 198, 46 A. L. R. 1512.

The minority rule, as exemplified by the case of Central Trust Co. v. First National Bank, 101 U. S. 68, 25 L. Ed. 876, is that a guaranty placed on a bill or note does not

constitute a commercial negotiation thereof, that the guaranty is a separate contract, and that there is either no transfer or it operates as an assignment, the transferee taking subject to the equities of the maker, and this upon the theory that a blank indorsement admits of the implications of its terms only because of the fact that it is in blank and that where, as here, the contract is express, no other terms may be implied. For collections of cases and discussion of the opposing views see Notes 34 Yale L. J. 144; 72 U. of Pa. L. Rev. (Am. Law Reg.) 296; 21 A. L. R. 1375; 33 A. L. R. 97; 46 A. L. R. 1516.

The majority decisions are the better reasoned and are in accordance with the policy of free circulation of commercial paper as a substitute for money and with the spirit and purpose of the Negotiable Instruments Law. In Mangold & Glandt Bank v. Utterback, 54 Okl. 655, 160 P. 713, 715, L. R. A. 1917B, 364, after quoting section 4113 of the Oklahoma Revised Laws of 1910, which is identical with section 3144 of our Civil Code and with section 63 of the Negotiable Instruments Law, all of which provide: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity," the Oklahoma court said: "It will be observed from section 4113 that the tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases towards holding the same to be a commercial indorsement in due course. This rule is founded upon commercial necessity. The unshackeled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions." In Richmond Guano Co. v. Walston, supra, similar language is used: "The decisions years ago on this important question were chaotic. In more recent years, and especially since the passage among the states over the nation of the Negotiable Instruments Laws to make the laws more uniform, the decisions are more in accord, and the great wealth hold that the indorsement, as in the present case, 'Demand, notice, and protest waived; payment guaranteed by the undersigned,' is an indorsement with an enlarged liability. The language makes the holder one in due course, and the instrument is taken free from equities and defenses which the maker has against the payee. The great importance in commerce and trade has forced uniform legislation in regard to negotiable instruments, and the courts have now, with few exceptions, held that the holder, under the facts in the present, is one in due course with enlarged liability." It is further to be borne in mind that the purpose of making the indorsement in this form must have been to make the instrument more attractive to the prospective purchaser. As said in Cady v. Bay City Land Co., supra: "It is not an instance where a stranger to the instrument guarantees its payment, which would be a collateral undertaking. It is a case of a payee, an actual party to the note, assuming a position in negotiating the same whereby he waives all further action on the part of the holder in fixing the liability of him who includes a guaranty in his indorsement." For these reasons we agree with the majority, and we are of the opinion that the finding of the trial court that the note had been indorsed in blank was correct and in accordance with the law.

[5, 6] The defendant objected to the introduction of the note in evidence on the ground that no transfer had been shown. In accordance with the views expressed above, the indorsement having been admitted, the note was properly received in evidence. Section 3140 of the Civil Code provides that "every holder is deemed prima facie to be a holder in due course." Where the genuineness of the indorsement is not legally challenged, or is established by proof, then the rule applies, and for the reason that, like an instrument made payable to bearer on its face, one payable to order may be negotiated by mere delivery when indorsed in blank by the payee; hence the presumption of ownership from the mere fact of the possession of such an instrument.

"This is illustrated by some of the cases cited and quoted from in counsels' brief. Among them is the case of Dawson Town & Gas Co. v. Woodhull, 14 C. C. A. 464 [32 U. S. App. 134], 67 F. 451, wherein Circuit Judge Thayer, in the opinion of the court, said: 'The legal presumption of ownership which exists in favor of one who is ostensibly in possession of negotiable notes indorsed in blank by the payee, as these notes were, and who brings a suit thereon, is not overcome by a mere denial of the fact of ownership contained in the answer. When these notes were offered, they were in the hands of the plaintiff's attorneys. The legal presumption was that they had received them from the hands of their client, * * * and that they were the client's property. There was no occasion, therefore, for offering testimony to confirm the presumption before the notes were admitted in evidence.'" Capitol Hill State Bank v. Rawlins Nat. Bank, 24 Wyo. 423, 160 P. 1171, 1176, 11 A. L. R. 937, 944.

[7, 8] It is insisted by the appellant that

there was no delivery of the note other than for the purpose of inspection and investigation, that there was no meeting of the minds of Craig and the plaintiff corporation and that the agent, Sommerfield, was never directed or authorized to deliver the note as collateral security. The evidence with reference to this transaction is sharply conflicting. Ramish, the president of the plaintiff corporation, testified that Craig's note to plaintiff was due in February of 1932; that a thirty-day extension was given, and that in April the plaintiff threatened suit; that Sommerfield made several calls on Ramish for the purpose of securing an extension which was refused because no security was offered other than an interest in an apartment house which he refused to accept; that, after that Sommerfield offered the Woodruff note as security; that he (Ramish) said he would accept it as collateral security "providing the note was any good"; that he received the note on May 7, 1932; that Sommerfield promised to get a report on the maker which he gave to Ramish on May 9th; that Ramish then himself investigated Woodruff's affairs, and, on May 11th told Sommerfield he would accept the note as collateral security, giving Craig an extension on his note until July 19th, when the Woodruff note was payable, but that no written extension had been given; that it was never intended that he should credit the Woodruff note on the Craig note, but only that he was to credit thereon whatever he collected on the Woodruff note at maturity. He also testified that, after May 7, 1932, Sommerfield never asked for the return of the Woodruff note.

The record contains a receipt dated May 7, 1932, and signed by Ramish, in which he acknowledges the receipt of the Woodruff note from Sommerfield, and that it was "to be held for a reasonable time for the purpose of investigation as to the responsibility of the maker." This is not inconsistent with Ramish's story of the transaction. There is also in evidence a carbon copy of a letter from Ramish's attorney to Craig dated July 16, 1932, inclosing a carbon copy of a letter to Woodruff "concerning note which Adolph Ramish Inc. hold as collateral for payment of your note dated November 3, 1931." Ramish's attorney testified that he was present on the occasion when Sommerfield offered the note as collateral security, and that the understanding was that the Craig note should be allowed to run until the maturity of the Woodruff note which was given to secure it; that the whole purpose of the transaction was to give security to gain time. One Weinblatt, who was involved in the transaction in connection with which Craig had given his note to Ramish, testified that Craig had told him prior to May 7th that he was having Sommerfield negotiate with Ramish with the purpose of giving the Woodruff note as collateral security for his own note.

Murrey Sommerfield testified that he carried on the negotiations with Ramish with regard to Craig's note; that on May 7th he delivered the Woodruff note to Ramish for purposes of inspection and received the receipt; that he told Ramish the only way he could use the note was to return the Craig note; that, when he asked for its return, after having delivered the financial report on Woodruff, Ramish said, "Not yet"; that he wanted to try to collect the note; that nothing was said about holding it for security; that three or four weeks later Ramish still refused to return the Craig note, saying that he was not "ready to give it up" or to say what he was going to do with the notes; that he knew of no extension agreement. Craig testified that he told Sommerfield he believed it might be possible that the Woodruff note might be used in some way to satisfy Mr. Ramish as to his (Craig's) indebtedness, and that he wished Sommerfield to take the matter up with him "along those lines"; that he had no communication with Ramish thereafter; that Sommerfield reported that Ramish was not inclined to take the note, but would negotiate further; that he wanted the note to inspect it, and, if it were satisfactory, he might use it to extinguish the obligation Craig owed him, though not Weinblatt's. He also testified that Sommerfield later reported that he had left the note; that he saw the receipt about the date it bears; that later Sommerfield told him Ramish was satisfied to take the note, but would not return the Craig note until he had collected on the other one. Further on in his testimony he said that he was never notified that Ramish would actually accept the note, although he had found it to be good and satisfactory paper. He also said that in his instructions to Sommerfield the manner in which the note was to be used was left quite indefinite, "because it would be a matter of conversation and discussion between Mr. Sommerfield and Mr. Ramish"; that his understanding was that Ramish was considering holding the note "until it became due and collect from Mr. Woodruff"; that "it would be accepted, if at all, in the cancelation of my obligation, but I was never informed by Mr. Sommerfield that Mr. Ramish had said definitely that he would do that"; that no definite extension was ever given, the note was just allowed to run; that he could not remember whether he had ever previously requested Weinblatt to negotiate with Ramish for an extension.

On this state of the evidence, and especially since the testimony of both the principal and his agent was extremely vague and evasive, the trial court was amply justified in concluding that the plaintiff took the note in controversy as collateral security, and

hence for value. In our view of the case, it is immaterial that no formal extension agreement was ever entered into. "It is the law that an antecedent debt constitutes a valuable consideration for a transfer as security, and the holder of the security is a purchaser for value as to third persons. Smitton v. McCullough, 182 Cal. 530, 537, 189 P. 686; Fowles v. National Bank of California, 167 Cal. 653, 664, 140 P. 271; Chapman v. Hughes, 134 Cal. 641, 659, 58 P. 298, 60 P. 974, 66 P. 982; 17 Cal. Jur. 955." Ekmann v. Plumas County Bank, 215 Cal. 671, 12 P.(2d) 433, 434.

[9, 10] The appellant offered to show that, although the face value of the Craig note was $13,500, the plaintiff had in fact only advanced the sum of $6,820, and that this amount was the actual indebtedness which the Woodruff note was given to secure, and such proof was refused by the trial court. This was error. We have already pointed out that, simultaneously with the execution and delivery of the Woodruff note, Craig executed and delivered to Woodruff his promissory note in the same amount, $10,000. The pledgee of notes can recover the full amount thereof from the maker, holding any surplus over the debt for the benefit of the payee-pledgor, when there are no equities between the maker and the pledgor, but, if there is any defense available to the maker against the indorser, the pledgee, although he is a holder in due course, is only a holder in due course to the amount of his debt, and can only recover on the note the amount for which it was pledged. "Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien." Cal. Civ. Code, § 3108 [N. I. L. § 27]; Brannan's Negotiable Instruments Law [5th Ed.] 362; Bell v. Bean, 75 Cal. 86, 16 P. 521; Kelly v. Universal Oil Co., 65 Cal. App. 493, 498, 224 P. 261; Note 69 A. L. R. 898. It is obvious that, in order to determine the actual amount of the indebtedness secured, such evidence was both proper and necessary. To hold otherwise would be to allow a pledgee to recover from the maker of the collateral note, who has a defense against the pledgor, a greater amount than he could recover in a suit against the pledgor himself.

[11] The appellant has presented a petition to take additional evidence in this court under section 956a of the Code of Civil Procedure and rule XXXVIII of the Rules of the Supreme Court. The testimony offered is directed toward showing that the plaintiff was not a holder in due course, that the note was not in the hands of the respondent prior to the date it became due. The evidence the appellant proposes to offer is the testimony of Joseph Weinblatt, who, appellant asserts, will testify that he had the note in his possession on the 23d of June, 1932, and, at the instance of Craig, was offering the same for sale, and of Ernest Smith, to whom the note was offered for sale as the property of Craig. In opposition to this petition, the respondent has filed the affidavit of the vice president of its bank and a photostatic copy of the receipt given for the note by the bank which tend to establish that the bank held the note for Ramish, Inc., from May 11, 1932, to June 13, 1932; and also the affidavit of Weinblatt denying that the note was in his possession or that he had seen it since before the 7th of May, 1932. It is said in Tupman v. Haberkern, 208 Cal. 256, 270, 280 P. 970, 976, that the primary purpose of the rule which allows the taking of evidence in the appellate court is that the reviewing court may affirm the judgment or modify and affirm it and terminate the litigation, but that, when the judgment must be reversed and a new trial had, findings in the appellate court are unauthorized and inappropriate unless the trial court is to be directed to enter judgment for the appellant, and, in that case, although findings may be made by the reviewing court, the power is to be used sparingly. Following this case and that of Davis v. Chipman, 210 Cal. 609, 293 P. 40, we deny the petition, for the reason that we are not so impressed by the evidence offered by the appellant, either in the trial court or in the petition now before us, that we are prepared to say that it appears "from the record * * * that on no theory grounded in reason and justice could the party defeated on appeal make a further substantial showing * * * in support of his cause." Moreover, should the appellant fail on this issue, it will be necessary to offer proof upon the question of the actual indebtedness secured.

For obvious reasons, the motion of the respondent to dismiss the appeal or affirm the judgment is likewise denied. The judgment is reversed.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.

Mr. Justice IRA F. THOMPSON, deeming himself disqualified, does not participate.

136 Cal.App. 197

WOOD et al. v. WILLEY et al.

Civ. 8938.

District Court of Appeal, First District, Division 1, California.

Jan. 9, 1934.

1. Limitation of actions ⇐165.

One acquiring mortgaged land for consideration, without becoming personally liable for debt secured, after time for foreclosure, may quiet title as against mortgagee without paying debt.

2. Limitation of actions ⇐145(5).

Mortgagee's agreement to extend time for payment of debt secured was sufficient consideration for promise, made before debt was barred by limitations, by one acquiring property subject to mortgage to pay balance due.

3. Limitation of actions ⇐164.

Promise by one acquiring property subject to mortgage to pay debt secured in consideration of extension of time extended both debt and mortgage lien, though he did not assume debt.

4. Limitation of actions ⇐164.

Purchaser of mortgaged property from mortgagor or his successor, promising to pay debt secured, after extension of time therefor, takes it subject to mortgage lien until debt is barred by limitations, though he did not know of extension at time of purchase.

5. Limitation of actions ⇐164.

Mortgagee's agreement to extend time for payment of debt by mortgagor or his successor is good against all whose rights accrued after such extension.

6. Limitation of actions ⇐164.

Persons purchasing mortgaged property and title insurance company issuing policy to them with knowledge of recorded mortgage before title passed were bound to inquire whether note secured had been renewed or extended.

7. Limitation of actions ⇐164.

Evidence *held* not to sustain finding that parties suing to quiet title did not have notice before purchasing land that mortgage thereon had been extended.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Meyer Wood and another against E. H. Willey and others. Judgment for plaintiffs, and defendant E. H. Willey appeals.

Affirmed in part and reversed in part.

Collamer A. Bridge and Ratzer, Bridge & Gebhardt, all of Los Angeles, for appellant.

Harley E. Riggins, of Los Angeles, and G. R. Dexter, of Hollywood, for respondents.

PER CURIAM.

The above action was brought to quiet plaintiffs' title to a parcel of land in Los Angeles county. Plaintiffs acquired title from the estate of J. J. Morgan, deceased, by deed dated September 20, 1929, and recorded on September 27, 1929. Morgan acquired the property from F. N. & J. Willey on November 8, 1902, by a deed which recited that the conveyance was made subject to "the mortgage on this and other property for the amount of $14,000." The mortgage referred to was executed by W. E. Hoel and others to the Willeys, and it was recorded on March 10, 1920. The same was assigned to appellant E. H. Willey on June 6, 1922, and the assignment was duly recorded. The mortgage secured a note payable on or before three years after March 1, 1920. So far as appears by the public records, the note and mortgage were barred by the statute of limitations at the time of the plaintiffs' purchase. On February 2, 1925, Morgan executed an agreement in writing to pay appellant Willey on March 2, 1926, the balance which remained unpaid on the note, namely, $500 with interest, and said appellant therein agreed to extend the time for payment accordingly. This agreement was not acknowledged nor recorded, and no part of the said amount or the interest thereon has been paid. Willey alleged that plaintiffs had notice at the time of their purchase of all of the above facts and acquired title subject to the lien of the mortgage. The court, however, found against these allegations, and entered judgment quieting plaintiffs' title as against Bank of America of California, a corporation, and Mary L. Willey, who were joined as defendants, and said E. H. Willey. The latter, who has appealed, contends that these findings are unsupported, and that the lien of the mortgage continued by virtue of said agreement.

[1-5] As urged by plaintiffs, one not personally liable for the debt secured, who acquires mortgaged land for a consideration after the lapse of time within which an action to foreclose the mortgage could be brought and at a time when the records show the lien to be extinguished may quiet his title as against the mortgagee without paying the debt. Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209; Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 48 A. L. R. 1308. Here, however, as found by the trial court, Morgan, in consideration of an extension, agreed to pay the balance of the debt on February 22, 1926. This promise was made before the debt was barred by the statute, and appellant's agreement to ex-

tend the time was a sufficient consideration therefor. 41 Cor. Jur., Mortgages, § 773, p. 727; Huene v. Cribb, 9 Cal. App. 141, 98 P. 78; Wiswall v. Giroux, 70 Colo. 121, 197 P. 759; Iowa L. & T. Co. v. Haller, 119 Iowa, 645, 93 N. W. 636; Citizens', etc., Savings Ass'n v. Rampe, 68 App. Div. 556, 74 N. Y. S. 192. Although Morgan did not assume the debt at the time the property was conveyed to him, the effect of his promise was to extend both the debt and the lien of the mortgage. London & San Francisco Bank v. Bandmann, 120 Cal. 220, 52 P. 583; Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Daniels v. Johnson, 129 Cal. 417, 61 P. 1107, 79 Am. St. Rep. 123; Sanford v. Bergin, 156 Cal. 43, 103 P. 333; Curtis v. Holee, 184 Cal. 726, 195 P. 395, 18 A. L. R. 1024. It is also the rule that, if a mortgagor while still the owner of the mortgaged property extends the time of payment, a purchaser of the property from him takes the same subject to the lien of the mortgage until the debt is barred by the statute of limitations, although at the time of his purchase he did not know that the time of payment had been extended. Lent v. Morrill, 25 Cal. 492; Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L. R. A. 673; Craig v. Dinwiddie, 77 Cal. App. 681, 247 P. 516. The same principle applies where the extension agreement is made by the mortgagor's successor in interest who has promised to pay the debt [Curtis v. Holee, supra; Ekmann v. Plumas County Bank, 215 Cal. 671, 12 P.(2d) 433], and such an agreement is good against all whose rights were not in existence at the time of the extension [Ekmann v. Plumas County Bank, supra].

[6] The evidence shows without conflict that both plaintiffs and a title insurance company, which acted as escrow holder in the transaction through which plaintiffs acquired title, and which company issued to them its policy insuring the title, knew before the title passed of the existence of the mortgage in question. As held in Lent v. Morrill, supra, and the other cases cited, although plaintiffs may have been ignorant of the fact that the note and mortgage had been extended, they knew that the mortgage had not been discharged of record, and were bound to know as a matter of law that a renewal of the note was a possible event. Under such circumstances it was their duty to inquire as to whether it had been renewed or extended in fact. Here an officer of the title company testified that while the deed was in escrow, appellant advised the company that he held a mortgage on the property and asked for information regarding the proposed transfer, but information was refused. It is evident from this that appellant was diligently seeking to apprise those interested of his claim. Whether plaintiffs were chargeable with constructive notice by the information conveyed by appellant to the escrow holder, it is unnecessary to decide (see Early v. Owens, 109 Cal. App. 489, 293 P. 136) as according to the cases cited the record was sufficient for this purpose, and, so far as shown, no inquiries were made by plaintiffs or the title company.

[7] Under the admitted facts and the law as declared in the above cases the finding that plaintiffs did not prior to their purchase have notice that the mortgage had been extended is not sustained. Moreover, it has been held not to be sufficient in cases of this character to find merely that a party was without actual notice or knowledge. Prouty v. Devin, 118 Cal. 258, 50 P. 380. That plaintiffs own the legal title to the property as joint tenants, and that defendants Bank of America, a corporation, and Mary L. Willey have no right, title, or interest therein, is undisputed; and to that extent the judgment is affirmed; but that portion thereof which in effect adjudges that appellant E. H. Willey has no lien thereon by virtue of said mortgage is reversed.

PURDY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 9106.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1933.

Rehearing Granted Jan. 27, 1934.

1. Banks and banking ⇐134(7).

Bank accepting deposit by trustees with knowledge that account consisted of trust income held under naked trust for beneficiary became involuntary trustee of moneys deposited, and could not apply such deposit in reduction of trustees' indebtedness to bank (Civ. Code §§ 2243, 3054; Code Civ. Proc. § 440).

2. Banks and banking ⇐134(7).

Bank taking deposit by trustees, of trust income, with knowledge that income was held under naked trust for beneficiary, did not, by giving pro tanto release of pre-existing debt of trustees, become "purchaser in good faith" of amount deposited (Civ. Code, §§ 2243, 3054; Code Civ. Proc. § 440).

[Ed. Note.—For other definitions of "Good Faith," see Words & Phrases.]

3. Limitation of actions ⇐34(1).

Claim against successor bank based on liability of original bank, whose assets and business successor bank acquired through successive sales and consolidation, *held* not barred by three-year limitation statute applicable to actions upon "statutory liability" (Code Civ. Proc. § 338, subd. 1; St. 1909, p. 95, § 31, as amended by St. 1921, p. 1373).

[Ed. Note.—For other definitions of "Statutory Liability," see Words & Phrases.]

4. Trusts ⇐366(2).

Beneficiary under trust could sue successor bank for money received, on ground of original bank's appropriation of trustees' deposit of trust income, without joining trustees, where trustees had declined to take proceedings for restitution of deposit (St. 1909, p. 95, § 31, as amended by St. 1921, p. 1373).

Beneficiary was not required to join the trustees individually or as trustees in action against successor bank based on original bank's appropriation of deposit of trust income, since the trustees, who had declined to take proceedings for restitution of the property appropriated, were estopped to assert any claim against the successor bank and thus any double payment by the bank was prevented.

5. Banks and banking ⇐134(7).

In action by beneficiary against successor bank for original bank's appropriation of deposit by trustees of trust income payable to beneficiary, amount of indebtedness of trustees to original bank was immaterial (St. 1909, p. 95, § 31, as amended by St. 1921, p. 1373).

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Judge.

Action by Anita Christal Purdy against the Bank of America National Trust & Savings Association, appearing in lieu of the Bank of Italy National Trust & Savings Association, which in turn was substituted for the defendant the Salinas City Bank. Judgment for plaintiff, and defendant, the Bank of America National Trust & Savings Association, appeals.

Affirmed.

Louis Ferrari, of San Francisco, C. F. Lacey, of Salinas, and Keyes & Erskine, of San Francisco, for appellant.

Houghton & Houghton and Edward T. Houghton, all of San Francisco, for respondent.

McNUTT, Justice pro tem.

The will of Alberto Trescony proved in Monterey county in 1894 appointed Julius A. Trescony and Robert F. Johnson trustees to hold, invest, manage, and control one-third of all the real property of the deceased for the use of two beneficiaries (grandchildren), one of whom is the (respondent) plaintiff.

In 1895 definite acreage was partitioned off to the trustees to be held, invested, managed, and controlled by them until the plaintiff, then Anita Christal and Leo Albert Christal, then minors, respectively arrived at the age of 30 years, and to pay over to him or her, or to either of them, or to expend for him or her, or either of them, the income or such part thereof as such trustees deemed suitable until one or the other of them arrived at the age of majority, and, when the plaintiff and Leo Albert, or either of them, should attain his majority, the trustees were to transfer to the one so of age, and the other on like event, the accumulations so accrued, and annually thereafter to one or both so of legal age a share and portion of the net annual income of said trust property, less necessary expenses of said trust until such time or times as the plaintiff and the said Leo Albert Christal shall respectively arrive at the age of 30 years, at which time or times the trustees were directed to pay over to the plaintiff or Leo Albert Christal, or to both of them, as the case might be, their respective equal shares of the trust property and the net income thereof, if any, less the necessary expenses of the trust.

In 1895 Trescony and Johnson opened a commercial account with the Salinas City Bank as the account of themselves, as trustees for Anita Purdy, then Anita Christal, and her brother, the beneficiaries referred to

above; thereafter, by successive borrowings, they created an overdraft which, on December 31, 1908, was $13,836.97. On January 1, 1909, Trescony and Johnson opened a new account with that bank as that of themselves as trustees for Anita Christal Purdy, respondent, to which they caused said entire overdraft to be charged. On September 8, 1909, they gave the bank a note signed by them as trustees for Anita Christal Purdy and her brother. On December 20, 1914, a renewal note in the sum of $14,500 was given to the bank. That was signed "J. A. Trescony [and] R. F. Johnson, trustees for Anita Christal Purdy and Leo Christal." The court found that the note last named was executed by them without any authority from the court permitting them to borrow money for the use of the trust or of the beneficiaries, and that the note did not bind the trust estate or the plaintiff, and that the plaintiff received no consideration for the said notes, or either of them, and that none moved from the Salinas Bank to the trust estate or to the plaintiff for the notes or for either of them. It further found that Trescony and Johnson deposited in the account opened by them in the Salinas Bank as the account of themselves as trustees for the account of Anita Christal Purdy (respondent) moneys collected or received by them as such trustees, as the one-half share or proportion of plaintiff of the income or earnings of the property subject to said trust.

On the 30th of October, 1916, the Salinas City Bank, without right, appropriated said deposit of $7,296.16 and applied the same in part payment of the promissory note dated December 20, 1914, for $14,500 without the sanction of the plaintiff and without any authorization so to do from any court. It is further found that the payment of the said promissory note was not secured by lien pledge or mortgage. At the time said appropriation of said $7,296.16 was made plaintiff was not indebted to the trustees in any sum, but it was alleged by plaintiff and proved that at said time they were indebted to her in the sum of $11,404.57, and that no part of said sum had ever been paid by the trustees to her as beneficiary of said testamentary trust.

January 27, 1927, the defendant Salinas City Bank was sold to the Liberty Bank of America, by agreement made pursuant to section 31 of the California Bank Act (as amended by St. 1921, p. 1373). February 19, 1927, said Liberty Bank of America, by similar agreement, sold to the Bank of Italy. March 1, 1927, said Bank of Italy was converted into a national association under the name of the Bank of Italy National Trust & Savings Association. By an order of the trial court made July 12, 1930, the plaintiff, on motion, was permitted to substitute Bank of Italy National Trust & Savings Association, and was granted leave to file an amended and supplemental complaint over the objection of the substituted defendant; that, after granting the order substituting the Bank of Italy for the original defendant, and before time for answering the supplemental complaint had expired, the said bank with another bank, namely, the Bank of America of California, consolidated under the title of Bank of America National Trust & Savings Association, which consolidated banking institution thereafter voluntarily appeared as a party defendant, and filed an answer to the original complaint in the action without having applied for or obtained leave to answer anew the original complaint, and filed as well an answer to the supplemental complaint. One of the trustees died prior to the time of the filing of the answer of the substituted and ultimate defendant.

The defenses sought to be urged by the ultimate defendant in its answer were that the claim against it was barred by the limitation of section 338 of the Code of Civil Procedure and other sections of said Code. It was alleged in the complaint that the $7,296.16 which had been deposited in the Salinas Bank in the manner aforesaid was the respondent's one-half share of the income or earnings of the testamentary trust. This was admitted by the original defendant, but sought to be denied for want of information by the ultimate defendant. At the time of the appropriation by the Salinas Bank of the $7,296.16, it was found that the sum was subject to the check of the trustee depositors and payable upon checks drawn by them as trustees for plaintiff.

[1, 2] Appellant justifies the appropriation as resulting from the exercise by the Salinas Bank of a banker's lien (section 3054, Civ. Code), and contends that cross-demands existed which were compensated pro tanto under section 440 of the Code of Civil Procedure. The argument advanced is that the testamentary trustees whose powers are hereinabove defined were agents for the trust property, and as such had the right to incur the debts represented by the overdrafts and to make the note to cover them, relying on section 2267, Civil Code. They then go a step further and say that the deposit of $7,296.16 in their names as trustees could be applied to the debt they incurred as testamentary trustees, upon the apparent theory that the deposit stood to their credit as testamentary trustees. The vice of the argument is this: That the depositing of the money in the names Trescony and Johnson, as trustees for Anita Christal Purdy, was not, either as between them and her, or as between them and the bank, any act on their part as testamentary trustees, and the bank knew it because the complaint alleged, and the answer admitted, that that $7,296.16 account was money which had been yielded by the trust property as income, and was held by them as trustees under a dry or naked trust, for her benefit. In this view of the situation, the nominal identity of testamentary

trustees with the trustees for the $7,296.16 account is wholly adventitious. The burden of the brief upon the part of the appellant is that the trustees had power, under the testamentary trust, to bind the trust estate, and per contra that of the respondent is that they had no such power. The determination of the question whether the trustees, in securing overdrafts or giving the note, bound the trust estate, is not necessary to this decision. The only power which the trustees of the $7,296.16 account had was to draw a check upon the bank and pay the money to Mrs. Purdy. The interposition of trustees under this naked trust does not alter the situation. It was as much her money as though it had been deposited in the bank by them in her name as her share of income. When the bank took that money and assumed to give the testamentary trustees credit therefor or assumed to credit the trust property with the amount thereof, it became an involuntary trustee for Mrs. Purdy. Section 2243, Civil Code: "Third persons, when involuntary trustees. Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration." See, also, U. S., etc., Co. v. First Nat. Bank, 18 Cal. App. 437, 123 P. 352, and cases therein cited. Granting that the Salinas Bank might successfully contend that there was a valuable consideration for the appropriation of the money, consisting of a pro tanto release of the pre-existing debt of $14,500, the bank was not a purchaser in good faith because it was fully aware of every significant fact surrounding the activities of the trustees in any capacity, either as testamentary trustees or as wholly voluntary trustees in the opening of the trust income account for Mrs. Purdy.

Appellant further contends that, notwithstanding the admitted fact that the $7,296.16 was Mrs. Purdy's share of the trust income, the overdraft had resulted from advances to the trustees for Mrs. Purdy, and that therefore she had through those advances had the equivalent of the $7,296.16 appropriated by it. To this contention there is a double answer: First, that the evidence is nebulous as to what advances were made to her and what the source of them was; and, second, the judgment in the case of Purdy against Johnson, which was a suit by her against the trustees for an accounting of their testamentary trust activities, disclosed that the trustees owed her something over $11,000, none of which they ever paid to her.

[3] Appellant contends that the claim of defendant is barred by subdivision 1 of section 338, Code of Civil Procedure, on the ground that a claim against a purchasing bank for an alleged liability of the selling bank is upon a statutory liability.

Suit herein was commenced about two months after the appropriation. Trial was in progress when the attorney for the defendant Salinas City Bank suggested that submission should not be had until the determination of the case of Purdy v. Johnson, a pending suit by respondent against the testamentary trustees for an accounting. The court adopted the suggestion. The original trial judge died, and a new trial was had, resulting in the judgment appealed from.

If by section 31 of the California Bank Act the ultimate purchaser of the Salinas City Bank stands in the shoes of the original defendant, the statute of limitations cannot be successfully urged. In the sense in which the appellant construes the words "statutory liability," it cannot be said that the defendant bank is bound. The provisions of the Banking Act compel a purchasing bank to assume every obligation of the purchased bank.

Section 31 of the California Bank Act reads: "The rights of creditors of the selling bank shall not in any manner be impaired by any such sale [of its banking business], nor shall any liability or obligation for the payment of any money due or to become due, or any claim or demand, in any manner, or for any cause existing against such selling bank, * * * be in any manner released or impaired, and all the rights, obligations and relations of all the parties, creditors, depositors, trustors and beneficiaries of trusts shall remain unimpaired by the sale, but such bank to which the other shall sell all its business or all the business of any of its departments, shall succeed to all such relations, obligations, trusts and liabilities and be held liable to pay and discharge all such debts and liabilities and to perform all such trusts of the selling bank in the same manner as if such bank to which the other had sold had itself incurred the obligation or liability or assumed the relation of trust."

This is in harmony with the view expressed in Barreiro v. Bank of Italy National Trust & Savings Association, 125 Cal. App. 153, 13 P. (2d) 1017. The progressive sales and purchases from and by the original bank to the ultimate defendant have no greater significance in the premises so far as concerns the obligation in suit than would have a change of name of the bank.

[4] Error is urged by appellant in overruling the demurrer of the purchasing bank for nonjoinder of the trustees individually or as trustees. In view of the fact that the trustees were called upon to take proceedings to cause a restitution of the property appropriated by the original bank and declined to do so, they are not necessary parties to this suit. They are estopped to assert any claim against the bank, and thus any double payment by the bank is prevented. This action is substantially one for money had and received, and in such aspect the bank may be sued alone.

[5] Appellant says that the decision is against law because no finding was made on the issue raised by the answer, which alleged "an indebtedness by the trustees of plaintiff in the sum of about $14,500 for money advanced to them as such trustees, which was unsecured, and was due, owing and unpaid at the time of the appropriation in question." In our view to find on such issue was unnecessary. The indebtedness of $14,500 existed by reason of loans (overdrafts) to the testamentary trustees which charged the trust estate, or the trustees personally, accordingly as they had or did not have the power to borrow and charge the estate. The borrowing created no privity between the individual beneficiary (respondent) and the bank, but the moment the testamentary trustees set apart $7,296.16 as her share of income to Anita Purdy that sum became her property, and they no longer held it as testamentary trustees. When they put it in the bank in an account as trustees for her, they were volunteer trustees, having, as we have pointed out, no duty to perform but that of drawing a check on the account and giving her the money. When they set apart that sum to her as her share of income, at a time when they owed it to her and the trust estate owed it to her as income, and when she owed neither them nor the bank, they could not apply it on debts incurred in the administration of their testamentary trusteeship, and they could not, by putting it in the bank for her, authorize or empower the bank to do so. It became her money free of any obligation arising from their trust activities. The decision is not in that or in any other respect against law.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

136 Cal.App. 91

HASMAN v. CANMAN et al.

Civ. 4858.

District Court of Appeal, Third District, California.

Dec. 27, 1933.

Hearing Denied by Supreme Court Feb. 21, 1934.

1. Limitation of actions ⇐50(1).

Action, brought on note, "hereby renewed from year to year" at holder's option, if not paid at maturity, within four years after year in which note was last renewed, was not barred by limitations, though commenced over four years after due date (Code Civ. Proc. § 337).

2. Bills and notes ⇐129(2).

Payee of note, authorizing acceleration of due date on interest default, had right to declare entire sum due when such contingency occurred, regardless of renewal of note.

3. Bills and notes ⇐138, 491.

Provision that note, if not paid at maturity, "is hereby renewed from year to year" at holder's option, is self-operating and automatically postpones maturity, unless holder's conduct indicates contrary intent, and maker must prove his contention that note has or has not been renewed.

4. Limitation of actions ⇐50(1).

Note "hereby renewed from year to year" at holder's option, if not paid at maturity, was so renewed by holder's forbearance to sue thereon, without any action clearly indicating that she did not desire to enforce payment, so that suit brought thereon within four years after year of last renewal was not barred by limitations (Code Civ. Proc. § 337).

5. Limitation of actions ⇐15.

Provision in note, giving holder option to continue it from year to year, if not paid at maturity, is tantamount to waiver of statute of limitations (Code Civ. Proc. § 337).

6. Limitation of actions ⇐175.

Statute of limitations may be waived.

7. Contracts ⇐143.

General policy of law is to give effect to every valid provision of contract not unlawful or against public policy.

8. Attorney and client ⇐86.

Attorney cannot waive client's rights through binding construction of legal effect of instrument.

9. Limitation of actions ⇐175.

Action on note, "renewed from year to year" at holder's option, if not paid at maturity, *held* not barred by limitations because of payee's forbearance to sue until over four years after due date, though payee's attorney wrote makers on or about such date that note was about to outlaw and would be collected through suit (Code Civ. Proc. § 337).

A third party had acquired rights, which might be affected, when attorney's letters were written, and attorney satisfactorily explained reason for language thereof.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Lillian Hasman against Sim Canman and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Clare S. Johnston, of Oakland, for appellants.

R. L. Shinn and Charles J. Hasman, both of Sacramento, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The action is to recover a balance claimed due upon a promissory note executed by defendants and payable to plaintiff. The case was tried without a jury, and, judgment going for the plaintiff, the defendants prosecute this appeal.

[1] The sole point involved is the statute of limitations. It is claimed that the action is barred under the provisions of section 337 of the Code of Civil Procedure, limiting the time within which an action may be commenced upon any contract, obligation, or liability founded upon an instrument in writing.

The date of the promissory note in question is August 1, 1923, and the term of the note is three years, making the same due on August 1, 1926. The present action was commenced on December 5, 1930.

The chronology would indicate the limitation claimed. However, there was a clause in the note which causes the controversy. The note provides: "If this note is not paid at maturity it is hereby renewed from year to year, at the option of the holder, until paid, and during such year the makers thereof shall not have the right to pay the same."

It is conceded that the note was not paid at maturity, and the finding of the trial court as to renewal is in the following language: "That said promissory note matured on the first day of August, 1926, and was thereafter regularly renewed from year to year, according to its terms, and interest thereon was paid during such terms of renewal but plaintiff did nothing to show that she had exercised her option to renew the note except that she forbore to sue or to do any other thing to collect the note and that she collected interest thereon after the due date thereof."

The appellant attacks this finding to the effect that the note was renewed as not being sustained by the evidence.

Without detailing the record, there is no question but that there is a lack of evidence as to any act manifesting the exercise of the option other than as found by the court in the plaintiff's forbearance and receipt of interest. Therefore the question presented is whether or not the provision for a renewal is self-operating.

Similar provisions have been before the courts of this state in a number of cases. Perhaps the latest expression of the Supreme Court on the subject may be found in Morehouse v. Allen, 213 Cal. 1, 300 P. 961. In this case the court holds such provisions valid.

In Caffaro v. Romani, 70 Cal. App. 448, 233 P. 412, the court accepts the doctrine of Kleinsorge v. Kleinsorge, 133 Cal. 412, 65 P. 876, and the Caffaro Case construes the Kleinsorge Case as holding that a provision such as we have under consideration here is self-executing, and that upon maturity, where the obligation remains unpaid, the renewal is automatic. The court then, in the Caffaro Case applies the same doctrine as is manifested by this language: "By analogy, the note in the instant case became due April 16, 1915, and was, by its terms, renewed for 1916, 1917, 1918, and 1919 and suit was brought upon it within four years from April 16, 1919."

And so in the case before us, if the note was renewed in 1926, 1927, 1928, 1929, and 1930, the action was brought within four years of breach.

[2] It might be here noted that the complaint alleged and the trial court found, which finding is undisputed, that the note carried a provision for acceleration of the due date in case interest was in default. This contingency occurred, and plaintiff exercised her option to declare the entire sum due, as was her right regardless of any renewal. Kleinsorge v. Kleinsorge, 133 Cal. 412, 65 P. 876.

[3] The claim of appellants here is that there could be no renewal under the clause noted unless there was some positive, definite action on the part of the holder which would give notice to the makers of the intention of renewing the note from year to year. Appellants do not point out just what form this action should take or what in their opinion would have been a sufficient notice to them.

Reliance is placed by appellants upon cer tain cited cases which we may note.

The case of California State Bank v. Web ber, 110 Cal. 538, 42 P. 1066, 1067, discusses a provision identical with the one before us. In that case it was the maker who was contending that there had been a renewal. There, as here, no action of any sort was taken by the holder indicating the intent of renewal. The court says: "To maintain this point it devolved upon the defendant [maker] to show affirmatively that the plaintiff, in the exercise of the option given him, renewed the note, and thereby extended the time of payment to a day later than that on which the action was commenced; yet he neither alleged nor attempted to prove such renewal of the note. In the absence of evidence tending to prove it, such renewal of the note cannot be presumed."

We construe this language as having application only to the case being decided. We think that the reasoning of the case is better illustrated by the following language: "If there had been a renewal of the note whereby the time of payment was extended to a later day than that on which the action was commenced, such renewal would have been relevant only as an affirmative defense, which must have been pleaded and proved by the defendant."

Reconciling this authority with those previ-

ously quoted, the rule would be that the provision is self-operating and automatically postpones the date of maturity excepting in cases where the conduct of the holder indicates a contrary intent.

In other words, whatever the contention of the maker might be, whether he contends that the note has been renewed or that it has not been renewed, the burden always rests upon him as a matter of affirmative defense to prove his contention.

Next appellants cite the case of Trinity Bank v. Haas, 151 Cal. 553, 91 P. 385. This case deals with a situation where the holder sought to accelerate the due date of a note rather than postpone it. The note before the court in that case provided that, upon a default in the payment of interest, before the due date of the principal, the holder at his option might declare the entire sum of interest and principal forthwith due. The court held that the option could be exercised without notice of any kind to the maker. But the holding went further and held that the option must be exercised while the maker was in default, and that, if the maker paid the interest before the option was exercised, there was no default at the time the holder declared the entire sum of principal and interest due. But, if a default had taken place and continued up to the time of commencement of suit, it was held that there was no requirement that the holder manifest in any way his decision to exercise the option given.

In Stalder v. Riverside Groves & Water Co., 167 Cal. 560, 140 P. 252, the same question was before the Supreme Court as decided in the Trinity Bank Case, namely, the exercise of an option to declare the note due upon a default in interest payments before maturity. It was again held that notice of the exercise of the option was unnecessary, but that the holder must do some act to negative a waiver, and that, until that time, the maker may terminate the option by a payment of the interest due.

The theory of both cases last cited closely approaches that of estoppel. The acceleration provisions of the notes under consideration operated in the nature of a penalty on default of the obligor and were for the exclusive benefit of the obligee. In its very nature the option given demanded a claiming of the right of acceleration, in the absence of which the obligor could assume a waiver.

[4] Coming then to the case at bar. When the note before us was executed, the maker knew of its terms and of the provisions which might postpone the due date. When the original date of maturity arrived, the holder could do one of two things. She could demand payment, thus definitely announcing her determination to refuse the option given her, or she could forbear under her option.

No action of any sort indicated clearly that the holder was not desirous of enforcing payment. If she had, upon the maturity date, as set forth in the note, written to the makers stating that she did not consider the note due and that pursuant to the option she had renewed the note for another year, no particular benefit would have accrued to the makers, and, by her failure so to do, no right of the makers was lost nor any penalty inflicted.

[5] A fair construction of this provision giving the holder the option of continuing the note from year to year would be that the same is tantamount to a waiver of the statute of limitations. In other words, the practical effect of this provision is to say to the payee, "We will pay you this money on August 1st, 1926, and if we do not pay you on that date you may, as you please, consider this our promise to pay you on August 1st, 1927, and so on each due date if we do not make payment."

The failure to insist upon payment when due is a matter of indulgence on the part of the payee, and on the part of the makers is, as stated, manifestly a waiver of limitation.

[6] The law is settled in this jurisdiction that the statute of limitations may be waived, and little doubt is left that it may be waived for all time. Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714.

[7] When the courts hold that a provision for renewal contained within an instrument is a valid provision (Morehouse v. Allen, supra), it necessarily implies the court's willingness to enforce the same. Likewise, the general policy of the law is to give effect to every valid provision of a contract not unlawful or against public policy.

[8, 9] Some stress is laid on the fact that the husband and attorney for plaintiff on or about the original due date, August 1, 1926, wrote to defendants, stating that the note was about to outlaw and advising of enforced collection through suit. We know of no law that authorizes an attorney to waive rights of his client through a binding construction of the legal effect of an instrument, though, in passing, it may be noted this is occasionally done. Further, it may be noted that when these letters were written a third party had acquired rights that might be affected. Further still, it may be noted that plaintiff's attorney explained the reason of the letters being in the language used and the trial court evidently accepted this explanation. It would, in these days and times, seem somewhat of a travesty to penalize one for forbearance unless the law compelled such action.

It is our conclusion that the judgment should be affirmed, and it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

GAFFIGAN v. LAWTON et al.*

Civ. 9196.

District Court of Appeal, First District, Division 2, California.

Jan. 11, 1934.

Hearing Granted by Supreme Court March 12, 1934.

1. Mechanics' liens ⇐317.

Where oral contract to furnish labor and material in construction of building is barred by two-year statute, contractor's surety who has given written bond may plead such statute (Code Civ. Proc. § 339).

2. Principal and surety ⇐118.

Suretyship contract is in nature of collateral agreement accessory to principal obligation, so that unqualified release of principal debtor is discharge of surety.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action on a contractor's bond by J. A. Gaffigan, doing business under the fictitious name of Gaffigan Sheet Metal Works, against Frederick H. Lawton, also known as Frederick Lawton, and others. From a judgment in favor of defendant National Surety Company of New York after an order sustaining a demurrer without leave to amend, plaintiff appeals.

Affirmed.

J. W. Coleberd, of South San Francisco, for appellant.

R. P. Wisecarver, of San Francisco, for respondent.

NOURSE, Presiding Justice.

On October 17, 1932, plaintiff commenced this action and served process on the defendant National Surety Company. This defendant demurred generally and set up the statute of limitations. The demurrer was sustained without leave to amend, and plaintiff appeals on the judgment roll.

Plaintiff furnished labor and material to defendant Lawton, a building contractor under contract with one Gerske. The surety company posted a bond under the terms of section 1183, Code of Civil Procedure, for the payment of all claims for labor and material incident to the contract. Plaintiff's services were rendered between July 24 and August 20, 1928. The building was completed October 31, 1928. It was alleged that the defendant Lawton promised to pay the plaintiff upon the completion of the building.

[1] The single question of law involved is, Where an oral contract to furnish labor and material in the construction of a building is barred by the statute of limitations in two years (section 339, Code Civ. Proc.), may the surety who has given a written bond in accordance with the statute plead the two-year statute of limitations, or is the suit on the bond governed by the four-year statute (section 337, Code Civ. Proc.), relating to a liability founded upon an instrument in writing? The trial court held that the surety could plead the two-year statute, and we are in accord with that ruling.

[2] The contract of suretyship is in the nature of a collateral agreement to pay the debt of another and is accessory to a principal obligation contracted by the other. Hence an unqualified release of the principal debtor is a discharge of the surety. It is generally admitted that a surety may set up in defense to an action against him any matter that operates as a discharge of the principal, and in this connection it has been held that, when the original debt has become barred by the statute of limitations, the surety may plead the statute in bar to a suit on the bond. 21 R. C. L. p. 1080; 23 Cal. Jur. 1050, 1101; Towle v. Sweeney, 2 Cal. App. 29, 33, 83 P. 74; County of Sonoma v. Hall, 132 Cal. 589, 590, 594, 62 P. 257, 312, 65 P. 12, 459; Paige v. Carroll, 61 Cal. 211, 215.

The Towle Case is directly in point. There the action was on a bond posted by building contractors to insure their payment of all claims for labor and materials incident to the building contract. The plaintiffs furnished the contractors certain materials which were used in the construction of the building. In their suit against the sureties the defendants set up the statute of limitations. In holding the plea good the appellate court said (page 33 of 2 Cal. App., 83 P. 74, 75): "The obligation of the defendants as sureties * * * is accessory and collateral to the obligation of their principals, and can be enforced against them only to the extent that the same obligation could have been enforced against [the principals]." As the surety's obligation is "accessory to that of the principal, if the principal is not liable, he is not, for there can be no accessory if there is no principal; and the surety may avail himself of any defense to the claim that would have been available to the principal."

The condition of the bond is "for the payment in full of the claims of all persons performing labor upon * * * such work." It is made to inure to the benefit of all such persons and they are given a right of action to recover upon the bond in a separate suit upon the bond. But the "payment of claims" presupposes valid and enforceable claims. Under the general principle that a surety can avail himself of the defenses available to his principal, a claim which is barred by the statute is not an enforceable one if the statute is pleaded. Hence, though the suit may be a separate action on the bond,

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 37 P.2d 79.

it is in effect an action to enforce the primary obligation. If the creditor has discharged the primary obligation either directly or by nonaction, the collateral agreement of the surety is likewise discharged.

Paige v. Carroll, supra, was decided in July, 1882. That was an action against the sheriff and his sureties for damages arising from the seizure and sale of property belonging to the plaintiff. The surety's obligation was in writing. The sheriff's liability was statutory, and the time within which suit could be brought against him was limited to two years. Section 339, Code Civ. Proc. Sureties pleaded the statute of limitations applicable to suits against the sheriff. In sustaining the plea the Supreme Court said: "We can not believe that the object was to allow a longer period for commencing an action against him [the sheriff] and his sureties for such liability, than is allowed for commencing an action against him alone for it."

The effect of the theory advanced by appellant on this appeal would be that, though the principal would be released at the end of two years, the liability of the surety would be extended two years longer because its obligation is in writing. It is unreasonable to assume that, if such were the intention of the Legislature, it would not have expressed that intention in clear language in view of the contrary holdings in the cases cited.

Judgment affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

136 Cal.App. 213

In re EASTON'S ESTATE.

DIXON et al. v. HARTNETT et al.

Civ. 8784.

District Court of Appeal, First District, Division 1, California.

Jan. 11, 1934.

Hearing Denied by Supreme Court March 12, 1934.

1. Judgment ⇐315.

Court has power, within reasonable time, to correct orders and judgments as entered, when inadvertently made, to make them conform to judgment or order directed, but cannot, under guise of an amendment, make record or order in fact never made.

2. Appeal and error ⇐643(4).

Parties to action must take notice of contents of record that comes to appellate courts.

3. Appeal and error ⇐659(3).

Where general order granting new trial, set out in transcript, was acquiesced in for 19 months, and case was presented on theory order was general, motion for diminution of record by incorporating in transcript order amending general order granting new trial to show new trial was granted for insufficiency of evidence could not be granted, where laches were not excused (Code Civ. Proc. § 657).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Will contest by Samuel Dixon and others opposed by Sarah Hartnett and others, proponents, to set aside the will of Mary Easton, deceased. From an order granting a motion for new trial, after judgment for contestants, they appeal. On respondents' motion for diminution of record.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

Motion denied.

Edwin L. Forster and Walker Peddicord, both of San Francisco, for appellants.

Robert McMahon, John P. Doran, and Andrew F. Burke, all of San Francisco, for respondents.

TYLER, Presiding Justice.

Motion for diminution of record. Respondents herein have made a motion for diminution of record by incorporating in and making part of the transcript on appeal an order amending nunc pro tunc an order granting a motion for a new trial. The order amending the record was made under the following circumstances: An appeal was taken by contestants from an order granting a motion for a new trial of the contest of the probate of the will of deceased. The contest was tried before a jury in February, 1930, nearly four years ago, which resulted in a verdict in favor of contestants, the jury finding the will to have been executed by virtue of undue influence exerted upon the deceased. This verdict was set aside by the court in March, 1930, the court subsequently granting a motion on the part of proponents for judgment notwithstanding the verdict. Contestants appealed from this judgment, and it was reversed, and the trial court was directed to enter judgment on the verdict. Estate of Easton, 118 Cal. App. 659, 5 P.(2d) 635. Upon the going down of the remittitur on March 3, 1932, judgment on the verdict was entered in contestants' favor. Five days thereafter proponents served and filed a notice of intention to move for a new trial based upon several grounds. The motion was granted by a minute order general in terms, the order reading "Motion for a new trial granted." An appeal was taken from this order by contestants in due course. The case was placed upon the August, 1933, calendar for hearing. Nothing was said in the briefs of either party concerning the form of the

order granting a new trial, it being conceded by them that the order was a general one. The case proceeded to argument. Respondents, in support of the general order granting a new trial, proceeded to argue that the order was based upon the insufficiency of the evidence, and were met with the objection that the order being general no such issue was involved.

Counsel for respondents argued that, notwithstanding the order granting a new trial was a general one, the motion having been based upon several grounds, including the insufficiency of the evidence, section 657 of the Code of Civil Procedure did not control, as the order implied it was granted on the insufficiency of the evidence. Counsel was granted the privilege of presenting authorities upon this question. Up to this time it is clearly manifest that counsel was well advised that the order granting a new trial was a general one. Instead of presenting authorities to support his argument, counsel for respondents then proceeded to the court below and obtained an ex parte order directing the entry nunc pro tunc as of April 6, 1932, of an order granting respondents' motion for a new trial, so as to show that the order granting such new trial was made upon the ground of the insufficiency of the evidence. It will be noticed that it is some four years since a jury rendered a verdict in favor of contestants. About nineteen months have elapsed since the court granted a new trial, during which time counsel for respondents has never questioned the form of the order, but on the contrary has acquiesced in the same up to the day of the argument of the appeal on its merits. In fact, as above stated, the case was presented upon the theory that the order was a general one.

[1] Appellants have gone to the expense of taking an appeal, relying upon the order of the court as originally made. There is no question but that a court has power within a reasonable time to correct orders and judgments as entered, when inadvertently made, so as to make them conform to the judgment or order directed, but this power is limited to making the entry conform to the order actually directed. A court may not, under the guise of an amendment, make a record or order that was in fact never made. Drinkhouse v. Van Ness, 202 Cal. 359, 370, 260 P. 869. However this may be, we are not here confined to the question as to whether or not the corrected order is a nullity, for we are of the opinion that it would work a grave hardship on contestants, considering the facts and the time consumed in this litigation, to grant the motion. In Podesta v. Deluchi, 98 Cal. App. 579, 277 P. 364, it is held that a motion for diminution of the record by modification of the bill of exceptions, which is made nearly a year after its settlement by the trial court and after the filing of the briefs on appeal, will be denied on the ground of unexcused delay in failing to sooner apply for relief. See, also, Poole v. Oliver, 89 Ark. 85, 115 S. W. 952.

[2, 3] Petitioners claim that they were not aware that the order was general in character. The record seems to indicate otherwise. The transcript as certified to by the trial court contains the original order, the certification of which was made more than a year ago; the order itself was made almost two years ago. The brief of contestants on appeal states in express language that the order granting a new trial was a general one, and counsel for proponents stated at the time of the argument of the case upon its merits that the order was general and argued his case accordingly. Moreover, parties to an action must take notice of the contents of a record that comes to appellate courts. Boyer v. Boyer, 4 Wash. 80, 29 P. 981. Both parties have for a long period of time relied upon the record as contained in the transcript, and have presented their case accordingly. Respondents have shown no excuse for their laches in having the order corrected, assuming it to have not been a general one, and it would be a hardship under all the circumstances to grant the motion and consider the case upon a new record. The motion for diminution of the record is therefore denied.

We concur: KNIGHT, J.; CASHIN, J.

136 Cal.App. 23

UTTLEY v. CITY OF SANTA ANA.

Civ. 1449.

District Court of Appeal, Fourth District, California.

Dec. 21, 1933.

Hearing Denied by Supreme Court Feb. 19, 1934.

1. Municipal corporations ⇐812(6).

Generally, substantial compliance with statutory requirement that claim against city for injuries caused by defective condition of street specify claimant's address is sufficient (St. 1931, p. 2475).

2. Municipal corporations ⇐816(5).

Allegation of complaint in action against city for personal injuries that claim filed with city clerk stated plaintiff's attorney's office address showed substantial compliance with statutory requirement that claim specify claimant's address, in absence of showing that city was misled or prejudiced (St. 1931, p. 2475).

3. Automobiles ⇐308(4).

Street, across which was depression, causing injury to guest in automobile, was not in safe condition as matter of law.

4. Automobiles ⇐308(10).

Automobile driver's violation of speed law in crossing blind intersection *held* not as matter of law proximate cause of injuries to guest when car passed over depression in street.

5. Automobiles ⇐305(7).

Testimony of surveyor, employed by defendant city, that changes were made in street after accident resulting in injuries to plaintiff, riding in automobile, when it passed over depression in street, was inadmissible to show prior unsafe condition of street.

6. Appeal and error ⇐837(11).

Claim of insufficiency of evidence to support verdict against city for injuries to guest in automobile because of depression in street as not showing that city had funds available to make street safe or erect warning signs without exceeding constitutional debt limitation cannot be considered on appeal, where city's surveyor testified without objection that changes were made in street after accident (Const. art. 11, § 18).

7. Trial ⇐295(7).

Instruction *held* not erroneous as telling jury that speed limit at street intersection was 45 miles per hour, if no signs that it was in business or residence district were posted, in view of instructions as whole (St. 1923, p. 517, § 28½, as added by St. 1929, p. 510, § 7; St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120, § 34; St. 1923, p. 555, § 116, as amended by St. 1931, p. 2122, § 38).

The instruction was that, unless jury found from evidence that point of accident resulting in injuries to plaintiff was within business or residence district, it was presumed not to be within such district and speed limit would be 45 miles per hour, but court also instructed jury that it is lawful to drive vehicle at not exceeding 15 miles per hour across highway intersection when driver's view is obstructed and evidence was undisputed that plaintiff was dozing in back seat of automobile and did not know at what speed it approached intersection.

8. Automobiles ⇐305(1).

Automobile driver's testimony in action against city for injuries to guest because of depression in street that witness' insurer told him he was not liable *held* inadmissible.

9. Appeal and error ⇐1050(1).

Error in admitting automobile driver's testimony in action against city for injuries to guest that witness' insurer told him he was not liable *held* not sufficiently prejudicial to justify reversal of judgment for plaintiff.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by B. Uttley against the City of Santa Ana. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clyde C. Downing and L. W. Blodget, both of Santa Ana, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for damages for injuries received by the plaintiff about midnight on February 28, 1932. At the intersection of Tenth street and Broadway, in the city of Santa Ana, there was at that time a dip or depression across Broadway which had been constructed for the purpose of carrying storm waters. It was stipulated that in October, 1931, this dip had been changed by making the gutter somewhat deeper and by raising the height of one of the shoulders in order to cause the water to flow along Tenth street instead of along Broadway. It was further stipulated that the condition of the street at this point, as it had existed for three months prior to February 28, 1932, was known to the legislative body of the city of Santa Ana. As an automobile, in which the plaintiff was a guest, was proceeding along Broadway and crossing Tenth street on the occasion in question, the plaintiff was thrown to the top of the automobile and then fell to the floor of the car, resulting in the injuries which are the basis of this action.

[1, 2] The first point raised is that the complaint is insufficient in that it fails to allege that a claim filed with the city contained the address of the claimant, as required by the statute (Stats. 1931, p. 2475). Paragraph IX of the complaint alleges the filing of a claim with the clerk of the city in all respects as required by the statute, with the exception that it alleges that the claim, as filed, set forth the name of the plaintiff and the name and office address of his attorney. It is insisted that this constitutes a fatal defect in the complaint. No California cases are cited, and most of the cases called to our attention are from the state of Washington, where the statute required that a claimant give his residence during the preceding year and not merely his address, as required by our statute. Even in that state it has been held that "it is sufficient, therefore, if the notice or claim is not calculated to mislead, but con-

tains such evidence of identity of place and person as to enable the investigating officials to make proper investigation when aided by reasonable inquiry. When, therefore, there is no evident intention to mislead, but a bona fide attempt to comply with the law, the notice is sufficient in the absence of any evidence that it did in fact mislead." Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, 622, Ann. Cas. 1916E, 720. The general rule with respect to this sort of notice of claim is that a substantial compliance with the provisions of the statute is sufficient. 19 R. C. L. 1044. The purpose of the statute would seem to be accomplished if an address is given at which or through which the claimant may be found, in order that the city officials may make such investigation of the merits of the claim as may be desired. The statute does not definitely require the giving of the claimant's home address or usual business address, and it is conceivable that a claimant might have neither a home address nor a permanent business address. There is nothing in this complaint to indicate that the address given was not in fact the business address of the claimant. In the absence of any showing that the appellant was misled or prejudiced, we think the allegations of the complaint are sufficient to show a substantial compliance with the statute.

[3, 4] It is next urged that the evidence does not support the verdict in three respects. It is first urged that it conclusively appears that the proximate cause of the accident was the excessive speed at which the driver of the car was proceeding, since there was evidence that the corner of Broadway and Tenth street was a blind intersection and the driver of the car testified that he was traveling from twenty-five to thirty miles per hour as he crossed the intersection. The second claim of insufficiency of the evidence is based upon the contention that the street must be held, as a matter of law, to have been safe. These two matters may be treated together. In Hook v. City of Sacramento, 118 Cal. App. 547, 5 P.(2d) 643, 645, it is said: "No hard and fast rule can be laid down in cases of this kind, as to the size or character of the hole or depression in a sidewalk or street that would constitute a dangerous or defective condition within the meaning of the statute, but each case must stand upon its own particular facts. * * *" If it be conceded that the driver of the automobile was violating the law at the time, a question still remains as to whether the respondent guest, who was dozing on the back seat of the automobile, was responsible for any negligence on the part of the driver. Even though the driver of the car exceeded the speed permissible at a blind intersection, the accident did not arise from the approach of a car along the cross street, and it is peculiarly a question of fact as to whether the violation of law or the condition of the street was the proximate cause of the accident. There was evidence that the approach to the dip or depression on one side was at an angle of 45 degrees or more, and on the other side was at an angle of about 30 degrees, and that the dip was 12 inches wide at the bottom and about 9 inches deep. It was stipulated that the gutter had recently been deepened and that one of its shoulders had been made higher in order to force storm waters away from Broadway and along Tenth street. The city engineer testified that a number of people had spoken to him about the dip and that he had read an article in the paper concerning it. The mayor of the city testified that, after the change was made in October, 1931, "there were complaints coming in that the condition was rough and should be corrected." The postmaster of the city of Santa Ana testified that he drove over this intersection practically every day, and that, after the change was made in the dip, he took the matter up with the assistant engineer of the city. It was stipulated that one of the superior court judges in that county would testify that he communicated the fact to the mayor that he had observed an accident at this place. Testimony was introduced of other accidents at the place in question. See Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118; Gorman v. County of Sacramento, 92 Cal. App. 656, 268 P. 1083. Without further summarizing the evidence, it fully appears that it cannot be held, as a matter of law, that the street in question was in a safe condition or that any violation of law on the part of the driver of the automobile was the proximate cause of the injuries received by the respondent.

[5, 6] The third claim of insufficiency of the evidence is that it contains no proof that funds were available in the city treasury for the purpose of putting this portion of the street in a safe condition or for erecting warning signs. This argument is based upon the inhibition contained in section 18 of article 11 of the state Constitution providing that no city shall incur any indebtedness or liability beyond a prescribed limit. It may be observed that, even where the constitutional provision referred to has been applied, it has always been held that the lack of funds is a matter of defense only. Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910; Johnson v. County of Yuba, 103 Cal. 538, 37 P. 528. However, the general question is not properly before us at this time, as the evidence in this case affirmatively shows that funds were available. A surveyor in the employ of the city testified that changes were made in the street at this point in April or May, 1932, which was after the accident but during the same fiscal year. While this evidence was inadmissible for the purpose of showing the prior unsafe condition of the street (Gorman v. County of Sacramento, supra), it was ad-

mitted without objection and furnishes some evidence that funds were available, if it could be assumed that any such evidence was necessary.

[7] The appellant complains of one instruction given. This instruction consisted of a copy of section 28½ of the California Vehicle Act (as added by St. 1929, p. 510, § 7), relating to what constitutes a business district and a residence district, and the presumptions in connection therewith, with a copy of section 116 of the act (as amended by St. 1931, p. 2122, § 38) relating to the posting of signs, and the following: "You are instructed that unless you find from clear and competent evidence as to the nature of the district at the point of this accident that it was within a business or residence district, then you are instructed that it was presumed not to be within a business or residence district, and the speed limit would then be forty-five miles per hour, subject to the requirement that any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

The appellant argues that, since this accident happened at an intersection, the reference in this portion of the instruction to the evidence "as to the nature of the district at the point of this accident" must have been taken by the jury as referring to the exact location of the accident at a street intersection, and that the jury was told, in effect, that, if they did not find there were signs posted making this a business or residence district, the speed limit at the intersection would be forty-five miles per hour. Strictly speaking, the language used may be susceptible of this interpretation, but, viewing the instructions as a whole, such an interpretation is not reasonable, and it can hardly be taken as possible that the jury so regarded it. Many instructions were given covering the various issues raised. Considerable evidence had been introduced with reference to the speed at which the automobile in which the respondent was riding had traveled for a considerable distance before it reached the intersection where the accident occurred, and as to whether or not the driver thereof decreased his speed as he approached that intersection. Covering that phase of the matter the court, in this instruction, read the two sections of the act, adding the portion of the instruction complained of. It is perfectly plain from the context that this part of the instruction referred to the nature of the surrounding district through which the automobile had come, and that it was not intended to be limited to the area within the intersection of the streets. This was not a formula instruction, and it purported to cover only one phase of the law and related to the surrounding district in general. A little later the court instructed the jury as follows: "The California Vehicle Act [section 113 as amended by St. 1931, p. 2120, § 34] provides that it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding 15 miles per hour in traversing an intersection of a highway when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last 100 feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of 200 feet from such intersection."

The jury was thus instructed as to the permissible rate of speed in general and also as to the lawful rate at an intersection where the view was obstructed. A further consideration is that, regardless of any negligence on the part of the driver of the automobile, it is hardly conceivable that the jury could have held the respondent responsible for the speed of the car, in view of the undisputed evidence that he was a guest riding in the back seat, that he was dozing, and that he did not know what the speed was as they approached this intersection. While there was some testimony that he came to consciousness some seven blocks before this intersection was reached, and that he thought the machine was traveling thirty miles an hour at that time, there is none as to the conditions prevailing at that place, and he did not know whether or not the speed was later decreased. The testimony indicates that he was so nearly asleep that he did not know much about what was going on. Under the circumstances, it is hardly possible to believe that the jurors, as reasonable persons, were misled by this instruction or that they relied upon it to the exclusion of all other instructions, and thus applied an incorrect rule of law. Ward v. Read (Cal. Sup.) 25 P.(2d) 821. After reading all of the evidence, we are far from convinced that any miscarriage of justice has occurred.

[8, 9] The only other point raised is that the court erred in one ruling on the admission of evidence. While the driver of the car was on the witness stand, he was asked by the appellant's counsel whether he had ever talked with the respondent or his attorney about the accident. He was then asked whether he had ever talked with any one else about his own liability for the accident. Upon being pressed for an answer, he replied that he had talked to his insurance people. Counsel for the appellant then asked the witness several questions relative to who the insurance people were, whether they carried insurance at the time, and whether they had

talked to the respondent and to his attorney. Thereafter counsel for respondent, on redirect examination, asked the witness what his insurance carrier had told him. An objection was overruled, and the witness answered, "They told me I was not liable." The matter was first gone into by appellant's counsel, and the question objected to was apparently asked for the purpose of bringing out the entire conversation. While we think the objection to the question should have been sustained, the question of liability or nonliability on the part of the driver of the car was not very directly involved in this case, and we regard the error as not sufficiently prejudicial to justify a reversal.

The judgment is affirmed.

We concur: JENNINGS, J.; WARMER, Justice pro tem.

GREENZWEIGHT v. TITLE GUARANTEE & TRUST CO. et al.*

Civ. 8962.

District Court of Appeal, First District, Division 1, California.

Jan. 10, 1934.

Rehearing Denied Feb. 9, 1934.

Hearing Granted by Supreme Court March 8, 1934.

1. Escrows ⇐14(1).

Delivery of deed by escrow agent contrary to terms of deposit in escrow is void.

2. Customs and usages ⇐17.

Custom or usage cannot be implied to vary terms of written instrument (Civ. Code, § 1655).

3. Escrows ⇐14(1).

Escrow holder's transmission of checks received for refinancing loan, to correspondent bank, where they were credited, subject to banker's lien, *held* violative of escrow instructions authorizing reconveyance of trust deed only on condition of holding of money for original incumbrancer; and therefore reconveyance was void (Civ. Code, § 1655).

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by W. E. Greenzweight, as administrator of the estate of Alpheus H. Greenzweight, deceased, substituted in place of Alpheus H. Greenzweight, deceased, against the Title Guarantee & Trust Company, the Fidelity Savings & Loan Association, and another. Judgment for plaintiff, and defendants named appeal.

Affirmed.

Charles I. Baker, Arch H. Vernon, and Gilbert E. Harris, all of Los Angeles, for appellants.

Willard W. Wallace and Joseph F. Rank, both of Los Angeles, for respondent.

TYLER, Presiding Justice.

This action is one for declaratory relief. It is sought thereby to have canceled a trust deed reconveyance and the indorsement of payment upon the trust deed note, and also to have both instruments reinstated in full force and effect. There is practically no dispute as to the facts.

Plaintiff deposited with the Belvedere State Bank in escrow his executed request for reconveyance of the trust deed and note mentioned. The escrow involved the refinancing of a loan upon defendant Levy's dwelling. Plaintiff held the then existing incumbrance thereupon, a trust deed, defendant Title Guarantee & Trust Company being the trustee thereof, which it was contemplated was to be paid off by funds derived from a new loan to be made by defendant Fidelity Savings & Loan Association and likewise secured by a trust deed. To consummate the refinancing, an escrow was opened at Belvedere State Bank into which plaintiff deposited his trust deed, his trust deed note, and an executed request for reconveyance by the Title Guarantee & Trust Company, all pursuant to a letter of instructions to said bank to which reference is hereinafter made. About the same time defendant Fidelity Savings & Loan Association transmitted to said State Bank, as said escrow agent, its instructions with reference to securing the new loan upon the said dwelling, and, on November 25, 1930, similarly delivered to the said bank its check in the sum of $2,425.87 to be used in accordance with its given instructions. Defendant Levy and his wife executed and delivered to the said bank in said escrow a new trust deed and a trust deed note in favor of defendant Fidelity Savings & Loan Association and also deposited therein a check for $161.98, being the excess amount required to make up the payment due the plaintiff. The Belvedere State Bank had a separate escrow department, which department carried a separate commercial checking account with the Belvedere State Bank. The checks so received were credited to the escrow account in the commercial department of the Belvedere State Bank. This bank was not a member of the Los Angeles Clearing House Association, but it maintained a commercial account with the Bank of America through which it cleared its checks. The checks so received were sent to the Bank of America for clear-

ance. They were paid, and credit was given by that institution to Belvedere State Bank account. At this time there was standing to the credit of Belvedere State Bank with Bank of America a deposit of over $18,000. On the 3d day of December, 1930, Belvedere State Bank delivered the reconveyance executed by plaintiff, and caused the trust deed note to be canceled and the reconveyance recorded. It also caused to be recorded a deed of trust against said dwelling in favor of defendant Fidelity Savings & Loan Association. Thereafter it transmitted to said defendant its new trust deed note secured by the deed of trust, and on December 13, 1930, mailed to the plaintiff the check of the escrow department drawn on said department's account in the Belvedere State Bank for the amount due him under his instructions. December 13th was a Saturday. Plaintiff received the check the evening of December 15th, and deposited it with his bank for collection on the morning of December 16th. On the following day, before the check had cleared, the Belvedere State Bank was closed by order of the superintendent of banks. At the time of its closing, the Belvedere State Bank had in its vaults the sum of $8,250.73. No part thereof, however, was held for plaintiff, but was subject to the use of the closed bank for its general business, including the payment of presented checks upon depositors' accounts. On the same day the Bank of America exercised its banker's lien on all the credits of the Belvedere State Bank on deposit with it.

It was plaintiff's claim at the trial that the Belvedere State Bank did not hold for him the moneys, as required by his instructions, at the time it delivered the reconveyance and canceled the note and trust deed, that therefore such delivery and cancellation were void and of no effect, and that his note therefore still remained in force and he retained his first lien upon the property as against the trust deed of defendant Fidelity Savings & Loan Association. Judgment went in favor of plaintiff. A motion for a new trial was made and denied. This is an appeal from the judgment.

[1-3] Plaintiff, respondent herein, presents the same argument here as he did below in support of his judgment. The argument is based upon the fact that plaintiff's escrow instructions did not authorize the Belvedere State Bank to hold or accept checks in lieu of money, but, on the contrary, they provided money alone was to be held. The law is well established that a delivery by an escrow agent contrary to the terms of a deposit in escrow is void and of no force or effect. Los Angeles City High School District v. Quinn, 195 Cal. 377, 234 P. 313. Appellants do not question this rule, but they contend that the escrow instructions permitted the Belvedere State Bank to accept checks for sums of money to be paid to it, because known usages are incorporated in every contract without specific mention thereof being made therein. The sole issue therefore, as agreed by the parties, is, Did Belvedere State Bank violate the terms and conditions of the escrow agreement? In other words, did the bank at the time it made use of plaintiff's documents hold for him the required sum of money? Plaintiff's instructions on this subject provided: "These documents you are authorized to use when you can hold for me the sum of $2,450.00, and interest on $3218.84, from August 1st, 1930, to date money is received by me." The law is also well settled that parties who contract as to a subject-matter concerning which known usages prevail incorporate such usages in their agreements by implication (Luckehe v. First Nat. Bank of Marysville, 193 Cal. 184, 223 P. 547), but by express Code provision stipulations which are necessary to make a contract conformable to usage are implied only in respect to matters concerning which the contract manifests no contrary intention. Civ. Code, § 1655; Andrews v. Waldo, 205 Cal. 764, 770, 272 P. 1052. In other words, custom or usage cannot vary the terms of a written instrument. The instructions given by plaintiff were clear and unequivocal. They required the bank to hold the money for plaintiff. Moreover, there was no evidence of custom or usage in this respect received or offered, and the pleadings were silent thereon. Assuming, however, that the court might take judicial notice of the fact that checks and drafts are usual and ordinary means of transacting business and transferring money in all business transactions (California Stearns Co. v. Treadwell, 82 Cal. App. 553, 559, 256 P. 242), still the fact remains that the escrow instructions called for the holding of the money and not a credit, and this express provision could not be varied by custom or usage. Here the credit of the Belvedere State Bank proved to be not even a true credit. It was subject to a banker's lien which was in fact exercised and the purported credit was wiped out.

The trial court found that the condition of the escrow, upon which the deposit of plaintiff had been based, had not been complied with at the time the Belvedere State Bank delivered the reconveyance, and it rightfully canceled the new note and trust deed. The evidence supports the finding that the money was not held as required by the instructions, which did not authorize the escrow holder to collect the money and cause it to be deposited in a bank where it had a doubtful credit, and which credit subsequently became exhausted before the check could be collected. The effect of such a transaction was to subject plaintiff's money to the obligations of the Belvedere State Bank, and this in the face of the positive instructions that the money was to be held by it. Had the State Bank accepted checks and then cashed them and held the

money, and then delivered the instruments, the instructions would have been complied with. This, as indicated, it did not do, and the court properly so found. A deed delivered by an escrow agent in violation of the conditions under which it was deposited in escrow vests no title in the grantee, nor in an innocent third person to whom the property is subsequently transferred. Such delivery is void, and has no force or effect whatsoever. Los Angeles City High School District v. Quinn, supra; Gould v. Wise, 97 Cal. 532, 32 P. 576, 33 P. 323; Promis v. Duke, 208 Cal. 420, 281 P. 613; Brown v. Wilson, 89 Cal. App. 764, 265 P. 351; Bingham v. Taylor (C. C. A.) 12 F.(2d) 15.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

136 Cal.App. 177

GILBERT et al. v. NIELSEN.

Civ. 1495.

District Court of Appeal, Fourth District, California.

Jan. 6, 1934.

1. Continuance ⇐26(11).

Refusing continuance to enable defendant to take deposition of one of plaintiffs *held* not abuse of discretion under circumstances.

Motion for continuance was supported only by the affidavit of defendant alleging due diligence in preparation for trial, but alleging no facts indicating such diligence, or that it was necessary to take deposition or that witness' presence could not be secured by subpœna. It appeared, furthermore, that defendant had forty-one days after answer was filed, eighteen days after receiving notice that case would be set, and eleven days after notice of date of trial, in which to take deposition, and that testimony to be expected from the witness according to the allegations of the affidavit was neither material nor admissible in the state of the pleadings at the time the continuance was asked for.

2. New trial ⇐102(3).

Denial of motion for new trial on ground of newly discovered evidence *held* not error where affidavit in support thereof disclosed essential facts relied on as new evidence were known many months before trial and new evidence referred to could not have affected result.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action to quiet title by E. B. Gilbert and others against E. K. Nielsen. Judgment for plaintiffs, and defendant appeals.

Affirmed.

John Dean Barrick, of Pasadena, for appellant.

C. P. Temple, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to certain mining claims in Inyo county. In her "answer" the defendant alleged that she had leased the property from the two first-named plaintiffs, that those plaintiffs had falsely represented themselves to be the sole owners of the property, and prayed for damages. This answer was filed on August 31, 1932. A memorandum for the purpose of having the cause set for trial was served on the defendant's attorney on September 23, 1932, and on September 26, 1932, the court set the trial for October 11, 1932. Notice thereof was served on the defendant's attorney on September 30, 1932. When the case came on for trial on October 11, 1932, the defendant moved for a continuance. The motion was denied and the trial continued resulting in a judgment in favor of the plaintiffs, from which the defendant has appealed.

[1] The main ground of appeal is that the trial court abused its discretion in refusing to grant a continuance. The only argument made is that one of the plaintiffs, D. W. Winzeler, was a necessary witness for the appellant and that it was an abuse of discretion not to grant a continuance for a time sufficient to enable the appellant to take his deposition. The motion for continuance was supported by the affidavit of the appellant only. While the affiant alleged that she had used due diligence in preparing for trial, no facts are alleged to indicate what, if any, diligence was used. If it was necessary to take the deposition referred to, the appellant had forty-one days after the answer was filed, eighteen days after receiving notice that the case would be set, and eleven days after receiving notice of the date of trial, and nothing appears to show why a deposition was not or could not have been taken during this time. No facts were alleged to show any necessity for a deposition, and nothing to show where the witness was, or that his presence could not be secured by subpœna. From all that appears from the showing made before the trial court, the witness may have been available in person, or may have been where his deposition could have been taken within a day or two. While it is now stated in appellant's brief that this witness was out of the state, that fact does not appear in the record nor

does the record indicate when the appellant learned that the witness would not be available, if such was the fact. In an answering affidavit the attorney for respondents alleged that on September 25, 1932, he informed the attorney for the appellant that he would sign a stipulation for the taking of any deposition he desired, but that no such stipulation was ever presented to him. A further consideration is that in the state of the pleadings at the time the continuance was asked for, the testimony to be expected from the witness if his deposition were taken, according to the allegations of the affidavit, were neither material nor admissible. No abuse of discretion appears and the general rule applies that in such a situation the granting of a continuance rests entirely within the sound discretion of the trial judge.

[2] Some argument is made that the court erred in refusing to grant a new trial on the ground of newly discovered evidence. Not only is there no showing of diligence in this regard, but the affidavit in support of the motion discloses that the essential facts relied upon as new evidence were known to the appellant many months before the date of the trial. In any event, the new evidence referred to, if produced, could not be expected to have affected the result in view of certain documentary evidence which was introduced by the respondents. The order complained of is fully sustained by the record.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

135 Cal.App. 627

HELLMAN v. LOS ANGELES RY. CORPORATION.

Civ. 8074.

District Court of Appeal, Second District, Division 2, California.

Jan. 6, 1934.

Hearing Denied by Supreme Court Feb. 5, 1934.

1. Appeal and error ⇐901.

Appellate court has no duty to discover errors not called to its attention.

2. Trial ⇐296(4, 5).

Instruction that jury should find for plaintiff, unless plaintiff was negligent and such negligence was the proximate cause of injury, *held* not prejudicial error, as instructing that only such negligence of plaintiff as was sole proximate cause of injury would defeat recovery, where jury were fully instructed as to contributory negligence.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 27 P.(2d) 946.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Kemper Campbell and Chas. L. Nichols, both of Los Angeles, for respondent.

PER CURIAM.

[1] Petition for rehearing denied. Petitioner calls our attention to the closing sentence of instruction VI, and of our failure to comment on same. It is not the duty of an appellate court to discover errors not called to its attention.

[2] After stating certain conditions which, if found to exist, justified a verdict for plaintiff, the instruction concludes: "Then your verdict should be for the plaintiff, unless you shall further find that the plaintiff was herself guilty of negligence, and that such negligence was *the* proximate cause of the injuries sustained." (Italics ours.) Appellant urges that such instruction amounts to a charge that, unless any such negligence was *the sole* proximate cause of the accident, it would not defeat a recovery by plaintiff. The case of Straten v. Spencer, 52 Cal. App. 98, 197 P. 540, is cited as authority for the contention urged. If such instruction stood alone, we would unhesitatingly declare it to be prejudicially erroneous. A similar defect existed in an instruction complained of in the case of Squier v. Davis Standard Bread Co., 181 Cal. 533, on page 537, 185 P. 391, 392, concerning which the court says: "The sentence containing the objectionable words is immediately preceded by a sentence requiring the jury to determine whether plaintiff's negligence, if any, was 'a proximate cause' of the injuries received by him. Moreover, the jury was elsewhere fully and correctly instructed on the law of contributory negligence. Considering the instructions as a whole, we consider the possibility that the jury could have been misled by the error complained of so remote as to be altogether unworthy of serious consideration." In the present case the jury was fully instructed as to contributory negligence and was told as a part of such instruction that "it matters not how slightly or in what degree it contributes, provided it does contribute directly or proximately to the injuries sustained." The same doctrine is laid down in several other instructions given by the court, and, considering all the instructions together, we cannot see how the jury could possibly have been misled by the defect in the instruction of which complaint is now for the first time made.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

136 Cal.App. 191

ALTON v. HAYWOOD.

Civ. 5028.

District Court of Appeal, Third District, California.

Jan. 8, 1934.

1. Deeds ⇐26.

Generally, deed silent as to parties, date, and description of property at time of execution, is void.

2. Frauds, statute of ⇐102.

Authority of grantor's agent to fill in blank deed after execution thereof can only be given by written instrument.

3. Frauds, statute of ⇐102.

Where changes in or additions to deed are inserted by agent in immediate presence of principal, written authority is not required.

4. Frauds, statute of ⇐158(1).

Proof that deed at time of execution lacked necessary provisions raises presumption that authority of agent who later inserted data was not in writing.

5. Frauds, statute of ⇐158(1).

Where agent is without written authority and it is claimed that additions to deed were made in grantor's immediate presence, party relying thereon has burden of establishing such facts.

6. Witnesses ⇐149(2).

In grantor's action to declare trust in realty, brought against administrator of deceased son, testimony that grantor signed blank deed *held* not inadmissible as relating to claim or demand against estate (Code Civ. Proc. § 1880, subd. 3).

7. Witnesses ⇐149(2).

"Claim or demand" against estate of deceased, within statute excluding testimony, refers to demand enforceable against decedent in his lifetime by personal judgment (Code Civ. Proc. § 1880, subd. 3).

8. Trial ⇐49.

Plaintiff, having made offer of proof on material issue, was entitled to finding thereon.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Rettie M. Alton against Gertrude Leah Haywood, as administratrix of the estate of Allie Fred Haywood, deceased. From a judgment in favor of the defendant, the plaintiff appeals.

Reversed.

James R. Jaffray, of Los Angeles, for appellant.

Wilbert C. Hamilton and Frank S. Adams, both of Los Angeles, for respondent.

LEMMON, Justice pro tem., delivered the opinion of the court.

Plaintiff appeals from an adverse judgment in an action brought to have declared a trust in certain real property. Respondent has neither filed a reply brief nor presented an oral argument on this appeal.

Two causes of action are set forth in plaintiff's amended complaint. The first alleges that plaintiff is the surviving mother of the deceased, Allie Fred Haywood, and that she had instructed a notary public to prepare a deed of gift in joint tenancy from plaintiff to her three children, one of whom was said Haywood; that thereafter and at the request of the notary public she affixed her signature to a deed which at the time was blank as to the names of the parties to the deed, date, and description of the property to be conveyed; that the notary thereafter filled in the blanks and inserted the names of the grantees, who, under the terms of the deed, were constituted tenants in common instead of joint tenants; that plaintiff signed the deed relying upon the notary to prepare the same in the form she had instructed. The second cause of action sets forth, in addition to the above allegations, that plaintiff was seriously ill at the time of the signing of the deed and that the deed was executed with the understanding and agreement had with the grantees therein that they would reconvey the property to plaintiff in the event of her recovery from her illness; that the most confidential relations existed between plaintiff and said grantees at the time of the signing of the instrument; that the consideration for the deed was love and affection; and that it would not have been executed but for plaintiff's belief at the time that she was in extremity and the trust and confidence which she placed in her children. Issue was joined by the defendant's denial of the allegations as to the intent, purpose and understanding of the parties to the deed and the circumstances of the execution thereof.

At the trial of the action, plaintiff introduced the deed, and, when asked whether she signed the same, testified "No, I signed a blank deed." Defendant moved to strike out this answer upon the theory that plaintiff was precluded from so testifying under the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure. The motion was granted. No further evidence was offered with reference to the circumstances under which the deed was executed. The trial court granted the defendant's motion for a nonsuit as to the first cause of action and

judgment was entered against the plaintiff after trial of the issues raised by the denials of the allegations contained in the second cause of action.

[1-3] Plaintiff contends that the deed was void for the reason that when executed by the grantor it was silent as to the names of the parties thereto, date of execution, and description of property to be conveyed. As a general rule a deed so executed is void. If the deficiencies are subsequently supplied and filled in by an agent of the grantor, his authority so to do can only be given by an instrument in writing. Harris v. Barlow, 180 Cal. 142, 179 P. 682. An exception to this rule exists where the changes in or additions to the instrument are inserted by the agent in the immediate presence of the principal. Videau v. Griffin, 21 Cal. 389.

[4, 5] Plaintiff offered no evidence to show that the authority of the agent was not in writing or to show by whom and under what circumstances the deficiencies were supplied. Proof that the instrument at the time of the execution lacked the data necessary to constitute it a deed raises the presumption that the authority of the one later inserting the data was not in writing. "If such authority in fact existed, it should have been produced. In the absence of its production the presumption is that it did not exist. Whatever authority, therefore, the attorney possessed upon the subject, we must regard as having been conferred by parol." Videau v. Griffin, supra. Similarly, where in the absence of written authorization it is claimed that the changes and additions are made in the immediate presence of the principal, the party who relies upon it has the burden of affirmatively establishing the fact.

[6, 7] The trial court erred in striking out the testimony above set forth. The action was not one on a claim or demand against the estate of Allie Fred Haywood. "Claim or demand," within the meaning of subdivision 3 of section 1880 of the Code of Civil Procedure, refers to such demands as might have been enforced against the decedent in his lifetime by a personal judgment. Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140. A claim of title to real property which is held by the representative of the estate of a deceased person does not preclude the claimant from being a witness in his own behalf in an action to establish a trust in the property or to quiet title thereto. Myers v. Reinstein, 67 Cal. 89, 7 P. 192. The reason for the rule is convincingly expressed in the case of Bollinger v. Wright, 143 Cal. 292, 76 P. 1108, wherein it is stated: To hold that it (the property in question) is part of the estate, and thus render the witness incompetent, would be to determine in advance the very question at issue. If it is not the property of the estate, then the action does not involve a claim or demand against the estate.

[8] The findings of fact are silent as to the issue raised by the denial of allegations in both causes of action that the deed at the time of its execution did not contain the date, names of the parties, and description of the property to be conveyed. This was a material issue, an offer of proof was made by plaintiff, and she was entitled to a finding thereon.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

UNITED BANK & TRUST CO. OF CALIFORNIA v. HUNT et al.*

Civ. 4853.

District Court of Appeal, Third District, California.

Jan. 8, 1934.

Hearing Granted by Supreme Court March 8, 1934.

1. Judgment ⇐585(3).

Judgment in action by mortgagors against mortgagee to recover damages through loss of crop because of mortgagee's failure to advance money under contract *held* not res judicata in mortgagee's action for deficiency as against mortgagors' counterclaim for breach of other provisions in same contract.

Action brought by mortgagors sought merely a recovery of damages for loss of crop because of the mortgagee's failure to advance money under contract to do so. Counterclaim in mortgagee's action for deficiency after foreclosure of mortgages sought recovery of damages for loss of anticipated profits because of mortgagee's failure to negotiate lease and for willfully inducing owner not to enter into lease with mortgagors, damages arising from foreclosure under deed of trust in violation of agreement to withhold foreclosure for a reasonable time, and damages for foreclosing chattel mortgage and for failing to advance money which was sole consideration therefor, all in violation of same contract.

2. Contracts ⇐171(1).

Where agreement embraces number of distinct subjects, each subject may be considered as forming matter of separate agreement.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 34 P.2d 1001.

3. Judgment ⇐719.

Judgment is conclusive upon issues tendered by complaint.

4. Judgment ⇐586(2).

More than one cause of action may arise out of same contract, and therefore identity of contract or property is not conclusive as to identity of causes of action, as basis for res judicata.

5. Judgment ⇐746.

Where defendant, in action for damages for breach of contract, successfully opposed motion to amend complaint to include various causes of action for breach of same contract involved in collateral case, and successfully opposed motion to try cases together, defendant waived right to raise question of res judicata in subsequent action.

Plaintiff, which was defendant in earlier case, waived right to raise question of res judicata by opposing motion in prior case to amend complaint to include various causes of action set forth in instant case and by opposing motion to try cases together, because course pursued by court in sustaining defendant in former case was tantamount to express determination by court with consent of opposing counsel to reserve issues involved for future adjudication, and litigants cannot successfully assume inconsistent positions.

6. Judgment ⇐956(4).

Parol evidence or reporter's transcript is admissible to show what matters provable under issues of case were submitted to jury as basis for determining whether judgment in former case is res judicata.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by the United Bank & Trust Company of California against A. P. Hunt and another, wherein the defendants filed a cross-complaint and counterclaim against the plaintiff. From a judgment of nonsuit on their cross-complaint and counterclaim, the defendants appeal.

Reversed, and cause remanded for a new trial.

Francis C. Brown, of San Francisco, Ray Manwell, of Marysville, and J. Oscar Goldstein, of Chico, for appellants.

Butler, Van Dyke, Desmond & Harris, of Sacramento, Rich, Weis & Carlin, of Marysville, and Morse Erskine, of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This controversy arises out of an agreement between appellants and cross-complainants, hereinafter referred to as the Hunts, and United Bank and Trust Company, now known as the Bank of America National Trust & Savings Association, a corporation, cross-defendants and respondents, hereinafter referred to as the bank.

Some time prior to April, 1924, the Hunts were the owners of an undivided one-half interest in three parcels of farm lands in Butte county and held a lease upon the other one-half interest thereof. The lands were known as the adobe ranch and referred to as parcel I in the agreement, the home place referred to as parcel II, and the upper place designated as parcel III.

In 1924 all of the property was subject to a deed of trust to secure an indebtedness to the bank of $45,000, and there were in addition, liens for water supplied for irrigation and certain unsecured notes due from the Hunts to the bank.

In April of that year the parties met and adjusted their financial relations, which resulted in the execution of the following instruments: (1) A promissory note for approximately $14,000 in favor of the bank, which included the amounts due for water and various unsecured notes. There was also included $2,500, an agreed future advance for irrigation water, and $1,000 which the bank agreed to advance to finance the farming operations on the home place; (2) a chattel mortgage as security for the foregoing amounts covering all of the farming equipment of the Hunts; (3) a crop mortgage covering all of the crops to be grown during the season of 1924 by the Hunts on the home place, and any interest they might have in any crops grown on the adobe ranch; (4) a written agreement whereby the bank was to make the future advance referred to; to suspend foreclosure under the trust deed for a reasonable time; to negotiate a lease with C. A. Bayless as tenant on the adobe ranch on a crop-sharing basis; to protect the Hunts against foreclosure on any water liens; and to endeavor to secure for the Hunts the repayment of money expended by them for plowing on the leased premises. The Hunts on their part agreed to apply on the indebtedness all of the proceeds from the crops raised on the home place, and to execute all necessary papers to consummate the agreement.

Thereafter differences arose between the parties, principally as to a tenant for the adobe ranch, and the bank, treating the agreement as having been abrogated, caused the property to be sold under its deed of trust. The property failed to bring the full amount of the note with interest and other advances, and in March, 1925, the bank brought an action in Sacramento county against the Hunts for this deficiency in the

sum of $14,378.37. This action was transferred to Yuba county, and is hereinafter referred to as the Yuba county case. To that complaint the Hunts in June, 1928, filed an answer admitting the execution of the trust deed, and a cross-complaint and counterclaim praying for judgment against the bank, alleging a claim for damages for loss of the crop on parcel II by reason of the bank's failure to advance the money for planting and water charges; a claim for damages for loss of anticipated profits from the Bayless lease on parcel I, due to the failure of the bank to complete the negotiations for the lease and for its act in willfully inducing Bayless not to enter into the lease; a claim for damages arising out of the foreclosure under the deed of trust in alleged violation of the agreement wherein the bank undertook to withhold foreclosure for a reasonable time, and a claim for damages for foreclosing a chattel mortgage after failure to advance the money which was the sole consideration thereof, all in the sum of $89,800.

In the meantime, and a few months after the bank had filed the Yuba county case against the Hunts, they, in October, 1925, filed a complaint against the bank in Butte county. In that complaint the Hunts set out in hæc verba the agreement of 1924, and alleged they had done the various acts imposed upon them by the agreement, but that the bank retook the seed rice they had obtained for cropping parcel II, refused to furnish any money to pay for the water charges upon said land or for the planting and harvesting of the crops therein, and, in violation of their agreement, advertised the lands for sale under the deed of trust, and caused the property to be sold by the trustees in March, 1925.

The answer of the bank admitted the execution of the agreement and set up a counterclaim for $14,378.37, which it claimed was due as a deficiency under the deed of trust after it had sold parcels I, II, and III. This counterclaim was identical with the complaint filed in the Yuba county case. Nothing was done in the Butte county case until March 9, 1928, when the present attorneys for the Hunts, having in the meantime been substituted for their original attorneys, moved to file an amended complaint, which was by the court denied. The proposed amended complaint was virtually identical with the cross-complaint and counterclaim in the Yuba county case.

Upon motion of the bank and over the objection of the Hunts, the Butte county case was set for trial. In opposition to the setting of the Butte county case, it was contended by the Hunts that the action in Butte county, if based upon the original complaint, would not present all of the claims for damage which the Hunts had against the bank, and that the action in Butte county should not be tried before the Yuba county action was tried, as a judgment in Butte county might be construed as an estoppel and res judicata against the action pending in Yuba county; that the Butte county case should be consolidated with the Yuba county case, and all of the issues between the parties there determined. However, the motion to amend, postpone, or consolidate was denied, and the cause proceeded to trial, and upon appeal the Hunts were awarded a judgment against the bank for $14,378.37 (Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184, 187), reference to which is made for a clear statement of the facts of that case and the issues submitted and determined therein.

Thereafter, and in October, 1931, the Hunts caused the issues pending in Yuba county to be brought to trial, and at the conclusion of the trial, upon the issues raised by the cross-complaint, the court granted a nonsuit against the Hunts, and from that judgment this appeal is prosecuted.

[1] Upon the theory that the judgment in Butte county was a bar to the action in Yuba county, the trial court sustained objections to the introduction of the evidence submitted by the Hunts upon the cross-complaint at the Yuba trial. We believe the trial court in this was in error. The issues tried in Butte county were limited to a single issue of the damages sustained by the Hunts through the loss of the rice crop on the home place. This is apparent from the pleadings, the complaint alleging "that by said wrongful violation by defendant as hereinabove set forth and that said failure to comply with the terms thereof * * * plaintiffs were unable to farm any of said lands and were damaged in the sum of $20,000.00." It will be recalled in that connection that the only lands the Hunts were to farm according to the agreement was parcel II, the home place. And in the opinion in the case of Hunt v. United Bank & Trust Co., supra, the court said: "The result was that the Home Place was not farmed during the 1924 season and Hunt lost his rice crop. Defendant then caused the lands to be sold under its deed of trust. Plaintiffs thereupon brought this action to recover damages in the sum of $20,000 from defendant by reason of the loss of the crop." Under the agreement between the parties, the bank was obligated to advance money to farm parcel II, to negotiate a lease to Bayless on parcel I, and to withhold foreclosure on the deed of trust. Each were independent of the other. The damages arising from the breach of any one of these obligations were separate and distinct from the others. Hence the recovery of damages for failure of the bank to advance money necessary to farm the home place did not affect their other causes of action arising from failure of the bank to negotiate the

lease on parcel I, nor the alleged wrongful foreclosure of the deed of trust, nor the sale of the personal property under the chattel mortgage.

[2] "Where an agreement embraces a number of distinct subjects, which admit of being separately executed and closed, the general rule is that it shall be taken distributively and each subject be considered as forming the matter of a separate agreement after it is closed." 6 R. C. L. 859.

[3] As stated in Hutchison v. Reclamation District, etc., 81 Cal. App. 427, 254 P. 606, 610: "It is unnecessary to analyze the cases cited by respondent which support the general rule that a judgment is conclusive not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated in the action. It is sufficient to say that this rule is not always applicable literally, but that: 'What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint.' Concannon v. Smith, 134 Cal. 14, 18, 66 P. 40, 42; Brown v. Brown, 170 Cal. 1, 6, 147 P. 1168; Lang v. Lang, 182 Cal. 765, 768, 190 P. 181; Linforth v. Montgomery, 195 Cal. 49, 58, 231 P. 735."

[4] Also, as stated in Freeman on Judgments (5th Ed.) vol. 2, par. 679, at page 1435: "More than one cause of action may grow out of the same contract. So, also, more than one may arise respecting the same piece of property. Hence, the identity of the contract or the property is not conclusive as to the identity of causes of action."

In the case of Agnifili v. Lagna, 204 Cal. 262, 267 P. 705, 708, a written contract was entered into to construct four bungalows for a landowner at a specific price. After building two of the houses, a dispute arose, and the builder sued the landowner for lost profits, claiming he had been prevented by the landowner from erecting two of the bungalows, although he was willing to do so. Judgment was entered against the builder. In the meantime the builder brought a second action to foreclose a builder's lien on the two bungalows he had completed, claiming he had not been paid for the same. The trial court held that the judgment in the first case was res judicata in the second, and therefore a bar. On appeal, the judgment was reversed, the court holding that the judgment in the first case was not a bar to the second, as the damages claimed in the first case were limited to lost profits on the two bungalows which were contracted for but not erected, while the second action was limited to the two which had actually been built. The court said: "The contract between the parties is a severable contract. That is, it is susceptible of division into two or more parts. In fact, it in reality comprises four distinct contracts, each independent of the others, to construct for a definite amount four separate buildings. [Citing cases.] While plaintiff may not recover for the two houses he did not construct, that fact, and its determination by the court in the first action, cannot be held to be any obstacle or bar to his right to recover for the two houses he did construct."

Therefore, the Butte county case having been confined to a single issue of damages arising out of the failure of the bank to advance the money necessary for planting the rice crop and for the water charges as agreed on one parcel, it does not appear that anything pertinent to the Yuba action was "actually and necessarily included" in the judgment in the Butte case.

[5] We are also of the opinion that the bank waived its right to raise the question of res judicata in the Yuba county case by its opposition to the motion to amend the Butte county case to include therein the various causes of action set forth in the Yuba county case, and by opposing a motion to try the two cases together.

Where counsel by timely notice call to a court's attention the pendency of other proceedings covering kindred matters and strive to have the same embraced within the scope of the inquiry, and such attempt is successfully blocked by opposing counsel, and the trial proceeds to the investigation of the specific issue before the court, counsel who were successful in preventing the consolidation of the issues cannot be heard later to object to a trial of the related matters upon the ground of res judicata. The course pursued by the court and counsel in the Butte county case was tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication. Asher v. G. F. Stearns, etc., Co., 241 Ky. 292, 43 S.W.(2d) 1012. Litigants cannot successfully assume such inconsistent positions.

"The rule against splitting a cause of action is for the benefit of the defendant and he may waive it or renounce it by agreement with plaintiff." 34 Cor. Jur. 829.

That being true, appellants contend that it was error for the court to exclude the proffered testimony of witness Brown in the present case as to what had taken place before the court in the Butte case relative to a continuance or to consolidating the Butte and Yuba cases, the testimony there admitted and what was said and done by counsel for the bank in opposition thereto. We believe the evidence was proper to determine whether or not defendant had waived or renounced the benefit of the rule.

[6] It is also a general rule that either parol evidence or a reporter's transcript is admissible to show what matters provable under the issues of a case were or were not submitted to a jury as an aid in determin-

ing whether a judgment acts as a bar to another action, and for that reason also the court should have permitted the testimony of Brown to have been received. Goodman v. Dam, 112 Cal. App. 244, 296 P. 623; People v. Bailey, 30 Cal. App. 581, 158 P. 1036; Meredith v. Santa Clara Mining Co., 56 Cal. 178.

Without elaborating further, we are of the opinion that the judgment of nonsuit on the counterclaim and cross-complaint of the appellants was error, the judgment should be reversed, and that the cause be remanded for a new trial.

It is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

136 Cal.App. 67

REUTER v. HILL.

Civ. 4936.

District Court of Appeal, Third District, California.

Dec. 26, 1933.

Hearing Denied by Supreme Court Feb. 21, 1934.

1. Landlord and tenant ⇐164(1).

Lessee of second floor office, who used stairway of building containing no elevator, *held* "invitee" to whom landlord owed duty of exercising ordinary care to keep stairway in reasonably safe condition.

[Ed. Note.—For other definitions of "Invitee," see Words & Phrases.]

2. Landlord and tenant ⇐169(11).

In action by second floor office lessee against landlord for injuries sustained by falling on waxed stairway of building containing no elevator, whether landlord was negligent in failing to have wax properly distributed on surface of linoleum covering stairs *held* for jury.

3. Landlord and tenant ⇐169(11).

Whether second floor office lessee, who slipped on waxed stairway, was contributorily negligent in not discovering excess wax upon stair, in failing to use railing, and in ascending steps two at a time, *held* for jury.

4. Negligence ⇐136(27).

One is not contributorily negligent as matter of law under all circumstances merely because he fails to use handrail in ascending stairway.

5. Negligence ⇐136(27).

Long-legged, able-bodied, active, and vigorous man cannot be held contributorily negligent as matter of law in taking two steps at time without clinging to railing in ascending stairway.

6. Trial ⇐253(7).

Formula instructions which purport to recite facts of case and direct finding of verdict in accordance therewith, but which omit essential elements constituting complete defense to action, are improper.

7. Trial ⇐296(8).

Formula instruction to find for plaintiff if plaintiff was tenant in building of defendant, and defendant negligently permitted excess wax upon stairway, *held* not reversible error because omitting reference to contributory negligence where jurors were subsequently clearly instructed upon contributory negligence (Const. art. 6, § 4½).

8. Trial ⇐285.

That construction should be given to instruction which will support judgment if it is reasonably susceptible of such interpretation (Const. art. 6, § 4½).

9. Landlord and tenant ⇐162.

Owner of building is not bound to keep stairway leading to rented offices therein absolutely safe from danger, but must only exercise ordinary care to keep stairway reasonably safe for customary use thereof.

10. Trial ⇐228(3).

Instruction that keeper of public building is bound to keep premises and stairs in safe condition and must use ordinary care to avoid injuries to those properly entering upon premises *held* not misleading because of word "bound," since read as a whole instruction is susceptible of construction that owner of building is bound to use ordinary care to avoid accidents or injuries (Const. art. 6, § 4½).

11. Damages ⇐132(2).

$7,500 to realtor in prime of life for fractured ankle and wrenched spine which caused severe pain and possibility of permanent injury *held* not excessive.

12. Landlord and tenant ⇐169(11).

Whether injuries sustained by office lessee were caused by fall upon waxed stairway, justifying recovery from landlord, or whether injuries were caused by arthritis only, *held* for jury.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by I. H. Reuter against Jack R. Hill. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK and THOMPSON, JJ., dissenting.

George P. Ross, of Merced, and George A. Work and Horace W. B. Smith, both of San Francisco, for appellant.

David E. Peckinpah and Bert Green, both of Fresno, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $7,500 which was rendered against him pursuant to a verdict returned by a jury in a suit for personal injuries sustained as a result of slipping and falling on a recently waxed stairway.

A reversal of the judgment is sought on the grounds that the evidence fails to show negligence on the part of the defendant, and upon the contrary that the record establishes the fact that the accident occurred as the result of the contributory negligence of the plaintiff. It is also asserted the court erred in giving to the jury certain instructions, and that the judgment is excessive.

The defendant is the owner of an office building in the city of Merced. The plaintiff was an active, vigorous realtor in the prime of life, who for several years had rented and occupied an office on the second floor of this building. There was no elevator in the building. Access to the upper floor was by means of a well-lighted stairway, consisting of two flights of steps divided by a platform landing and an abrupt turn in the course of the stairway. The stairway is normal in every respect. The first flight above the ground floor contains eighteen steps. At this point there is a landing platform, with an abrupt turn of the stairway to the left paralleling the course of the lower flight to the second floor of the building. The width of the stairway is six feet. The elevation of each step is normal. The treads are covered with brown linoleum and bound along the edge with a metal strip. A handrail extends along the wall on either side of the stairway except around the side of the platform landing. It was the custom of the janitor to wax the steps and floors each Saturday or Sunday by applying a combination of liquid and solid wax which was distributed by hand over the surface with a cloth. Sometimes the wax was not equally distributed, but was left in blotches. Occasionally the steps and floors were found to be slippery after the application of the wax. Two of the witnesses testified they had previously slipped on the wax. It does not appear their experience in that regard was serious, or that the plaintiff had knowledge of that fact. Upon one previous occasion the plaintiff had observed that the stairs were excessively waxed. He said in that regard:

"Had you ever seen oil on the steps before the 8th day of May? A. Yes, I had seen the steps * * * oiled before in a similar manner, but not quite so heavy as it was on this particular day.

"Q. Did you complain about it? A. I believe that I spoke to the janitor once or twice before."

On May 8, 1930, the plaintiff used the stairway early in the morning, going to and coming from his office, without observing any excess wax upon the steps or floor. In returning to his office in the afternoon, he reached the landing midway up the flight of stairs without noticing an excess of wax or a dangerous condition of the steps. Being an active man, it was his custom to ascend the stairs two steps at a time. Sometimes he used the railing as a guide or support. Upon reaching the landing upon this occasion, and turning to the left he placed his left foot upon the first step of the upper flight of stairs near the middle thereof and raised his right foot to the third step, at the same time reaching for the handrail. When he placed his weight upon the right foot it slipped from under him and he fell, spraining his right ankle and wrenching his back. Regarding the accident, the plaintiff testified: "I was going up the stairway to my office. I had passed the first flight of stairs and was on the platform going to the second flight to the upper floor, and I placed my left foot on the first step and I had raised my right foot to take the third step and about the center of the step my foot slipped as I was about to raise, * * * and reached for the railing * * * and my foot slipped across on this oil and swung me to my left and overbalanced me, and I had the heel of my right foot caught under this edge of the step and it threw me back to the left and in catching myself, wrenched my back and I landed back on the platform."

Regarding the wax which covered the linoleum on the stairway, he further said:

"Q. You said that you observed an excessive quantity of oil or other substance on the stairway where you slipped? A. I did, * * * *after I had slipped.*

"Q. What was the color of the substance? A. It was really colorless, naturally the color of the linoleum. * * *

"Q. You were not aware of that condition? A. I was not.

"Q. Had you been up those steps before that day? A. I had been up the steps that morning. * * *

"Q. Did you notice anything wrong with them when you came down? A. I did not. * * * I noticed (the excessive oil or wax, only) after I had slipped and fell. I looked at it after I slipped and fell back to the platform; the platform and stairway were all heavily oiled and I noticed it was excessive *and more than the usual quantity on the step that I slipped on.* * * * And the steps were all heavily covered with oil. * * *

"Q. Did you touch the rail? A. I did not.

"Q. Did you reach for it? A. Yes, * * *

"Q. But you did not get hold of the rail? A. No sir, I did not. * * *

"Q. Had you ever seen oil on the steps before the 8th day of May? A. Yes, I had seen the steps, I had seen them oiled before in a similar manner, but not quite so heavy as it was on this particular day.

"Q. Did you complain about it? A. I believe that I spoke to the janitor once or twice before (and he said) they would overcome it."

The evidence of the presence of an excess amount of wax on the step upon which the plaintiff slipped on that occasion is corroborated by a disinterested stenographer who worked upstairs, and observed the stairway after the accident occurred. Nell Loomis testified in that regard:

"Q. Now are those the stairs that you examined when you went down immediately after Mr. Reuter came into the office [after the accident occurred]? A. Yes sir.

"Q. Just describe to the jury what you found down there, if anything, on those stairs. A. There was a mark in the oil over towards the edge of the stairway.

"Q. Do you recall what stair it was, or are you sure about that? A. It was near the bottom flight, I think it was the second, third or fourth. * * *

"Q. There was a mark * * *? A. Well, the sort of a mark that a foot would make if it slipped in the damp oil substance.

"Q. Did you see any damp oil substance? A. Yes sir.

"Q. Describe that to the jury. A. Well, apparently it was a liquid of some sort that had been put on the steps; it wasn't very much more in evidence over towards the edge of the stairs than it was in the center of the stairs. * * * It was in spots.

"Q. Well, if you can, describe to the jury what you mean by 'spots.' A. Well, if anyone would have put wax on the floor or oiled the floor, you know, unless it is rubbed around even, it will be uneven blotches; you can see it thicker in some places.

"Q. You can see it thicker in some places than it was in others? A. Yes sir.

"Q. Did it have the appearance of having been rubbed in thoroughly or otherwise? A. No sir.

"Q. It did not have that appearance? A. No sir."

[1, 2] The record discloses a decided conflict of evidence regarding the alleged negligence of the defendant. As a lessee of the office in the defendant's building, in consideration of the payment of rent, since the owner retained the obligation to keep the stairway leading thereto in proper condition, the plaintiff was an invitee in his use of the stairway for the necessary purpose of going to and from his place of business. 45 C. J. 821, § 230; Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106. The owner of the building owed to the lessee the duty of exercising ordinary care to keep the stairway in a reasonably safe condition. 19 Cal. Jur. 618, § 53; 20 R. C. L. 55, § 51; 45 C. J. 823, § 235; Powers v. Raymond, 197 Cal. 126, 239 P. 1069. There is substantial evidence, heretofore quoted, from which the jury was warranted in finding that the janitor, who was the defendant's agent, was careless in failing to properly distribute the wax on the surface of the linoleum covering the stairs, and upon the contrary that the wax was left in comparatively thick spots or blotches which caused him to slip and fall. It was transparent and not readily seen without close examination. This is sufficient to support the implied finding that the defendant was negligent in failing to exercise ordinary care to keep the stairway reasonably safe.

The most serious problem in the present case, and one which presents a very close question of fact, is the charge that the plaintiff was guilty of contributory negligence in failing to see the presence of excessive wax of which he complains, and in failing to grasp the handrail at the side of the stairway as a support, and in attempting to ascend the stairway two steps at a time. In support of his charge of contributory negligence, the appellant has filed an excellent brief thoroughly reviewing numerous similar cases in this and other jurisdictions wherein the complainants were denied judgments on account of contributory negligence. It would be an arduous and useless task to distinguish these cases, since the existence of contributory negligence usually depends upon the specific facts of each particular case. It is sufficient to say that no case has been cited which depended upon facts and circumstances like those of the present action. The most favorable case upon which the appellant relies is Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76, 77. In that case, a judgment for the plaintiff was reversed upon the ground that a private nurse who was employed by a patient occupying a room in the Sutter Hospital at Sacramento, and who, in the performance of her duties, slipped upon a recently waxed floor and injured herself, was guilty of contributory negligence in acting suddenly and thoughtlessly with previous knowledge of the existence of a dangerously slippery floor. The court there said in that regard: "It is clear from the plaintiff's testimony that she had full knowledge of the condition of the floor during all the afternoon of September 28th and for two hours in the forenoon of the next day [upon which she fell and received her injury]. It does not appear that the defendant's knowledge thereof was superior to that of the plaintiff. If it was negligence for the defendant to maintain the floor in the condition de-

scribed by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, *with full knowledge of such condition*, to continue in the use thereof."

[3] In the present case the plaintiff claims he had not observed that the stairs were excessively waxed or dangerous on the occasion of the accident and he had not noticed, until after his fall, that the wax was unequally distributed on the step upon which he slipped. It does appear that the wax lay in spots or blotches on that step, and that it was transparent and not easily observable over the brown linoleum. It is true that the plaintiff had previously used the stairway once before on that day without discovering an excess of wax, and that at the time of the accident he had actually passed eighteen steps without seeing an excess of wax. The jury, however, may have reasonably assumed the excess wax was not discovered because the substance was transparent and therefore not easily seen, or that it was not excessively used on the lower flight of steps and upon the contrary that it was unevenly distributed and lay in blotches only on the one step upon which he slipped and fell. These were matters of fact for the determination of the jury. The jury may have reasonably assumed the plaintiff had no previous knowledge of the slippery and dangerous condition of the stairway and as a reasonably prudent person he was warranted in assuming the janitor would keep his promise to see that it was not again unevenly or excessively waxed. In that regard, the present case may be distinguished from the Sutter Hospital Case, above cited. It is true that the plaintiff had complained of the presence of excessive wax on one previous occasion, but the janitor assured him he would take care of that condition. Under these circumstances we are of the opinion the question regarding the plaintiff's previous knowledge of the presence of excessive wax and a dangerous condition of the stairs was a problem for the determination of the jury, the solution of which may not be disturbed on appeal.

[4] The plaintiff failed to grasp the handrail for support before he slipped on the step. We may not say, as a matter of law, that one is guilty of contributory negligence under any and all circumstances merely because he fails to use the handrail in ascending a stairway. If the stairs were known to be covered with a slippery coating of wax, or with ice, or if the stairway were obscured by darkness, it might constitute negligence to attempt to ascend them without holding to the railing. Under the circumstances of this case, we are of the opinion it was a question of fact to be determined by the jury as to whether the plaintiff was guilty of negligence in failing to use the railing.

[5] A more serious question is whether the plaintiff was guilty of contributory negligence in taking two steps at a time without clinging to the railing. We are of the opinion this also depends upon the circumstances of the particular case. We may not hold, as a matter of law, that when a man is long-legged, able-bodied, active, and vigorous, that it is negligence per se for him to take two steps at a time in ascending a stairway when the steps are uniform, normal, and well-lighted so that he can plainly see what he is doing. Again, we may suggest that if one is using a stairway in the darkness, which is irregularly constructed and out of repair, or known to be covered with ice or slippery wax, it would probably constitute negligence for one to attempt to ascend it two steps at a time without clinging to the railing. Under the circumstances of this case, however, we are of the opinion the implied finding of the jury to the effect that the plaintiff was not guilty of contributory negligence in using the stairway as he did may not be disturbed on appeal.

[6-8] It is asserted the court erred in giving to the jury at the request of the plaintiff the following formula instruction:

"If you find that the plaintiff in this case was a tenant in the building of the defendant and while using the stairs in said building in the ordinary manner slipped and fell by reason of the fact that the defendant or his agents, or servants negligently placed a quantity of oil or other substance on said stairs and by reason of the fall injured himself, then you must find in favor of the plaintiff and against the defendant."

Formula instructions which purport to recite the facts of a case and direct the finding of a verdict in accordance therewith, but which omit essential elements constituting a complete defense to the action, have been repeatedly criticized by the courts. Occasionally such instructions have been held to be fatally erroneous. In the present case the challenged instruction above quoted omits reference to the question of the alleged contributory negligence of the plaintiff. The jury was, however, elsewhere clearly instructed regarding the doctrine of contributory negligence, as follows: "It is a well-settled rule of law that if the negligence of plaintiff contributed proximately to the injury of which the plaintiff complains, he cannot recover. And if you so find from the evidence, then your verdict must be against the plaintiff and in favor of the defendant. Contributory negligence is the want of ordinary care and prudence on the part of the person injured contributing directly and proximately to the injury."

In view of the clear and correct instructions which were given to the jury in this case upon the subject of contributory negli-

gence, we are unable to say that the jury was misled by the foregoing challenged one, since, as the Supreme Court has recently said in the case of Douglas v. Southern Pacific Company, 203 Cal. 390, 264 P. 237, and in Barham v. Widing, 210 Cal. 206, 216, 291 P. 173, wherein similar instructions were discussed, it may be reasonably assumed the jury understood the challenged instruction to declare merely the legal principle that liability to the owner of a building attaches to him for the negligent acts of his agent or janitor. In other words, it does not purport to contain a recitation of all the essential facts of the case upon which a judgment may depend. In effect it declares that "If you find that the plaintiff was a tenant who was injured while he was actually using the stairway of the lessor's building in the ordinary (reasonable) manner, and that he slipped and fell as the result of the owner's agent or servant negligently placing upon the steps a quantity of oil or other substance, you should find a verdict in favor of the plaintiff for the reason that the owner of a building is liable for the negligent acts of his servant performed in the regular course of his employment." It is true the instruction may be otherwise construed. But that construction should be adopted which will support the judgment if it is reasonably susceptible of such interpretation. There is a disposition to relax the rigid application of the rule regarding formula instructions which is announced in Beyerle v. Clift, 59 Cal. App. 7, 209 P. 1015, and other similar cases since the adoption of article 6, § 4½, of the Constitution, when the record fails to show a miscarriage of justice. We therefore think the challenged instruction does not constitute reversible error.

[9, 10] The following instruction which was given to the jury at the request of the plaintiff is also assigned as erroneous: "You are instructed that the keeper of a public building or place of business is bound to keep his premises and stairs to and from it in a safe condition, and must use ordinary care to avoid accidents or injury to those properly entering upon his premises."

It is true that the owner of a building is not *bound* to keep the stairway leading to rented offices therein absolutely safe from danger. The owner is not an insurer against accidents. It is only necessary that he should exercise ordinary care to keep the stairway reasonably safe for the customary use thereof. While the preceding instruction is carelessly drawn, we are inclined to think the jury was not misled by its language. Read as a whole, it is reasonably susceptible of the construction that the owner of the building is bound to use "*ordinary care* to avoid accidents or injury" to persons entitled to use the stairway, and for that purpose must "keep his premises and stairs in a (reasonably) safe condition." The language which is used to the effect that the owner "is *bound* to keep" the premises safe, may be fairly interpreted to mean merely that it is his duty to keep them reasonably safe, since the final sentence of this instruction says "he must use *ordinary care* to avoid accidents." Construed in this manner, we are of the opinion the giving of this instruction does not constitute reversible error. Even though it be deemed to be erroneous, it is not reversible error in view of the constitutional provision above cited.

[11] Finally, it is insisted the judgment of $7,500 which was rendered against the defendant is excessive, since the plaintiff was not permanently nor seriously injured.

We are of the opinion there is substantial evidence to support the amount for which the judgment was rendered and that it is therefore not excessive. If the extreme pain which was suffered by the plaintiff for several months, the loss of time, income, and hospital expenses, together with the cost of drugs and medical care, were incurred as a result of the injuries sustained from the fall on the waxed stairs, then the sum of $7,500 is not excessive. If, upon the contrary, that pain and expense resulted from a chronic arthritis and not from the fractured ankle or wrenched spine, then he is not entitled to any damages whatever.

There is evidence to support the plaintiff's claim that he, at first, supposed his ankle was merely sprained and not really fractured. The displacement of the vertebrae and the extreme pain from that source apparently developed gradually, and increased during a period of three or four months. The plaintiff did not consult a physician for several days after the accident occurred. He bandaged his foot and limped about, but was unable to visit his office. When he first consulted Dr. Lilley three or four days after the accident occurred, both he and the doctor apparently attributed the pain in his ankle and spine to another cause. The doctor treated him for arthritis. No X-ray pictures were then taken. After the lapse of three months, and the pain in his ankle and spine increased, he consulted another physician. X-ray pictures were taken by Dr. Ethan H. Smith, a reputable physician of San Francisco, who is a graduate of both the Bellevue Medical College of New York and the University of Berlin. He diagnosed the case as a compound fracture of the ankle and a serious wrenching of the spine caused by the fall. The plaintiff's foot was placed in a plaster cast, and he went about on crutches for several weeks. Dr. Smith testified that an improper knitting of the bones of the ankle had caused a permanent injury to the foot which would always impair his ability to walk and that any unusual strain upon the foot would cause him pain. There is, therefore, evidence that the injury to the foot is permanent. X-ray pictures were introduced in evidence.

Lines were pointed out on these pictures which the doctor said indicated a fracture of the "lower end of the fibula." The doctor positively asserted there was no evidence of arthritis. Upon the contrary, Dr. Bennett, a reputable physician of Fresno who made a detailed examination of the plaintiff in September, 1931, also procured X-ray pictures to be taken of both the ankle and the spine. He testified positively there was neither a fracture of the ankle nor an injury to the spine. He asserted that the plaintiff was suffering from a clear case of arthritis in both the ankle and the spine. He affirmed that the pictures which Dr. Smith had taken indicated that fact.

There is substantial evidence corroborating the theory that the plaintiff's ankle was fractured by the fall, or at least that it was seriously injured at that very time. Mrs. Loomis, who is a stenographer employed in a law office in the Hill building where the plaintiff and her employer shared a common reception room, testified that prior to the day upon which the accident occurred, the plaintiff walked naturally and did not limp, but that immediately after the accident happened he came limping into the office and that "he was hopping on one foot and occasionally just put the tip of his toe and his other foot to the floor when he would try to step."

[12] In view of the conflict in evidence, it became a problem for the jury to determine whether the plaintiff was suffering from a broken ankle and a wrenched spine, or whether he was afflicted with arthritis only. For this reason, on appeal, we must assume he did sustain a broken ankle and a wrenched spine as a result of the accident, and that the amount of the judgment is therefore not excessive.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

136 Cal.App. 32

GREEN v. NEWMARK et ux.

Civ. 8014.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1938.

Hearing Denied by Supreme Court Feb. 19, 1934.

1. Indemnity ⇐8.

Where defendant agreed to save plaintiff harmless when plaintiff paid judgment against defendant and took personal property in settlement thereof, and in event he should not sell property in two years for sufficient to cover expenditures, to pay net losses, defendant was not liable for deficiency when property was not sold within two years.

2. Indemnity ⇐15(7).

Evidence disclosing no written agreement or executed oral agreement to extend agreed time for sale of property transferred to plaintiff in settlement for his payment of judgment against defendant finding that defendant was not estopped to set up plaintiff's failure to sell within agreed time in plaintiff's action on indemnity contract for deficiency was justified (Civ. Code, § 1698).

3. Indemnity ⇐15(7).

In action for loss sustained in sale of stock transferred to plaintiff in settlement for his payment of judgment against defendant, evidence sustained finding that stock was worth par value or more for two years after transfer, which was time within which stock was required to be sold to make defendant liable for deficiency.

4. Evidence ⇐592.

Statute providing that party calling adverse party as witness should not be precluded from rebutting his testimony or impeaching witness *held* not to prevent consideration of defendant's testimony because opposed to plaintiff's case (Code Civ. Proc. § 2055).

5. Trial ⇐165, 178.

Defendant's testimony, given on examination by plaintiff, cannot be considered on motion for nonsuit, nor on motion for directed verdict if unfavorable to plaintiff, since in such cases it is duty of court to consider only evidence favorable to plaintiff (Code Civ. Proc. § 2055).

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by Calvin C. Green against M. N. Newmark and wife. From an adverse judgment, plaintiff appeals.

Affirmed.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for appellant.

Walter F. Haas and H. C. Johnston, both of Los Angeles (Gerald E. Kerrin, of Los Angeles, of counsel), for respondents.

ARCHBALD, Justice pro tem.

On December 28, 1920, plaintiff loaned his close friend, defendant M. N. Newmark, the sum of $2,500. In addition, and in order to stay execution on a judgment rendered against said defendant, plaintiff became surety on a stay bond. Such judgment was appealed by Newmark and was affirmed. Demand was made on plaintiff by the judgment creditor to pay said judgment, with interest

and costs, in accordance with the terms of the bond executed by him. At the time, Newmark was unable to pay said judgment, but he and his wife, the defendant Jessie F. Newmark, were beneficiaries under a trust of which the Title Insurance & Trust Company was trustee, a part of the corpus of said trust being 87½ shares of the capital stock of the Standard Woodenware Company and a promissory note for $1,500 secured by a mortgage of real estate. It was agreed in writing dated May 1, 1922, between plaintiff and defendants, that plaintiff would accept from said trustee said shares of stock and promissory note in satisfaction of defendant M. N. Newmark's liability by reason of the payment of said judgment by plaintiff and in satisfaction of the loan of $2,500 theretofore made. It was further agreed that if plaintiff "shall pay said judgment and satisfy the same of record, and should receive from the said trustee the aforesaid personal property in settlement therefor, that they and each of them will save the said Calvin Green harmless from all loss by reason of the accepting of said personal property in satisfaction of the aforesaid claim and judgment; and in the event the said Calvin Green is unable to sell the said personal property on or before two years from the date hereof, for a sufficient sum to repay to him the amount of his said claim for $2,500 and the amount expended in satisfaction of said judgment, together with interest thereon at the rate of seven per cent per annum, and any reasonable attorney's fees paid out and expended, and all other reasonable costs and disbursements expended by the said Calvin Green in and about the settlement of the aforesaid matter, and the sale and disposition of the said personal property received by him from said trustee as aforesaid, and all other reasonable expenses, that they will, upon demand, pay to the said Calvin Green such losses as he may have suffered by reason of the transaction hereinabove set forth."

According to his complaint, plaintiff paid said judgment and satisfied same of record, and accepted said stock and promissory note "in satisfaction of said claim and judgment and costs." The stock was sold by plaintiff September 4, 1929, for $1,700, and this action was brought to recover the amount alleged to have been lost by reason of the acceptance of the stock and note in satisfaction of said claim and judgment. From the judgment rendered against him, plaintiff has appealed.

The evidence shows that the stock in question paid dividends on its par value of $100 per share at the rate of 6 per cent. per annum for two and one-half years, amounting to $1,312.50, and that then the dividends stopped. It also appears that the stock was not listed on the market; that it was owned largely by the Newmark family and relatives; and that some of it had been purchased by one of them at par some time before the transfer to plaintiff.

It is appellant's contention that the writing above quoted from contains two covenants, one a general agreement to save harmless, with no limitation of time within which such stock is to be sold and the loss ascertained, and the second contingent on ascertaining the loss by sale of the stock on or before two years from the date of the contract. The first count of the complaint is based on said supposed general covenant, and the second on the one which specifies the items of loss for which defendants are liable and contingent on the sale of said stock within two years. The stock was not sold within that time, and the complaint seeks to avoid such limitation of liability by the allegation that plaintiff refrained from making such sale at the request of defendants. The loss claimed in the second cause of action is increased by a reasonable attorney's fee of $1,000, claimed therein. The third cause of action is based on assumpsit.

[1] The findings of the trial court indicate that it was of the opinion that but one covenant was expressed by the contract, dependent upon the sale of the stock within two years. In our opinion such conclusion is correct. It was undoubtedly the purpose of the indemnitors to save appellant harmless in every way, but we fail to see from an examination of the contract—rather inartificially drawn—any intention to separate such liability from a fairly prompt sale of the stock. The evidence shows that an option to repurchase the stock within two years for the sum of $8,275 was given by appellant to the trustee for respondents. Such option did not prevent a sale by appellant within such time, however, as a proviso thereof gave him the right to sell at a price satisfactory to him within forty-eight hours after notifying respondents of his intention to sell and their failure to purchase for such price within that time. The stock was apparently considered to be valuable by all parties. It seems clear to us, with reference to the portion of the contract above quoted, that the conjunction "and," at the beginning of the clause "and in the event," etc., connects such clause with the preceding one; that what follows is not only a limitation upon the agreement to indemnify, but a detailed explanation of the particular losses intended to be covered; and that the clear intention is that the stock is to be sold within such two-year period and the liability fixed by that time or no liability can accrue thereunder. In our opinion, to give the language the construction contended for by appellant would require a period where the semicolon is, the elimination of the word "and," above referred to, and the capitalization of the word "in," which would then commence the next and then independent clause. An examination of the second clause referred to

shows that such clause particularizes the losses intended to be paid. The fact still remains that those agreed to be paid, in such clause, are "such losses as he may have suffered by reason of the transaction hereinbefore set forth," which are the same as specified in the first clause, viz., "all loss by reason of the accepting of said personal property in satisfaction of the aforesaid claim and judgment" and particularly specified in the language immediately succeeding.

[2] That a sale made after such two-year period would not impose any liability upon respondents under the language of the clause noted unless they had requested appellant to refrain from making such sale, is conceded by the allegations of the second cause of action set forth in the complaint. Plaintiff urges that defendants are estopped by reason of the fact that such requests were made. The trial court expressly found to the contrary. The liability of respondents arising out of a written contract, as it does, the terms of such instrument can only be changed by a contract in writing or an executed oral agreement (section 1698, Civ. Code). The evidence fails to disclose either; and no competent evidence appearing to support the affirmative allegations of requested extensions of time to sell contained in plaintiff's complaint, the court was fully justified in making the negative finding.

[3] A finding was made by the court, of which appellant complains, to the effect that on May 1, 1922, and for two years thereafter the stock in question was worth its par value or more. The evidence shows that the stock paid dividends of 6 per cent. on such par value for said period and six months more. We think it a fair presumption that such dividends were paid out of earnings and that the conclusion reached by the court might fairly be drawn from such evidence alone. The finding referred to, however, is not necessary to support the judgment. If the stock was worth anything during the two-year period mentioned, it would be presumed that some purchaser could be found if it was offered for sale. That the stock was valuable during all that time is a fair inference from the evidence presented. In any event, no effort seems to have been made by appellant to sell it.

[4, 5] Such finding also finds support in the evidence of defendant M. N. Newmark, as does also the finding to the effect that plaintiff's failure to sell the stock was not caused by or procured at the instance of defendants, of which appellant also complains. It is urged that since no evidence was introduced by defendants, and such conflicting evidence having been introduced into the case on the examination of respondent M. N. Newmark under section 2055, Code of Civil Procedure, by the plaintiff, it cannot be considered if opposed to plaintiff's case. With such contention we do not agree. Section 2055 does not mean that testimony so given may not be accorded its proper weight, but merely "that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness." Figari v. Olcese, 184 Cal. 775, 782, 195 P. 425, 428, 15 A. L. R. 192. Appellant relies upon the case of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, to support such contention, but we fail to find that it does. The court in that case says (page 559 of 212 Cal., 299 P. 529, 537): "This testimony [under section 2055] is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury." To be sure, it cannot be considered on a motion for a nonsuit if it is not favorable to the plaintiff (Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529), nor on a motion for a directed verdict, which was the situation in the Smellie Case, as in both such cases it is the duty of the court to consider only evidence favorable to the plaintiff, and, if any such is found, the motion must be denied.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

136 Cal.App. 158

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 5048.

District Court of Appeal, Third District, California.

Jan. 2, 1934.

Hearing Denied by Supreme Court March 2, 1934.

Insurance ⇐435.

Where workmen's compensation policy named as employer an administratrix who was operating business for decedent's estate and policy forbade assignment of employer's interest in policy, policy became ineffective when distributee of business took personal charge and control thereof.

Proceeding under the Workmen's Compensation Act by Charles Thur, employee, opposed by Earl Lounsbury, employer, and the Pacific Indemnity Company, alleged insurer. To review an award of compensation holding that alleged insurer was insurance carrier for the employer, such insurer brings certiorari.

Award annulled.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

Everett O. Corten, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

On May 27, 1932, Pacific Indemnity Company, petitioner herein, issued a standard policy of workmen's compensation insurance to Florence Blanche Lounsbury, administratrix employer. At that time the insured was the duly appointed, qualified, and acting administratrix of the estate of her deceased husband, and, as such, was operating a garage business in the city of Merced.

On March 10, 1933, the estate of C. E. Lounsbury, deceased, was finally distributed by order of court, and among other properties, the garage business and all fixtures and appurtenances were distributed to Earl R. Lounsbury, who immediately assumed personal charge thereof, and thereafter had full control of the operation of the business, with authority to employ and discharge all employees, and to fix their compensation and terms and conditions of employment. On April 5, 1933, a release was signed by Earl R. Lounsbury, acknowledging the receipt of all properties coming to him from the estate of C. E. Lounsbury, and releasing Florence Blanche Lounsbury of all liability in connection with the administration of the estate of C. E. Lounsbury, deceased.

Thereafter, on April 12, 1933, Charles Thur, an employee in the garage, was injured in the course of his employment. No notice of change of ownership or of the final distribution had been given to the insurance company, and upon the coming in of the proof of injury the company furnished medical treatment to the injured employee. Shortly thereafter it was noted in the report of the accident that the injured employee was in the service of Earl R. Lounsbury and not employed by Florence Blanche Lounsbury. Thereupon the company denied liability, and an application was filed with respondent Industrial Accident Commission to establish a lien for the medical treatment furnished and to obtain an adjudication that the policy in question did not cover the insured employee. After a hearing thereon, respondent commission held that the injured workman was an employee of Earl R. Lounsbury and that Pacific Indemnity Company was the insurance carrier for said employer Earl R. Lounsbury, and the employee was entitled to compensation and medical treatment. Upon the grounds that the evidence did not justify the finding and award, a writ to review the holding of the commission was obtained and is now before us for consideration.

Petitioner points out the policy in question was issued to Florence Blanche Lounsbury covering the operation by her as the administratrix of the estate of her deceased husband, of a certain garage business for a period of one year.

Item 1 of the declaration of the policy reads as follows:

"Item 1. Name of Employer—Florence Blanche Lounsbury, Administratrix

"P. O. Address—631 M Street, Merced, California

"For the purpose of serving notice, as in the policy provided, this Employer agrees that this address may be considered as both the residence and business address of this Employer or any representative upon whom notice may be served. Individual, Co-partnership, Corporation or Estate—Estate."

By an indorsement executed and attached to the policy on the day of its execution, paragraph I of the conditions of the policy read:

"The interest of the employer in this policy cannot be assigned to any other person or organization."

No indorsement was obtained from the insurance company transferring any rights under the policy to the successor, nor any agreement of any kind on the part of the company to insure any other than Florence Blanche Lounsbury. In fact no such transfer nor agreement could have been issued under the policy.

In First National Trust & Savings Bank v. Industrial Accident Commission, 213 Cal. 322, 2 P.(2d) 347, 348, 78 A. L. R. 1324, the court, in referring to the liability assumed by one acting in a representative capacity for an estate, said: "While acting as the executor of the will of a deceased, if it [the bank] undertook to carry on any business on behalf of the estate of said decedent, it became personally liable to all persons employed by it in such business, not only for their wages, *but, in our opinion, for compensation in case any of such employees sustained a compensative injury while in its employ.*" (Italics added.)

It will thus be seen that the policy, being executed solely for the personal benefit of Florence Blanche Lounsbury, was to be effective only as long as she personally remained in the category of an employer in connection with the operation of the garage belonging to the estate of her deceased husband.

The mere fact that the word "administratrix" was written after the name of Florence Blanche Lounsbury did not, in any way, affect the liability assumed by her as enunciated in the rule quoted above, this word being merely descriptio personæ and only indicating the connection of the named insured with the business covered by the policy.

The Industrial Accident Commission has held in Disberg v. Karrer and Western Indemnity Company, 5 I. A. C. 30, that a policy covering a business conducted by a known in-

dividual does not cover another individual who takes over the business without an indorsement of the policy, as required by its terms. To the same effect was State Compensation Insurance Fund v. Bredemann, 11 I. A. C. 30.

Respondent Industrial Accident Commission seems to have misconceived the rule expressed in Capital Glenn Mining Co. v. Industrial Accident Commission, 124 Cal. App. 79, 12 P.(2d) 122, 124. There, prior to the accident, the employer had been a partnership engaged in the operation of a mine under the name of Glenn mine and carried their compensation insurance under such name; while so insured, the organization was transformed to a corporation under the name of Capital Glenn Mining Company, and at least two premium payments were made with checks bearing such name, and upon the expiration of the original policy, without application having been made therefor, respondent insurance carrier issued its new policy in the name of the Glenn mines. Shortly after the incorporation, the company wrote their insurance carrier regarding the status of their employees and the insurance company replied, addressing its reply to Capital Glenn Mining Company. These checks and correspondence furnish undisputed evidence sufficient to charge the insurance carrier with knowledge of the change of name of the company. Upon the happening of the accident for which compensation was claimed, the company denied liability, but the court held that the company was estopped to repudiate its liability, there being no evidence of fraud or misrepresentation on the part of petitioner, the court saying: "It is inconceivable that the law will become a party to the injustice of permitting an insurance company possessed of actual knowledge of the real name of an assured, to issue a policy without written application, without inquiry regarding the identity of the proposed assured, and without fraud or misrepresentation on the part of the assured; permit it to collect and retain premiums in payment therefor, and then repudiate its liability because of error in the name or identity of the assured which is primarily the result of the negligence or mistake of the insurance company."

It is claimed by respondent that the decree of distribution of March 10, 1933, made no change in the status of the parties, as the title to real property of an heir vests immediately upon the death of an ancestor, but we are here concerned not with relation of an heir to the title to the property of an estate, but rather the status of one who has succeeded to a business as the employer by a decree of distribution, and whether the successor is an heir or a stranger to the estate is not material under the terms of the insurance contract.

The contract of indemnity having been made with Florence Blanche Lounsbury and having provided that she alone would be covered by its provisions, the court cannot extend the scope of the contract nor impose its terms upon a stranger to its execution. Zimmerman v. Industrial Accident Commission, 119 Cal. App. 253, 6 P.(2d) 291.

Were conditions reversed and an action brought against Florence Blanche Lounsbury, the decree of distribution and change in ownership would be a complete answer to any attempt to hold her for any injuries to an employee occurring after the distribution. We realize the insurance company would, upon application, probably quickly and without question have issued a policy to the successor of the administratrix, but we are without authority to make a contract for the parties where they have not done so themselves.

The award of the commission must be annulled, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

135 Cal.App. 781

In re FULLER'S ESTATE.

ROBINSON et al. v. NELLE et al.

NELLE et al. v. OAKLAND TRUST & SAVINGS BANK et al.

OAKLAND TRUST & SAVINGS BANK et al. v. NELLE et al.

Civ. 9140.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1933.

Rehearing Denied Jan. 17, 1934.

Hearing Denied by Supreme Court Feb. 15, 1934.

1. Wills ⇐448.

Where reasonably possible, will should be interpreted to prevent intestacy (Probate Code, § 102).

2. Wills ⇐457.

In construing holographic will, technical words will be given nontechnical sense, to render will operative, where it appears that testator so used words (Probate Code, § 106).

3. Wills ⇐487(1).

Evidence that testatrix had beneficial interest in stock and could assume that stock stood in her name sustained finding that testatrix intended provision in holographic will giving all stock standing in her name to

daughter to include such beneficial interest in stock, though stock was actually not in testatrix' name (Probate Code, §§ 102, 106; Civ. Code § 3529).

4. Wills ⇐488.

Whether will is ambiguous, so as to permit introduction of parol evidence to determine intention of testator, is question for trial court.

5. Wills ⇐384.

In will contest, evidence that testatrix intended to dispose of stock not in her name but in which she had beneficial interest, being admissible on issue of whether mutual will had been revoked by holographic will, admitting such evidence in proceeding to probate holographic will *held* not prejudicial in view of finding that mutual will was revoked by holographic will.

6. Wills ⇐386.

Where evidence of contestants of will showed opportunity to exercise duress and undue influence, but no pressure operating on testamentary act, finding of probate court that there was no duress or undue influence will be sustained.

7. Wills ⇐386.

Where testimony of handwriting experts was conflicting and numerous exemplars of testatrix' handwriting were in evidence, finding that signature to will was genuine *held* conclusive.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Proceeding by Frances R. Nelle, the Oakland Trust & Savings Bank, and others, for the probate of the will of Harriet N. Fuller, deceased, opposed by Carrie Haskell Robinson and others. From a decree admitting the will to probate, Carrie Haskell Robinson and others appeal.

Affirmed.

Kemper Campbell, of Los Angeles, and Rodgers & Bray, of Martinez, for appellants.

Walter E. Dorn, L. W. Lovey, and Vida M. Jones, all of San Francisco, and Thomas M. Carlson, of Richmond, for respondents.

NOURSE, Presiding Justice.

This is an appeal from a judgment of the probate court admitting to probate a holographic will of Harriet N. Fuller, dated April 7, 1927, and denying probate of a mutual will executed by the deceased and her predeceased husband in July, 1926. The appellants are the contestants of the holographic will and the proponents of the mutual will. The grounds of the contest were that the execution of the holographic will was procured through fraud and duress and that it did not dispose of any property of the deceased. For these reasons it was contended that the holographic will did not revoke or modify the mutual will and therefore the contestants as proponents of the latter will were entitled to its admission to probate.

The respondent Frances R. Nelle, at the age of 2 years, was legally adopted by Clifford A. and Harriet N. Fuller, who had no children of their own. She was reared and treated as their natural child, living continually with her foster parents until some time after her marriage. In November, 1926, Mr. Fuller died at the age of about 90 years and thereafter Mrs. Fuller lived the greater part of the time at the home of this respondent until her death in January, 1931. Some time in the year 1920 the Fullers transferred to this respondent certain real property estimated to be of the value of $4,500 and at that time Mrs. Nelle executed an agreement waiving further claim to their estate. In July, 1926, Mr. and Mrs. Fuller executed the mutual will offered for probate by the appellants herein. This will covered an estate of about $22,000 under the terms of which Mrs. Nelle was to be given $500, her son Clifford $5,000, Mr. Fuller's relatives $7,000 and Mrs. Fuller's relatives $8,500. This mutual will was admitted to probate as the will of Mr. Fuller and distribution was made to Mrs. Fuller of an $8,500 note and mortgage and something over $500 in cash. Stock in the Southern California Edison Company, appraised at over $24,000, stood in the name of Mr. and Mrs. Fuller as joint tenants and was not distributed under this will but was delivered to Mrs. Fuller upon a decree of court in a proceeding had to terminate the joint tenancy. Mrs. Fuller, being then 90 years of age, created a trust covering this property and a Los Angeles bank was named as trustee. On December 13, 1926, Mrs. Fuller created a new trust in which Mrs. Nelle was given $5,000, Mr. Nelle $2,000, Clifford Nelle $4,000 and the residue of the estate, and a sister of Mrs. Fuller was given $4,000. On February 2, 1927, Mrs. Fuller terminated this trust and created a new one substantially carrying out the terms of the mutual will. On February 8, 1927, she changed the latter trust, substituting William Nelle in place of a second cousin. On April 6, 1927, she changed the trust again by adding $5,000 to Mrs. Nelle's interest. On June 25, 1928, Mrs. Fuller withdrew all the property distributed to her from her husband's estate, including the note and mortgage, and gave instructions to the bank to prepare a new trust. At the same time she made a gift to Mrs. Nelle of the $8,500 note and mortgage. Her instructions to create a new trust were not carried out, and on August 2, 1928, she revoked the trust with the bank and created a new trust,

naming Mrs. Nelle as trustee. The bank turned all the trust property over to Mrs. Nelle and at that time the stock certificates in the Southern California Edison Company were registered in the name of "Frances R. Nelle, trustee." This trust was revoked by Mrs. Fuller a few days thereafter, but the stock certificates were permitted to remain in the name of "Frances R. Nelle, trustee," until the death of Mrs. Fuller. Intermingled with these transactions several wills were executed by Mrs. Fuller and subsequently destroyed. She left intact, however, a holographic will dated April 7, 1927, and a formal typewritten revocation of the mutual will of herself and husband. This revocation was date May 9, 1927, and was duly witnessed.

The holographic will admitted to probate reads:

"Los Angeles, Calif.

"I, Harriet N. Fuller, do will to my daughter Frances R. Nelle, 1784 Sonoma Ave. Berkeley, Calif. all monies stocks or real estate that stands in my name at the time of my death. Signed by me this 7th day of April, 1927.

"Harriet N. Fuller."

[1] In their attack upon this will the contestants show that there were no moneys, stocks, or real estate standing in the name of the testatrix at the time of her death or (with the exception of a small amount of money in bank) at the time the will was executed. All the real estate theretofore held or owned by the testatrix had been transferred to Mrs. Nelle or otherwise disposed of. All the stocks which had not theretofore been disposed of stood in the name of "Frances R. Nelle, trustee" at the time of the death of the testatrix though the trust under which such property was held had long since been revoked. At the time this will was executed these stocks were held by a Los Angeles bank as trustee. Though Mrs. Fuller claimed ownership of these stocks from the date of her husband's death in 1926 until her own death in 1931, they did not at any time during that period stand in her own name upon the books of the corporation. The inventory filed in this estate showed that the deceased left personal effects appraised at $10 and two blocks of this stock appraised at $24,000. The situation which thus confronted the probate court was that if the will was to be given the effect contended for by the appellants it would result in a disposition of an estate of $10 and intestacy in relation to an estate of $24,000. The parties came together on this issue, the appellants contending that because the holographic will did not dispose of the property of the estate it could not be treated as a revocation of the mutual will; the respondents contending that a reasonable interpretation must be given to the terms of the holographic will as expressing an intention of the testatrix to dispose of all her property.

The probate court adopted the theory of respondents and found that the holographic will was entitled to admission to probate and also that the holographic will, taken with the formal revocation of the mutual will, barred probate of the latter. This judgment finds sanction in section 102 of the Probate Code, which reads, in part, "and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." In interpreting the holographic will as intending to dispose of all the property owned or held by the testatrix which she was entitled to dispose of by will the judgment of the court is supported by the well-known rule that a will is always to be interpreted so as to prevent intestacy if such an interpretation is reasonably possible. Estate of Silva, 169 Cal. 116, 145 P. 1015; Estate of Carrillo, 187 Cal. 597, 203 P. 104; Estate of Friedrichs, 107 Cal. App. 142, 290 P. 54; Angell v. Springfield Home for Aged Women, 157 Mass. 241, 31 N. E. 1064, 1065. The Angell Case closely resembles the case at bar. There the will read: "I give the dividends and income of my shares of stock of the following named banks, * * *" among which was the Chapin National Bank. There were no shares of stock of this bank in the name of the testatrix but it was shown that she held jointly with her brother a beneficial interest in shares of that bank, the certificate for which stood in the name of her deceased sister. In interpreting the will the Massachusetts court held that it was the intention of the testatrix to bequeath all the shares of stock in this bank either standing in her own name or in which she had a beneficial interest.

[2] In this interpretation of the will another rule of law comes into play—"technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, *or unless it satisfactorily appears* that the will was drawn solely by the testator, *and that he was unacquainted with such technical sense.*" Section 106, Probate Code. Thus, in the early case of Estate of Wood, 36 Cal. 75, 81, the Supreme Court said: "If a word has no meaning, or is absurd, or repugnant to the clear intention manifested in other parts, it may be regarded as surplusage, or restricted in its application." And again (page 82 of 36 Cal.): "We are not at liberty to suppose that he [the testator] used a single word in the instrument in a sense that would defeat the operation of the whole instrument. * * *"

[3] For the purpose of determining the intention of the testatrix, evidence, both oral and documentary, was received from both sides. This evidence disclosed that the testatrix was not familiar with the technical

words used in the will, but that she assumed to cover all her property whether technically "standing in her name" or otherwise. In this connection the maxim of jurisprudence found in section 3529 of the Civil Code is also applicable. This section reads: "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." When the trust covering the shares of stock was revoked, it became the duty of the trustee to cause the certificates to be transferred to the name of the owner. The testatrix had the right to assume that this duty would be performed. It cannot be contended that the evidence was not sufficient to support the finding of the probate court that it was the intention of the testatrix in the execution of the holographic will to dispose of all the property owned by her and mentioned and provided for in the mutual will. It must be conceded that this finding compels the conclusion that the holographic will effected a revocation of the mutual will and was entitled to probate.

[4, 5] But the appellants argue that all the evidence admitted for that purpose was improperly admitted because there was no ambiguity in the document. This question is a mixed question of law and fact which the trial court must determine in the first instance. On the original issue of respondent Nelle's petition for the probate of the holographic will such evidence was unnecessary and, the due execution of the will having been satisfactorily proved, it was properly admitted to probate irrespective of any question as to what property it disposed of. It was on appellants' petition for the probate of the mutual will that this question really arose and then only for the purpose of determining whether the holographic will effected a revocation of the mutual will. Hence if any evidence was improperly admitted on this issue it could not have prejudiced the appellants in this proceeding because of the finding that the mutual will was expressly revoked by the act of May 9, 1927. This finding compelled the conclusion that the mutual will should not be admitted to probate.

[6] Two other points require but brief consideration. The appellants attacked the holographic will on the ground that its execution was procured through duress and undue influence. The court found the allegations untrue. Appellants do not contend that there was not sufficient evidence to support the finding; they argue that the court should have disbelieved respondents' witnesses and given credence to those called by appellants. The most that can be said for appellants' evidence on this issue is that it showed an opportunity to influence but did not show any pressure operating on the testamentary act. With the burden on the appellants such evidence would not have sustained a finding in their favor. Estate of Fleming, 199 Cal. 750, 756, 251 P. 637; Estate of Bryson, 191 Cal. 521, 541, 217 P. 525.

[7] The appellants attacked the revocation of the mutual will on the grounds that it was procured through duress and undue influence and that the signature thereon of the decedent was forged. In relation to the first ground the evidence was of the same character as that relating to the execution of the holographic will and, for the reasons just stated, the finding adverse to appellants cannot be disturbed. As to the second ground two handwriting experts were called as witnesses, and each testified in harmony with the views of the party calling him. Numerous exemplars of the decedent's handwriting were in evidence. Whether the court based its finding on the testimony of the experts or upon its own examination of the exemplars there was a conflict which forecloses further inquiry.

There is a large mass of irrelevant matter in the briefs criticizing the court, the counsel, and the witnesses. It is not necessary to discuss these matters as the points of law which have been covered compel an affirmance of the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

KLEIN v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 8841.

District Court of Appeal, First District, Division 1, California.

Jan. 3, 1934.

Rehearing Denied Feb. 2, 1934.

Hearing Granted by Supreme Court March 2, 1934.

1. Constitutional law ⇐102(1).

Tenure which vice principal of San Francisco elementary schools acquired was vested right which could not be divested by repeal of statute creating tenure (Pol. Code, § 5, and § 1793, subd. 1, and §§ 1609, 1617, as amended; School Code 1929, § 10.3; St. 1931, p. 3057, § 135).

2. Schools and school districts ⇐133.

Vice principal of San Francisco elementary schools, appointed to position in 1921, did not acquire permanent tenure so as to

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 37 P.2d 74.

prevent her dismissal except for cause, since under existing laws principal could not acquire tenure, and vice principal performed duties of assistant principal, having same rights as principal (Pol. Code, § 5, and § 1793, subd. 1).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Proceeding by Marie G. Klein against the Board of Education of the City and County of San Francisco, State of California, and Ira W. Coburn and others, constituting the commissioners thereof. From a judgment directing issuance of a peremptory writ of mandate commanding the board to restore petitioner to her position as permanent vice principal in elementary schools, defendants appeal.

Reversed.

For prior opinion, see 27 P.(2d) 88.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco (Irving G. Breyer, of San Francisco, of counsel), for appellants.

Francis W. Murphy, of San Francisco, for respondent.

GRAY, Justice pro tem.

The board of education of the city and county of San Francisco and the members thereof appeal from a judgment directing the issuance of a peremptory writ of mandate commanding them to restore respondent to her position and status as a permanent vice principal teacher in the elementary schools of said city and county. In October, 1904, respondent, having served the probationary period of two years, was elected a permanent teacher in such schools, without limitation as to time. On August 16, 1921, after two years' probationary service, she was elected vice principal in such schools, without limitation as to time. Thereafter for ten years she was continuously employed as a vice principal and teacher in various elementary schools to which she was assigned and, as such, performed the supervisory and administrative functions of a vice principal, and also taught classes daily. On August 11, 1931, the board dismissed her as a vice principal, but retained her as a teacher. Such action was not taken for any cause, for which the law authorized the board to dismiss the holder of a permanent tenure.

[1] Respondent's tenure as vice principal, but not as teacher, is here involved. The sole question for decision is whether, under the above facts, she had previously acquired a tenure, which prevented her dismissal except for cause. She contends that section 1793 of the Political Code gave her such tenure upon her election on August 16, 1921. As to this contention, appellants deny that a vice principalship is a position of which the state law permits the acquisition of a permanent tenure. At the time of her election, subdivision 1 of section 1793 read as follows: "The holders of city, or city and county, certificates are eligible to teach in cities, or cities and counties, in which such certificates were granted, in schools or classes of grades corresponding to the grades of such certificates, and when elected shall be dismissed only for insubordination or other causes, as mentioned in section seventeen hundred and ninety-one of this code, duly ascertained and approved by the boards of education of such cities, or cities and counties." From its enactment in 1881 to its repeal by the School Code of 1929 (section 10.3), the language of this subdivision has remained substantially the same. Anderson v. Board of Education, 126 Cal. App. 514, 15 P.(2d) 774, 16 P.(2d) 272. Such tenure, as had been previously acquired, was a vested right of which respondent was not deprived by such repeal. Gastineau v. Meyer (Cal. App.) 22 P.(2d) 31. Indeed, section 5 of the preliminary provisions of that Code expressly continued such tenure.

Respondent's argument, in support of her contention, rests upon the case of Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, followed under similar facts, without further discussion in Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26, and approved, arguendo, in Barthel v. Board of Education, 153 Cal. 376, 95 P. 892. While never overruled, its decision, it has been held, should be strictly confined to its facts. Marion v. Board of Education, 97 Cal. 606, 32 P. 643, 20 L. R. A. 197; Bates v. Board of Education, 139 Cal. 145, 72 P. 907. Decided in 1890, the Kennedy Case holds that the holder of a city and county certificate who had been elected principal teacher of a San Francisco grammar school and who was thereafter transferred to the same position in a school of lower grade, was entitled to a writ of mandate, restoring her to the first position. As therein stated, this decision depended upon the construction to be given to sections 1617 and 1793 of the Political Code. It was determined that section 1617, authorizing the employment of a teacher, limited the time of such employment by a board of trustees, but not by a board of education; and that a holder of the requisite certificate after election as a teacher, without limitation as to time, could be dismissed only for the causes specified in section 1793.

Since an essential factor in that decision was the absence of any time limitation upon the board of education in the employment of a teacher, it is necessary, before applying its doctrine, to ascertain whether the then existing law contains such limitation.

The history and exact language of the numerous amendments to section 1617, to section 1609, into which the former was transposed, and to the various sections of the School Code, which superseded the latter, may be found in the cases cited in this paragraph. Section 1617 was amended in 1911 (St. 1911, p. 1362) so as to expressly authorize the employment of a principal. "Prior to 1911 the power to employ a principal was included in the general authorization to employ teachers." Godward v. Board of Trustees, 94 Cal. App. 160, 161, 270 P. 725. Section 1793 granted a tenure only to holders of city or city and county certificates, but a statewide teachers' tenure was provided in 1921 by amendment to section 1609 (St. 1921, p. 1663). Anderson v. Board of Education, supra. The case of Bland v. Board of Trustees, 67 Cal. App. 784, 228 P. 395, holds that, under section 1609, as amended in 1921, a principal did not have tenure and therefore could be dismissed arbitrarily after the expiration of the term for which he was elected. Under section 1609, as amended in 1927 (St. 1927, p. 1913), the trustees of a school district are not authorized to employ a principal for a longer term than one year. Godward v. Board of Trustees, supra. A person employed both as principal and teacher may, under the School Code, acquire tenure as teacher, but not as principal. Gastineau v. Meyer, supra. In Anderson v. Board of Education, supra, the court purposely refrained from deciding whether a principal in a San Francisco school could obtain tenure under the School Code alone, but rested its decision that he had acquired tenure upon section 135 of the new San Francisco charter (St. 1931, pp. 2973, 3057), which took effect on January 8, 1932, as provided in section 226 thereof. At the time of these decisions, the distinction, noted in the Kennedy Case, between a city board of education and the trustees of a rural school district as to the power of employment of a principal or a teacher had been eliminated.

[2] Although the state law has never specified the position of vice principal, it was tacitly assumed in Harby v. Board of Education, 2 Cal. App. 418, 83 P. 1081, that a vice principal's right of tenure was governed by the law applicable to a principal. Appellants' rules, adopted December 28, 1910, provide for the position of vice principal, and its rules, adopted January 1, 1927, define the duties of a vice principal. These duties are of the same general nature—to wit, supervisory and administrative—as are performed by a principal, although they are more subordinate and less important. A vice principal therefore would seem to be an assistant principal (see Bland v. Board of Trustees, supra) having the same rights of tenure as a principal. But from the above cited cases it appears that, under the law as it stood at the time when respondent claims to have acquired tenure, a principal was not permitted to acquire tenure. Respondent's contention is therefore untenable.

The judgment is reversed.

We concur: CASHIN, J.; KNIGHT, Acting P. J.

135 Cal.App. 703

ELLINGTON v. PACIFIC COAST PULP & PAPER CORPORATION.

Civ. 4957.

District Court of Appeal, Third District, California.

Dec. 12, 1933.

1. Bills and notes ⇐140.

Liability upon notes executed by corporation could not be changed by renewal notes executed subsequently and accompanied by additional agreements, where renewal notes and original ones stood upon the same basis (Civ. Code, §§ 1607, 1667; St. 1917, p. 679, § 12, as amended by St. 1931, p. 949, § 15).

2. Licenses ⇐39.

Oral agreement by payee of corporation note to purchase stock prior to issuance of permit as required by Corporate Securities Act *held* void, entitling payee to recover upon note; payee not being in pari delicto with corporation (Civ. Code, §§ 1607, 1608, 1667; St. 1917, p. 679, § 12, as amended by St. 1931, p. 949, § 15).

3. Evidence ⇐420(7), 445(4).

Note apparently binding may be shown by parol to have been conditionally delivered, but conditions must be precedent or concurrent with delivery of note; subsequent oral agreement being inadmissible for purpose of establishing fact of conditional delivery (Civ. Code, § 3097).

4. Evidence ⇐420(7).

Conversations between payee of note and witnesses relative to conditional delivery of note five months before date of conversations *held* inadmissible in payee's action upon note (Civ. Code, § 3097).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by L. E. Ellington against the Pacific Coast Pulp & Paper Corporation, and cross-complaint by defendant. Judgment for defendant, and plaintiff appeals.

Reversed, and appeal from order denying new trial dismissed.

Raymond A. Leonard and Hubert Townshend, both of Oroville, for appellant.

Wesley E. Marten, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun to collect the sum of $2,000, based upon two promissory notes executed and delivered by the defendant to the appellant. One note was for the sum of $1,000, and one note for the sum of $1,040. While the notes sued upon are dated, respectively, September 31, 1931, and October 10, 1931, the record shows that they are renewal notes. The first notes issued by the defendant and delivered to the plaintiff appear to have been delivered on February 21, 1931, and on April 10, 1931. The dates of the renewal notes, which were subsequently merged into the notes dated September 21, and October 10, 1931, do not satisfactorily appear in the record. Sufficient to state, however, that the first note executed and delivered to the plaintiff was dated February 21, 1931. This note was signed by the president of the defendant corporation, and given in his individual capacity, and subsequently taken up, and a note signed by the corporation issued in lieu thereof. Both notes are unconditional promises to pay.

The answer of the respondent admitting the execution of the notes alleges that the two notes were really conditional notes; that at the time of the execution of the first note the plaintiff verbally promised to purchase certificates of stock in the defendant corporation, to the value of $10,000; and also that an agreement would be executed by the defendant to the plaintiff whereby the plaintiff would be given the contract of hauling rice straw, for the uses and purposes of the defendant. It is admitted that the agreement to purchase stock was oral and was not entered into in accordance with the terms of the Corporate Securities Act, or in accordance with the permits of the corporation that were offered in evidence. The permits shown in the record were not in force during the year 1931, nor at the time of the alleged agreement to purchase stock of the defendant corporation by the plaintiff, set up in defendant's answer.

In December, 1931, an agreement was entered into between the plaintiff and the defendant relative to the hauling of rice straw by the plaintiff, for the uses and purposes of the defendant, for the period of two years, at $6 per ton, the hauling of the rice straw to begin when the corporation was ready to operate its proposed pulp and paper manufacturing plant. The trial was had in December, 1932. So far as the record shows, the defendant has not completed its pulp and paper plant, and no part thereof has been placed in operation, and the agreement to deliver rice straw has not come into operative effect.

At the trial of the action the defendant, over the objection of the plaintiff, was permitted to introduce a great deal of testimony relative to the oral agreement to purchase stock subsequent to the execution of the notes in question. No denial is made that the plaintiff advanced to the defendant the sum of $2,000, evidenced by the promissory notes, the contention being that the notes were given as security to the plaintiff that the contract to haul rice straw would be awarded to him, and apparently also to evidence the fact that the plaintiff had advanced the sum of $2,000 on account of his oral promise to purchase $10,000 worth of the capital stock of the defendant corporation.

At the time of the execution and delivery of the promissory notes by the defendant to the plaintiff, of which the notes set up in the complaint are renewal notes, section 12 of the Corporate Securities Act (St. 1917, p. 679, § 12) read as follows: "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the provisions, if any, which it is required by the permit of the commissioner to contain, shall be void." The permits to sell stock issued by the commissioner of corporations to the defendant required, among other things, that the agreement to purchase should be in writing, and that at least 40 per cent. of the value of subscribed capital stock should be paid in cash. In other words, that at the time of the oral agreement referred to in this action at the time of the issuance of the first note, in order to be a binding obligation between the plaintiff and the defendant, the agreement should have been in writing and $4,000 paid in cash.

Section 1607 Civil Code, reads: "The consideration of a contract must be lawful within the meaning of section sixteen hundred and sixty-seven." Section 1667 Civil Code, provides that a contract is not lawful which is—"1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals." Teachout v. Bogy, 175 Cal. 481, 166 P. 319. The oral contract involved in this action is directly contrary to the express provisions of the law as it existed at the time of the execution of the notes, of which the notes set up in the complaint are renewals.

[1] Renewal notes and original notes stand upon the same basis, from which it follows that the oral agreement alleged to have preceded the giving of the first note is not changed in its character or binding effect by

any subsequent renewal notes, and the renewal notes being simply replacement of the original obligations, the conditions, if any, which preceded the giving of the original notes are the only conditions which can affect the liability of respondent, and also, the admissibility of the evidence in relation thereto, for the simple reason that if the obligation had become fixed, the liability, if any, of the defendant could not be changed by any oral promises or agreements occurring subsequent thereto. Imperial Livestock v. Tracy, 208 Cal. 205, 281 P. 50.

The findings of the court are, among other things, to the effect that on or about the 21st day of February, 1931, the plaintiff entered into a verbal contract with D. M. Thomson, president of the defendant corporation, to purchase $10,000 worth of stock, in consideration that the plaintiff be given an exclusive contract for hauling rice straw for two years, and that on or about the 21st day of February, 1931, the plaintiff delivered to D. M. Thomson, as said president of the corporation, the sum of $1,000, to be applied on the purchase of said stock, and that as security for the execution of the contract to haul rice straw, Thomson, as president of such corporation, delivered to the plaintiff a promissory note for the repayment of the $1,000. That thereafter, and in June, 1931, the plaintiff and the entire board of directors of the defendant corporation, met at its principal place of business and office of said corporation, in Richvale, Cal., and at such meeting the plaintiff agreed that he would either purchase $10,000 worth of the capital stock of said corporation, or $5,000 worth, if he (defendant) would give the plaintiff an exclusive contract for hauling rice straw. If $10,000 of stock were purchased, the plaintiff was to have an official position with the corporation, but if only $5,000 worth of stock were purchased, the plaintiff was to have only the contract for hauling the rice straw; and that subsequently, and on September 21, 1931, the defendant corporation executed and delivered to plaintiff the promissory note set out in paragraph II of the first cause of action mentioned in plaintiff's complaint; that at the same time it was further agreed orally, that the plaintiff would advance at least $2,000 additional to be applied upon his agreement to purchase stock.

It is further found that the plaintiff did advance an additional $1,000. The court also found that the agreement to purchase stock was voidable and not void, apparently basing this finding upon section 16 of the Corporate Securities Act which became effective on August 24, 1931 (St. 1931, p. 949, § 15).

Whatever may be said of the findings concerning the second promissory note, the finding of the court as to the first note is directly in contravention of the undisputed writings in the record. A letter dated March 9, 1931, sent by the defendant to the plaintiff, reads as follows:

"L. E. Ellington,
"Monte Bello, Calif. Box #296.
"Dear Sir:

"At a Board meeting it was decided in order to simplify the issuance of stock certificates as security against the one thousand dollars ($1,000.00) loaned by you to Mr. D. M. Thomson, that the latter issue his personal note to you for the loan and also pass on to you to be held as security the eight units of stock of the Pacific Coast Pulp and Paper Corporation which shall be issued to Mr. Thomson for the money obtained from this loan. Please, therefore, return the company note given to you by Mr. Thomson for $1,000.00 to our auditor in the self-addressed stamped envelope at your earliest convenience. The stock will be forwarded to you to hold as security for said loan as soon as issued.

"For the financial accommodation extended we hereby agree to give you contract for the hauling of our straw for the period of two years at a price not to exceed $6.00 per ton delivered baled, you to make a lower price to us based on cost plus a reasonable profit to you if not baled. Adjusted cost to be determined by your detailed costs determined after a reasonable period of operation. This will serve as binding contract until we get together and draw a more detailed one.

"Your very truly,
"Pacific Coast Pulp & Paper Corporation
"By D. M. Thomson, Pres."

On the same date a letter written by D. M. Thomson, president of the corporation, was sent to the plaintiff in this action. This letter refers to the company's note theretofore issued and delivered to the plaintiff, requesting its surrender and to be replaced by the note mentioned in the first letter set forth herein (which appears as "Plaintiff's Exhibit No. 4"), as follows:

"Hotel Oaks, Chico, California,
"March 9, 1932:

"Dear L. E.

"I enclose letter from the P. C. P. & P. Corp., which is self-explanatory. Please send the Company's note to the auditor in addressed envelope in exchange for my note enclosed. I forgot whether the interest was 7% or 8%, the latter, I think. Will you please insert what was agreed upon. I enclose certificates duly endorsed by me as security for you. Please acknowledge safe receipt. The Company's letter guarantees the hauling to you for 2 years, till you come up, and then we will give you a regular contract, signed, not like Suckow's.

"I have been extremely busy, 11 & 12 p. m. every night, with the auditor, or would have written you before now, but I told Annie to

phone you that everything looked very good. The auditor says the deal is assured; everything looks better at this date than ever it did. I am rushing to catch the mail. I shall write you more fully regarding everything the day the auditor leaves, which looks like to be Wednesday evening.

"With warmest regards to you and your good wife, and again, many thanks for your warm kindness and very practical assistance, which is greatly appreciated.

"Yours very truly, D. M. Thomson.

"Have you any news regarding Suckow? How is everything going?

"D. M. T."

On September 21, 1931, D. M. Thomson, the president of the corporation, wrote to the plaintiff as follows:

"Richvale, Calif., Sept. 21st, 1931.

"My Dear Ellington:

"I got back to the plant Saturday, and as promised, I enclose contract re baling & hauling; also our note for $1040.00. I just notice that by dating note today, one month's interest is not included, but this letter is & will be your authority to collect same at a future date, as soon as we are in funds. There is not much to report. Our agreement as I outlined it, is agreeable to the Board, and I hope when you and Mr. Newman come up about the end of this week, we can arrange matters to the satisfaction of all concerned. I called on the Commercial Credit Company of San Francisco, and they state they would be willing to consider a contract for the purchase of all our machinery under their usual terms for Industrial loans. So this is a very good move and a great help to us if we have to use them. Dr. Lofgren had a long talk with Mabrey last Friday while in Sacramento, and it seems there is likely to be an agreement whereby Schwab will advance the loan by installments to complete the buildings as required. Schwab is coming up here with Mabrey in the next day or two to go over the matter, and I hope we can come to some definite plan to complete all the buildings without a halt. This would be a wonderful move for us, and I hope I can make it good.

"Yours, D. M. Thomson."

The facts set forth in these letters, as we have stated, do not appear to be controverted. However, there is some testimony to the effect that when the plaintiff wanted some money, stating the purposes for which he desired to use the same, that he orally promised to return the same to the corporation.

The record further shows that the plaintiff had no knowledge of the terms or conditions of the permit issued by the corporation commissioner authorizing the sale of certificates of stock by the defendant prior to the 21st or 22nd of June, 1931, at which time a copy of the permit and the conditions thereto attached were sent by the defendant to the plaintiff.

[2] In support of the judgment of the court and its findings that the oral agreement on the part of the plaintiff to purchase stock in the defendant corporation was not void, or only voidable, reliance is placed upon section 16 of the Corporate Securities Act as it appears in the act of the Legislature approved May 26, 1931. That act provides, in substance, that securities issued by a company without a permit, or not in accordance with the terms and conditions of the permit, shall be voidable at the election of the holder thereof, unless within 60 days after written notice of such irregularity in the issuance of such security has been given to the commissioner, he shall issue a permit authorizing the issuance of all securities, etc. And providing, further, that if said permit is issued within said time, none of said securities shall be voidable by reason of being issued without a permit, or by reason of being issued otherwise than in conformity with the terms of the original permit. The contention being that it is incumbent upon the purchaser under such circumstances to give notice to the commissioner, etc. We cannot agree with any such construction of the statute. It is the duty of the corporation to see that its permits are properly issued, and that its sales of stock are in accordance with the conditions, and upon discovery of any irregularity it may, by giving notice to the commissioner, place itself in the position where such securities may be held valid if the commissioner, by his permit, so authorizes the issuance of the stock and the conditions under which the same may have been issued. The corporation is the custodian of the permits issued by the commissioner, has control of its own records, and is the one for whose benefit the amendment to the permit and the correction of the conditions for the sale of stock may be made. However, the oral agreements for the purchase of stock were all made prior to the date of section 16 of the Corporate Securities Act becoming effective. The agreement for the hauling of rice straw, which bears date of December 21, 1931, denominated the final consummation of the transaction, contains no reference to the purchase of stock, and upon its face includes the agreement between the parties so far as the hauling of rice straw is concerned, and it cannot be aided by any invalid agreement relative to the sale of stock.

That an agreement for the purchase of stock, contrary to section 12 of the Corporate Securities Act as it read at the time of the transactions referred to herein, is void, is expressly held in the case of Walker v. Harbor Realty Corporation, 214 Cal. 46, 3 P.(2d) 557. In this case it is likewise held that the purchaser is not in pari delicto with the corporation. The act was held to be for

the benefit of purchasers and not for the benefit of the corporation selling stock.

To the same effect is the case of Pollak v. Staunton, 210 Cal. 656, 239 P. 26. These cases hold that the purchaser is entitled to recover any moneys paid by him.

In the case of Teachout v. Bogy, supra, it is further held that if any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void. This is simply a reiteration of section 1608, Civil Code.

The circumstances involved in the case of Domenigoni v. Imperial Live Stock Co., 189 Cal. 467, 209 P. 36, relied upon by the respondent as showing the purchaser of stock in pari delicto with the seller in contravention of a corporation permit, are readily distinguishable from the circumstances involved in the instant case, as in the instant case there is no issue that the plaintiff knew anything about the permits or conditions attached thereto, at the time that the original notes were issued. The Domenigoni Case, supra, sets forth circumstances showing that the purchaser connived with the seller to circumvent the Corporate Securities Act. Nothing of that kind appears in the record which we are now considering.

Likewise, in the case of Michell v. Grass Valley Gold Mines Co., 206 Cal. 610, 275 P. 418, the parties seeking to avoid the illegal issue of stock were directors of the corporation and participated in the issuance thereof.

While the record shows the date of February 21, 1931, when the first loan, as claimed by the plaintiff, of $1,000 was made to the defendant, and a promissory note given therefor, we fail to find in the record any evidence of the exact date when the second promissory note was given, upon the plaintiff loaning to the defendant an additional $1,000. One of the renewal notes set forth the sum of $1,040, the $40 being added as interest accruing as of the date of the renewal note.

Over the objection of the plaintiff the defendant was allowed to introduce testimony of the witnesses Thomson, Lofgren, Marten, Grell, and Lundberg, of an oral agreement to purchase stock subsequent to the execution of the notes in question, for the purpose of showing that the notes were conditional and not binding obligations. How much of this testimony was subsequent to the execution of the note evidencing the advancement of the second $1,000 cannot be ascertained from the record, but it does satisfactorily appear that the witnesses we have named were allowed to testify to oral conversations and agreements occurring several months after the advancement of the first $1,000 and the execution of the note dated February 21, 1931.

In addition to what we have stated the defendant was allowed to introduce in testimony, without any foundation having been laid therefor, a certain letter dated May 10, 1932, written by the president of the corporation to an attorney by the name of Walter H. Moses, reiterating the substance of the oral agreement to purchase stock by the plaintiff in consideration of his being given the contract to haul the rice straw, as theretofore testified to by himself and other witnesses we have named. This letter, of course, is in direct contravention of the letters dated March 9, 1931, written by the same person, and heretofore set out in this opinion.

[3, 4] That a note apparently binding in its terms may be shown to have been conditionally delivered is permissible under the provisions of section 3097, Civil Code, and is supported by the following cases: Silva v. Gordo, 65 Cal. App. 486, 224 P. 757; Richardson v. Lamp, 209 Cal. 668, 290 P. 14, and cases there cited. These conditions may be shown by oral testimony, but the conditions must either be precedent or concurrent with the delivery of the note. Subsequent oral agreements cannot be admitted for the purpose of establishing the fact of a conditional delivery. Santa Ana Sugar Co. v. Smith, 116 Cal. App. 422, 2 P. (2d) 866. Thus, conversations between the plaintiff and some of the witnesses taking place during the month of June, 1931, were wholly inadmissible for the purpose of showing the conditional delivery of the note made, executed, and manually delivered on February 21, 1931. It may be mentioned that the letters set forth herein, written by the president of the corporation, mentioning the delivery of the notes and renewal notes, contain nothing indicating conditional deliveries.

The complaint in this action makes no offer to surrender to the corporation the agreement relative to the hauling of rice straw, nor does the cross-complaint filed by the defendant ask for the cancellation of such agreement. Whether the consideration for the execution of the agreement which we have just mentioned has failed, is not involved in this action. While there is a statement in the testimony of the president of the corporation that he told the plaintiff the contract for hauling the rice straw would be a valuable contract, there is no evidence in the record to substantiate such statement. It simply appears that the plaintiff according to the contract was to receive $6 a ton for baling and hauling rice straw. The expense of baling and hauling is not set forth. Nor is there anything in the record from which the value of the $10,000 worth of stock testified to have been orally agreed to be purchased by the plaintiff can be determined.

While we have considered only the testimony on the part of the defendant in this action as to whether the findings are supported and the judgment is correct, we may state that the plaintiff testified that he never agreed to buy any of the capital stock of the

corporation; that he loaned the money and received the notes therefor.

Other cases might be cited to support the rules of law which we have set forth herein, but they would only be cumulative.

It follows from what we have said that the judgment of the trial court should be reversed. And it is so ordered.

The appeal from the order denying a new trial is dismissed.

We concur: PULLEN, P. J.; THOMPSON, J.

136 Cal.App. 248

BROECKER v. MOXLEY et al.

Civ. 1076.

District Court of Appeal, Fourth District, California.

Jan. 11, 1934.

1. Attorney and client ⇐70.

Any presumptions existing in favor of attorney's authority to bind client cease if court and other parties are notified of lack of authority before matter is consummated.

2. Attorney and client ⇐103.

Ratification of attorney's unauthorized acts could not occur until client knew all facts.

3. Attorney and client ⇐103.

Client who promptly discharged attorney after knowing all facts as to attorney's acts in signing partial satisfaction of judgment did not ratify attorney's acts because not making earlier protest to court where client had not been shown paper and even court and counsel could not understand what had been done without a hearing.

4. Attorney and client ⇐101(1).

Attempt by plaintiff's attorney to satisfy judgment as to certain defendants in advance of rendition by signing purported partial satisfaction did not release one joint tort-feasor and prevent recovery against others where plaintiff did not know of attorney's acts and discharged attorney after learning thereof.

5. Automobiles ⇐172(7).

Driver's acts in driving close to taxicab ahead to see whether he knew driver and bumping taxicab, causing injuries to passenger, *held* negligence.

6. Master and servant ⇐302(6).

Where servant combines his business with master's or attends to both at substantially same time, master is responsible for servant's acts unless servant clearly could not have been serving master.

7. Automobiles ⇐193(9).

Driver driving close to taxicab ahead to see if he recognized driver and bumping taxicab, thus injuring passenger, did not so depart from scope of employment as to relieve employer from responsibility.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Benjamin W. Broecker against Harry Moxley and others, doing business under the name and style of the California Cab Company, Charles Smith, and others. From the judgment, defendant Smith appeals.

Affirmed.

Hamilton, Lindley & Higgins, of San Diego, for appellant.

W. K. Brown, Edgar B. Hervey, and J. Franklin Armstrong, all of San Diego, for respondent.

BARNARD, Presiding Justice.

On the evening of December 19, 1931, the plaintiff was a passenger in a taxicab owned by the California Cab Company and driven by one of the persons constituting that company. As this taxicab was proceeding along Park boulevard in the city of San Diego, a Cadillac rent car owned by the defendant Smith and driven by the defendant Bruce, and carrying two passengers for hire, bumped into the taxicab from the rear, causing injuries to the plaintiff. In this action which followed, the owners and driver of the taxicab and the owner and driver of the rent car were jointly charged with negligence. The case was tried by the court without a jury and judgment rendered against Smith and Bruce, the owner and driver respectively of the rent car. From this judgment, the defendant Smith alone has appealed.

The first point raised is that the respondent, through his then attorney, had compromised and settled his claim against those defendants who were owners of the taxicab and thereby released the appellant from liability. With respect to this matter, the record presents an unusual situation requiring a rather lengthy recital of the facts. When the case came on for trial on November 25, 1932, the appellant filed a supplemental answer in which it was alleged that the respondent's claim against certain of the defendants had been compromised and settled for the sum of $150. The court announced that it would first take up that phase of the matter. The attorney for the respondent

was called as a witness and testified that there had been an attempt to settle the matter between himself and the attorneys for certain of the defendants and that a tentative agreement was drawn up which was not complete; that he signed the tentative agreement in blank, but that the agreement was never completed; that he received $150 from these attorneys; and that the same had not been paid back. He further testified that when he went to the office of the attorneys with whom he was negotiating, he found two papers prepared for his signature; that he called one of these attorneys on the telephone and informed him that he would sign only one; and that he then signed one of the papers in blank but did not sign the other. One of the attorneys just referred to was called as a witness and testified that he prepared two papers, a partial satisfaction of judgment in blank and a release of all claims and demands growing out of this accident; that he left these with his secretary with instructions to deliver a check for $150 when the two papers were signed by the respondent's attorney; that this attorney refused to sign one of the papers and called him up on the telephone; and that "as a result of which the matter was left open for further negotiations; and I contended that he take—I instructed my girl to give him the check pending these other matters being agreed upon, and that they never were agreed upon and he never signed the second agreement, and we have been unable to get back the $150." The paper which was signed by the respondent's attorney was a partial satisfaction of judgment dated October 28, 1932, and was headed by the full title and number of this case. It recited that in consideration of the sum of $150 and other good and valuable consideration paid by the defendants constituting the California Cab Company "full satisfaction is hereby acknowledged of a certain judgment rendered and entered in said Court in the said action on the ——— day of ———, 1932, in favor of plaintiff in the said action insofar as the said judgment is against any of the said defendants, or all of them, for the sum of ——— Dollars ($———) current lawful money of the United States of America together with interest thereon as specified in said judgment and plaintiff's costs, as such judgment is recorded in Book No. ——— of Judgments, at page ——— records of the County Clerk's office, San Diego, California. This satisfaction of judgment, however, shall not release the judgment of plaintiff against any of the defendants, except those named herein, and I hereby authorize and direct the Clerk of said Court to enter satisfaction of record of said judgment in said action as to said defendants." This instrument was shown to the court and admitted in evidence, but does not appear to have been read aloud or shown to the respondent. It developed that a continuance was necessary in order to secure certain other evidence with reference to the purported settlement and the court announced that in order to save time, evidence would be received on the original issues. The respondent was then called to the stand and was asked and answered many questions relating to the case on its merits.

An adjournment was taken to December 1, 1932, at which time the matter of the purported settlement was again taken up. At this time one of the attorneys for the other defendants referred to testified that the respondent's attorney had in the meantime handed him a check for $150 which he refused to accept, telling him that he was not authorized by his clients to accept the return of the money. The witness produced a copy of the other document which respondent's attorney had been asked to sign, which was a full release of all claims growing out of this accident. With respect to the two instruments referred to, the witness testified that the attorney for the respondent called him on the telephone and told him it was his understanding that he was only to sign the blank partial satisfaction of judgment; that he replied that if this was his understanding the check would be delivered and he could later take up the matter with the witness' partner; that he then hold his secretary over the telephone to deliver the check to the respondent's attorney when the blank partial satisfaction was signed; and that when he returned to the office he found that the original release was not signed. This witness' law partner testified that he conducted the negotiations for a settlement with the respondent's attorney and that a settlement was agreed upon on the express condition that the fact that a settlement had been made should be kept secret; that about two weeks before the day of the trial he discovered that his agent had told an adjuster for the defendant Smith that the settlement had been made; that he thereupon called the attorney for the respondent on the phone and told him what had happened; that the attorney for the respondent came right over and stated that he rescinded the agreement on that ground and offered a note in the sum of $150 which the witness refused to accept for the reason that he did not have any authority from his principal to do so; and that he then wrote to his principal in regard to the matter but had never received authority to accept the money. The attorney for the respondent then testified that on that occasion he told these attorneys that he would rescind the agreement and would return the $150; that these attorneys informed him they had no authority to accept a rescission but would take the matter up with their principal; that he had since taken the matter up with these attorneys and had been advised

that their principal had never authorized the acceptance of the money; that on that date he told them he would return the money if they would take it; and that he was unable to pay them the money because they refused to accept it. At the close of this hearing the court ordered judgment in favor of all of the defendants on the ground that one joint tortfeasor had been released.

After this hearing, the respondent substituted other attorneys for his then attorney and, on December 8, 1932, filed a notice of motion to reopen the case and set the same for further trial and determination. This motion was based on the ground that any purported satisfaction of judgment claimed to have been executed on behalf of the respondent was not executed by him nor with his knowledge or consent; that the purported satisfaction of judgment introduced in evidence was wholly unauthorized, fraudulent, and void; and that any action taken by his former attorney was in excess of his authority, without his knowledge, and fraudulent. Affidavits in support of the motion and in opposition thereto were filed and a hearing had, and on December 19, 1932, the court granted the motion on condition that the $150 be paid into court. This was done and the trial proceeded, resulting in the judgment above referred to. The court found that the respondent had not agreed to settle his claim against any of the defendants; that he was not a party to any agreement with the members of the California Cab Company; that he at no time authorized the making or entering into of any such agreement on his behalf; that he had no knowledge of the making of any such agreement; and that he never ratified any such agreement or accepted any benefits therefrom or received any consideration therefor.

It is not seriously argued that the action of his first attorney in signing a partial satisfaction of judgment in blank was either authorized by the respondent or within the implied authority of an attorney. But it is earnestly contended that the respondent ratified the action of his attorney in signing the instrument by failing to inform the court during the hearings on November 25 and on December 1 that the same had been signed without his knowledge; that it was unauthorized; and that he refused to be bound thereby. It is argued that he then obtained full information of what had been done by his attorney and that he had full opportunity to inform the court of his disavowal thereof since he was on the witness stand for a considerable period.

[1] It may first be observed that whatever presumptions exist in favor of the authority of an attorney to bind his client, these presumptions cease if the court and the other parties are notified of a lack of authority before a matter is consummated. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647. If it could be assumed that an attorney had the authority to bind his client by accepting a small part of the amount claimed and signing a satisfaction of judgment before trial, a number of other considerations affect the situation here. The purported satisfaction of judgment was signed in blank and left for future completion with definite dates and amounts to be later filled in. The misunderstanding as to whether one or two instruments were to be signed was left for a future adjustment which was never had. The condition on which the agreement was based was broken. An attempted rescission was held up to permit the other attorneys to take the matter up with their clients, but no reply was ever received. In the meantime the entire matter came to the attention of the court and the other parties.

[2, 3] It is also a general rule that ratification cannot take place until the party ratifying is in possession of the full facts. It appears that the full facts in this matter did not come out at the hearing on November 25, 1932. While the purported satisfaction of judgment was referred to and introduced in evidence, it does not appear that the respondent saw it or knew what it contained. His attorney testified that he had made no agreement of settlement with the defendants in question, and during the argument most of the attorneys stated to the court that they did not know what was the effect of the paper about which they were talking. In order to find out what had occurred, it was necessary for the court to continue the hearing and secure other evidence. Thereupon, the respondent was called to the stand and was asked specific questions relating to the merits of the case, which he answered. Under these circumstances, when court and counsel could not understand what had been done, it is hardly reasonable to hold that the respondent, who had not even been shown the instrument which it is claimed is binding upon him through ratification, must have understood the situation, and that it was his duty while on the witness stand to interrupt the proceedings and to inform the court that he had not authorized, would not be bound by, and disavowed that which his attorney had just testified he had not done. At the hearing on December 1, the full facts with reference to the purported settlement came out for the first time and the court at once acted. Immediately thereafter the respondent discharged his attorney and obtained other counsel. He acted promptly after all information came to him as to the acts of his former attorney and, in our opinion, he cannot be held to have ratified such acts merely because he did not make an earlier protest to the court.

[4] The attempt to satisfy the judgment as to certain defendants in advance of its being rendered and the agreement to keep the entire transaction secret was a fraud on the court and on the respondent as well, and furnishes an additional reason why he should not be held to have ratified the same, especially until such time as he came into possession of all of the facts. He then acted promptly, and appellant had not changed his position because of anything that had happened in the meantime. Under the facts of this case we think that the purported partial satisfaction of judgment signed in blank by the former attorney for the respondent was ineffectual for the purpose claimed and that the same did not release any of the defendants from liability.

[5-7] A second contention is that the appellant is not liable because the driver of his car intentionally collided with the taxicab for the purpose of attracting the attention of the driver of that vehicle and thereby acted without the scope of his employment. It is conceded that the driver of the Cadillac was driving the same for the appellant, and that he was at the time taking two passengers for hire to their destination by a proper route. But it is claimed that the evidence conclusively shows that he departed from the scope of his employment and engaged in an undertaking for himself since he testified that he thought he must know the driver of the taxicab and intended to attract his attention by gently bumping his rear bumper. It appears that the two cars were at that time passing a street intersection where there were two dips constructed for the purpose of draining water; that as the cars were passing the first dip the front bumper of the Cadillac caught on the rear bumper of the taxicab; and that as the cars passed the second dip the bumpers became disengaged. Apparently the respondent was thrown to the floor of the taxicab on the first contact of the cars. While the driver of the Cadillac testified that he intended to bump the other car easily in order to attract the driver's attention and that the bump was more severe than he intended, at other times he testified that it was his intention to drive close enough to see if he recognized the other driver; that he did not intend to bump the other car unless he recognized the driver; that he came up close in order to look ahead to see if he knew the other driver; and that when the other car slowed down for the dip he put on his brakes and tried to stop and prevent the two cars from coming into contact. There is some evidence that he did not intend to bump the other car unless he knew the driver thereof; that he did not recognize that driver until the accident had occurred and the car had stopped; and that while running close to the other car he endeavored to stop when he saw the other car decrease its speed. In any event, he was an employee of the appellant and was engaged in a specific mission for the benefit of his employer. He had neither stopped nor turned aside from the regular route to his destination and, in our opinion, his manner of driving constituted negligence rather than a departure from the scope of his employment. While an attempt to satisfy his own curiosity may have involved an element personal to him, the same may be said of the act of a driver who allows his attention to be distracted by something interesting on the side, or who drives at an excessive speed in order to complete his work at an earlier hour. Any such personal interest reflects itself in the manner of driving, is intimately associated with the employment, and is not a thing apart therefrom. If it can be said at all that this driver was engaged in his own business for the moment, it is still true that he was at the same time and predominantly engaged in his master's business. As was said in Ryan v. Farrell, 208 Cal. 200, 280 P. 945, 946:

"It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master."

It cannot be said that the driver of the Cadillac had so departed from the scope of his employment as to relieve the appellant from responsibility.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

136 Cal.App. 120

TORVEND v. PATTERSON et al.

Civ. 4946.

District Court of Appeal, Third District, California.

Dec. 29, 1933.

1. Trial ⇐243.

Instruction in effect placing burden on seller of goods to partnership of proving he had no notice of dissolution thereof *held* erroneous as laying down rule contradictory to law as set forth in instructions previously given.

2. Partnership ⇐296(3).

Defendants in action to recover against partnership for goods sold, asserting that partnership had been dissolved, had burden of proof thereof (Code Civ. Proc. § 1981).

3. Partnership ⇐290.

Until proper notice has been given creditor of dissolution of partnership, creditor had power although not right to subject retiring partner to liability.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Ingolf Torvend against J. D. Patterson and another, individually and as copartners, doing business under the name of Patterson & Witherly, and another. Judgment for defendants, and plaintiff appeals.

Reversed.

Whitehurst & Logan, of Patterson, for appellant.

A. J. Carlson, of Modesto, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

For some time prior to July 1, 1929, defendants J. D. Patterson and W. Witherly had been partners in the sheep business, under the firm name of Patterson & Witherly. During that period the partnership, in the firm name, purchased groceries from plaintiff for their sheep camps; certain groceries were also purchased by Witherly individually. The partnership carried a checking account with the Commercial Bank of Patterson in the name of Patterson & Witherly, out of which account, with checks signed "Patterson & Witherly, by W. Witherly," plaintiff had been paid for groceries during a time prior to July 1, 1929, and extending into May, 1931.

After July 1, 1929, plaintiff continued to sell groceries upon the order of W. Witherly or his employees, charging it upon his ledger to Patterson & Witherly, and at the time of the delivery of the merchandise, handed to the one taking delivery a memorandum of the items addressed to Patterson & Witherly, and each month, according to his custom, mailed to Witherly a statement of the balance due, showing the items charged to Patterson & Witherly. Checks in payment on account thereof were, from time to time, given to plaintiff, such checks being drawn on an account in the Commercial Bank and signed "Patterson & Witherly, by W. Witherly," all as had been the practice prior to July, 1929.

On August 27, 1931, plaintiff brought this action against defendants for the merchandise so sold and delivered subsequent to July 1, 1929. Defendant Patterson answered, denying that he was liable, either individually or as a member of the partnership; Witherly answered, admitting his personal liability, but denied any partnership obligation, they both alleging that the partnership had been dissolved July 1, 1929.

The evidence presented with regard to the question of whether or not timely notice of the dissolution was given to plaintiff was sharply conflicting. The questions here presented were brought before the court by a bill of exceptions and have to do principally with certain instructions of the court dealing with the question upon whom rested the burden of proof of establishing notice of dissolution. Defendants claim that it devolved upon plaintiff to establish, among other things, that no notice of dissolution had been received by him, while plaintiff claims that defendants, relying upon the dissolution of partnership, have the burden upon them to prove that actual notice of dissolution was received by plaintiff. Also, exceptions are taken as to the admissibility of certain evidence.

Upon behalf of plaintiff instructions were given, from which we quote such portions as are material to the questions here involved:

"Plaintiff's instruction No. 3. It is admitted by defendants J. D. Patterson and W. Witherly that prior to July 1, 1929, they were doing business as a partnership under the name of Patterson & Witherly. They allege that such partnership was dissolved on July 1, 1929, and that plaintiff had notice of such dissolution.

"To affect the rights of one dealing with and extending credit to a partnership prior to its dissolution, actual notice must be brought home to him * * *, and even though you find that the firm of Patterson & Witherly was dissolved, your verdict must be for plaintiff, against all of the defendants unless you also find, by a preponderance of the evidence, that plaintiff Torvend had actual notice of the dissolution.

"I further instruct you that the burden of proof is on the defendants to prove that Mr. Torvend had actual notice that the firm of Patterson & Witherly was dissolved. It is not necessary for plaintiff to prove that he

did not have notice of the dissolution. It is up to defendants to prove that he did have such notice.

"Plaintiff's instruction No. 4. You are instructed that, * * * the liability of a general partner continues, even after his withdrawal from the partnership, in favor of persons who have had dealings with and given credit to the partnership during his connection with it until they have had personal notice of his withdrawal * * *; and you are further instructed that the burden is upon the defendants to prove by a preponderance of the evidence that defendant Patterson had withdrawn from said partnership prior to the term covered by the transaction upon which this action is based, and that the plaintiff had notice of that fact prior to such term. * * *

"Plaintiff's instruction No. 5. In order that a withdrawing partner may escape liability for future debts in favor of one who had previously extended credit to the firm * * *, actual notice must be received by the person who had so extended credit. * * * Creditors who have dealt with the firm are entitled to rely on his credit and financial standing in extending credit to the firm until they have actual notice of his withdrawal, and unless you find by a preponderance of the evidence that Mr. Torvend received actual notice of Mr. Patterson's withdrawal from the firm of Patterson & Witherly, your verdict must be for plaintiff. * * *

"Plaintiff's instruction No. 7. * * * Unless you find by a preponderance of the evidence that defendant J. D. Patterson withdrew from the firm of Patterson & Witherly and plaintiff had actual notice of such withdrawal, your verdict shall be for the plaintiff against all of the defendants. * * *

"Plaintiff's instruction No. 8. The court has instructed you that the burden of proof is on defendants to prove by a preponderance of the evidence that plaintiff received actual notice of defendant Patterson's withdrawal from the firm of Patterson & Witherly, even though you found that such firm was dissolved, before defendant Patterson can escape liability for credit extended after such withdrawal where credit was extended by plaintiff while he was a member of such firm."

After the giving of the foregoing instructions, submitted by plaintiff, which correctly state the law, the court, at the request of defendants, gave the following instruction:

"Defendants' instruction No. 13. The burden of proving a liability against the defendant Patterson rests upon the plaintiff and it must be established by a preponderance of the evidence as heretofore explained. In order, therefore, to justify a verdict against defendant Patterson you must find from a preponderance of the evidence; that is, by a greater weight of the evidence, that no notice was given to Mr. Torvend of the dissolution of the partnership. *If the evidence upon this point is equally balanced, then you must find on this issue in favor of the defendant Patterson*, provided, of course, you find that the partnership was actually dissolved." (Italicizing added.)

[1] It is the contention of plaintiff that the foregoing instruction laid down a rule directly contradictory to the law as set forth in the instructions previously given, and dealing as it does with a factor essential in the determination of the issues the error makes a new trial imperative. With this we must agree.

As the court said in Starr v. Los Angeles Railway Co., 187 Cal. 281, 201 P. 599, 603:

"It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached."

And, to the same effect, the court said in Buttrick v. Pacific Electric Ry. Co., 86 Cal. App. 137, 260 P. 588, 591:

"This instruction [No. 12] is contradictory of said instruction No. 17, above quoted, in essential particulars, and the jury could not determine which of the two instructions correctly stated the law. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided, and, if the instructions are inconsistent or contradictory, it is impossible to tell which was adopted in reaching their verdict in this case, and for that reason a new trial should be granted."

There is considerable confusion in the meaning and use of the term "burden of proof," which arises, as Wigmore says, "not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which our law has so long suffered." (Sec. 2485.)

It was said in Powers v. Russell, 13 Pick. (Mass.) 69, that "where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he

will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact. [Hughes v. Williams, 229 Mass. 467, 118 N. E. 914, and cases collected.]"

[2] Applying this rule to the case at bar it is clear that plaintiff made out his case when he showed the existence of the partnership, the sale and delivery of merchandise, charged to the partnership, and the nonpayment thereof. To offset this showing defendants sought to avoid its effect by proof of a distinct fact, that is, that the partnership had been dissolved. This was an affirmative allegation and the burden rested upon defendants as the parties asserting it. It was no part of plaintiff's case and upon him could be imposed no duty of establishing that fact. As to that part of the case the burden rested upon defendants.

The rule as to burden of proof is expressed in section 1981, Code of Civil Procedure, as follows: "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

In 17 American & English Encyclopedia of Law (1st Ed.) 1118, regarding the burden on a retiring partner, it is said:

"The burden of proof to establish notice rests with the partner claiming it, and if the evidence is conflicting the benefit of the doubt will be given the creditor."

Rowley, in his Modern Law of Partnership, § 596, states: "It is a question of fact for the jury whether a previous customer had notice of the dissolution of a partnership, and the burden of proving notice is on the partner seeking to escape liability."

In Reading Braid Co. v. Stewart, 19 Misc. 431, 43 N. Y. S. 1129, 1130, defendant's evidence showed that notice to plaintiff of dissolution of the partnership had been written on a post card, but the boy to whom the mailing of the card was intrusted had no definite recollection of having mailed the same. Plaintiff denied receiving any notice, and the court, holding a directed verdict in favor of the plaintiff proper, said: "The burden of proof in this case, therefore, was on the defendant Stewart to show, by a preponderance of evidence, that notice of his withdrawal from the business was brought home by him to the plaintiffs in this action."

In Poage Milling Co. v. Joseph Howard & Co., 227 Ky. 353, 13 S.W.(2d) 266, the court held: " 'The burden of proving notice is on the partner. Notice of dissolution may be given by mail, and in case proper mailing is shown the presumption arises that the notice reached the addressee; but if such presumption is rebutted by evidence that it did not reach him, the attempted notification is ineffective.' * * * In such cases unequivocal notice should be given, and when denied must be proved by the preponderance of the evidence."

In Albrecht v. Massing, 199 Ill. App. 182, it is said: "The burden of proof is upon a partner in a suit on a partnership indebtedness to establish a sale of the interest of such partner to the other and notice thereof by creditor."

An exception is also taken to defendants' instruction No. 11, reading as follows: "Mr. Patterson and Mr. Witherly had a right to dissolve their partnership. Upon the occurring of such dissolution the remaining partner, Mr. Witherly, had no right or power to incur any further obligations on the credit of Mr. Patterson."

[3] No doubt the incurring of such an obligation would be a breach of obligation to a retiring partner, but until proper notice had been given to a creditor, he had the power, although not the right, to subject the retiring partner to a liability. To that extent the instruction was incorrect.

We must therefore hold that instructions 11 and 13 upon behalf of defendants were erroneous and being in conflict with instructions given upon behalf of plaintiff, with the evidence sharply conflicting upon a material issue, a new trial must be granted.

We do not believe it necessary to comment on other exceptions noted in the briefs, as the question may not arise upon the retrial of the issues.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

136 Cal.App. 233

PEOPLE v. SINGH.

Cr. 1310.

District Court of Appeal, Third District, California.

Jan. 11, 1934.

1. Homicide ⇐250.

Evidence *held* to sustain conviction for manslaughter.

2. Criminal law ⇐444.

Sufficiency of preliminary proof identifying article, photograph of which was offered in evidence, *held* matter for determination of trial judge.

3. Criminal law ⇐1158(4).

Trial judge's province to determine sufficiency of preliminary proof identifying article, photograph of which was offered in evidence, will not be disturbed on appeal, in absence of abuse.

4. Criminal law ⇐438.

Photograph of mattress, on which deceased's body was placed after affray, *held* competent to indicate presence and appearance of mattress, notwithstanding photograph was taken two days after removal of deceased's body; weight of evidence being for jury.

5. Homicide ⇐174(8).

Alleged false declarations of defendant regarding knowledge of affray wherein deceased allegedly sustained fatal injuries *held* properly admitted to show defendant's guilty knowledge of cause of injuries.

6. Criminal law ⇐1137(5).

Defendant, by voluntarily admitting that he previously made false statement regarding his knowledge of affray, waived right to object because prosecution had been permitted to develop, on cross-examination of defendant, fact that he had previously made false statement.

7. Criminal law ⇐1044.

Admitting testimony that defendant did not attempt to refute statement made in his presence as to deceased sustaining fatal injuries in affray *held* not reversible error, notwithstanding defendant had not, at time of statement, been accused of committing assault, in absence of motion to strike out testimony.

8. Criminal law ⇐304(2).

It is common knowledge that presence of clothing will tend to prevent abrasions of skin as result of blow.

9. Criminal law ⇐1144(12).

In determining error in admission of evidence, jurors will be presumed to know what everybody of ordinary intelligence ought to know.

10. Criminal law ⇐1169(9).

Where deceased allegedly sustained fatal internal injuries in affray, admitting doctor's testimony that presence of clothing might account for absence of exterior abrasions *held* harmless, though it constituted nonexpert testimony.

11. Criminal law ⇐476.

Question whether injuries would have been confined to right side, if deceased had been run over by automobile as contended by defendant, *held* legitimate subject of inquiry from medical expert.

12. Criminal law ⇐473.

Where deceased allegedly sustained fatal injuries in affray, admitting doctor's testimony that it was easy or convenient to definitely determine extent of fractured ribs without X-ray *held* not error.

13. Criminal law ⇐351(8).

Where witness, who had been detained in county jail as witness in case, had testified that defendant attempted to bribe him, and that defendant had promised to arrange bail, permitting prosecution to question witness as to how long he had been in jail at that time *held* proper.

14. Criminal law ⇐1170(4).

Sustaining objection to defendant's question propounded to witness *held* not error, where matter was fully covered by subsequent answers of witnesses, which were elicited without objection.

15. Criminal law ⇐696(3).

Refusing to strike out testimony that defendant instructed witness to get in automobile when they were about to take deceased to hospital on morning following affray, in which deceased was allegedly injured by defendant, *held* not error.

16. Criminal law ⇐627½.

In seeking to impeach witness by proving that he made prior contradictory statements, counsel may refer to unsigned, unapproved, and extrajudicial written report of witness' statement for purpose of accuracy or to refresh attorney's memory, without submitting document to inspection of witness or his attorneys (Code Civ. Proc. § 2052).

17. Criminal law ⇐829(9).

Refusing instruction that, in absence of evidence, no inference could be drawn by jury against defendant, *held* not error, where court further instructed as to presumption of defendant's innocence.

18. Criminal law ⇐494.

Jury are not bound by opinions of expert witness, but jury should give expert's opinion such weight as it appears to be entitled to, under circumstances.

19. Criminal law ⇐1171(1).

Mere sarcastic or extravagant statements of prosecuting attorney in midst of hotly contested trial are insufficient to require reversal of conviction, in absence of showing of prejudice.

20. Criminal law ⇐730(7).

Prosecuting attorney's erroneous statement, in argument to jury, regarding presence of blood on mattress on which deceased was placed after affray with defendant, *held* not reversible error, where jury was clearly instructed to disregard statement.

21. Criminal law ⇐720(6).

Attorney is entitled to argue to jury any inference which may be reasonably deduced from evidence.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

H. Indar Singh was convicted of manslaughter, and he appeals.

Affirmed.

S. Luke Howe, R. B. Hibbitt, and O. F. Meldon, all of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was charged with the murder of Kehar Singh. He was convicted of manslaughter. From the judgment which was rendered accordingly and from an order denying his motion for a new trial, this appeal was perfected.

It is contended the evidence fails to support the judgment of conviction of manslaughter; that the court erred in its rulings admitting and rejecting evidence; and in giving and refusing certain instructions to the jury. It is also claimed the prosecuting attorney was guilty of prejudicial misconduct in the course of the trial.

March 2, 1933, an affray occurred in an inn conducted by Hukam Singh at Walnut Grove between the defendant and Kehar Singh. There were several individuals present. All parties who were present belong to the Hindu race. About 8 o'clock in the evening Kehar sat upon a bench in the main room with other men. The defendant, who is a merchant, entered the room and accused Kehar of interfering with his sale of groceries. After some controversy over the matter, the defendant seized Kehar Singh and threw him to the floor, kicking and hitting him and finally crushing his chest with his knee. Kehar was apparently helpless and unable to resist the attack on account of the superior size and strength of the defendant. The prostrate man called for help. One of the bystanders attempted to remonstrate with the defendant, who threatened to shoot or administer bodily harm to him if he did not withdraw. He did so, and the defendant continued to crush the body of Kehar with his knee, saying, "I am going to kill you today." Kehar was beaten and crushed until he became unconscious. The defendant and one Dogar Singh then seized him by the arms and dragged his body into an adjacent room, where he was placed upon a mattress which lay upon the floor. The victim of the assault remained on this mattress until the following morning, when he was taken to a hospital and died that day. An autopsy disclosed the fact that he sustained three broken ribs, and that his death resulted from hemorrhage of the liver and right lung, which were punctured.

The defendant was charged with murder, and upon trial he was convicted of manslaughter. He contends that the affray was a mere wrestling match, and that the evidence does not show the deceased died from injuries sustained therein. The witnesses to the actual affray are all members of the Hindu race. The evidence is conflicting and irreconcilable.

[1] There is adequate evidence to support the judgment of manslaughter. It appears that an affray occurred in which the defendant was the aggressor and in the course of which he violently beat, kicked, and crushed the deceased with his knee while he lay helpless upon his back on the floor. The evidence is undisputed that Kehar died as the result of fractured ribs and hemorrhage of the liver and right lung induced by traumatic force. There were no external incisions or abrasions of the flesh apparent upon the body of the deceased.

[2-4] It is contended the court erred in admitting in evidence, over the objection of the defendant, a photograph of the mattress upon which the body of Kehar was placed as it lay on the floor of a room adjacent to the kitchen, without first showing that the surrounding conditions which existed at the time his body was placed there, remained unchanged. The photograph was taken in that room of the Singh building two days after the body of the deceased was removed from the mattress. Partap Singh testified he saw the deceased lying upon the mattress in that room near the kitchen at 8 o'clock on the morning following the affray. He said: "I saw him in that place where he was laid in the evening, on the same mattress. * * * Then Indar Singh and Dogar Singh and I brought Kehar Singh from inside of the store and put Kehar Singh in the machine," and took him to the hospital.

"Q. Is that the same mattress he was placed on the night before and where you had seen him the same morning a few minutes before? A. Yes, the same mattress of the night before."

Fateh Singh sufficiently identified the photograph as a picture of the mattress upon which the deceased was placed after the affray. He said in response to the question: "Does that picture resemble the mattress that was in the adjoining room to the kitchen in Hukam Singh's place March 2, 1933? A. Yes, I think it looks like that." There is no evidence to the contrary. The photograph was not offered to show the condition of the room or its contents, other than the mattress. It was merely offered as a corroborating circumstance to show that the deceased was seriously hurt and that the room contained a mattress upon which his body was placed. There can be little doubt of that fact. Partap Singh saw him lying on a mattress in that very room the morning following the affray. The preliminary proof identifying the mattress was a matter for the trial judge to pass upon. His province to determine the weight of that preliminary proof will not be disturbed on appeal, except for an abuse thereof. Diller v. Northern Cal. Power Co., 162 Cal. 531, 538, 123 P. 359, Ann. Cas. 1913D, 908. The photograph which was taken two days after the removal of the body of the deceased was competent to indicate the presence and appearance of the mattress. The evidence was not too remote. People v. Grill, 151 Cal. 592, 598, 91 P. 515; People v. Singh, 78 Cal. App. 476, 483, 248 P. 981; 3 Jones on Evidence (2d Ed.) p. 2577, § 1418. It is immaterial that the photograph was of slight value as evidence in the case. The weight of the evidence was a matter for the jury to determine. The fact that there was a conflict of evidence regarding the placing of the deceased upon the mattress in the room adjoining the kitchen is addressed solely to the weight of the evidence. The consideration of that conflict was a problem for the trial judge to determine upon the offer to introduce the photograph in evidence. The admission of the photograph in evidence was not erroneous.

[5, 6] It is contended the court erred in permitting the prosecution to develop on cross-examination of the defendant the fact that he had previously stated to an officer that he was not present at the place of business of Hukam Singh in Walnut Grove on the evening of March 2, 1933, and knew nothing of the conflict which took place then and there, and that he had no information regarding the cause of the injuries which were received by Kehar Singh. It is asserted this cross-examination was prejudicial, since upon the trial of the cause the defendant freely admitted he was in Hukam Singh's place of business the night of the affray and testified to his version of the affair.

The cross-examination of the defendant was harmless for the reason that the defendant subsequently voluntarily testified to the same statements which he had previously made to the officer, and explained his reasons for doing so by saying:

"I didn't like to get mixed. I said Kehar Singh was dead and they may not hold me for any complications.

"Q. You didn't want to get mixed up in it, is that what you mean? A. Yes."

Moreover, before the defendant took the stand in his own behalf, the officer to whom the false statements were made was permitted, without objection, to fully recite the circumstances and purport of that conversation, in the course of which the defendant said, "No, I wasn't there. I was peddling my groceries and came back [to my place of business] that evening to work on my books." Another witness who was present and heard this conversation was previously permitted to testify, without objection, that the defendant first denied having any knowledge of the affray in which Kehar Singh was injured, and explained his serious condition by saying, "I think he is like one of my countrymen, maybe he got drunk and got hurt."

The alleged false declarations of the defendant were properly admitted in evidence to show his guilty knowledge of the cause of the injuries which resulted in the death of Kehar Singh. People v. Peete, 54 Cal. App. 333, 353, 202 P. 51; People v. Sampsell, 104 Cal. App. 431, 441, 286 P. 434; People v. Yeager, 194 Cal. 452, 486, 229 P. 40; People v. Cuff, 122 Cal. 589, 55 P. 407; 8 Cal. Jur., p. 42, § 157.

The defendant, having previously developed on cross-examination the same statements and having voluntarily admitted at the trial that he had previously made these false statements, waived his right to object to this evidence, and may not predicate a claim of reversible error thereon, for the reason that it became cumulative and harmless. People v. Correa, 44 Cal. App. 634, 642, 186 P. 1055; People v. Frank, 75 Cal. App. 74, 241 P. 924; 8 Cal. Jur. p. 502, § 516; 16 Cor. Jur. p. 550, § 1059.

[7] The admission of certain testimony by Dr. Frank W. Lee is assigned as erroneous. The doctor was asked:

"Q. Did you in the presence of the defendant, Indar Singh, ask Mr. Baines— * * * What did you ask there? * * * A. Asked how this occurred. * * *

"Q. And Mr. Baines replied? A. That the injured had been drunk and that there had possibly been a quarrel or accident. He was rather noncommittal in this statement." On motion of counsel for the defendant to "strike out the answer of the witness that 'He was rather noncommittal' as a conclusion," that portion of the answer was stricken from the

record. Since the defendant was not then accused of committing the assault which caused the injuries from which Kehar was then suffering, it may be questionable as to whether the defendant was called upon to refute the statement of Mr. Baines which was made in his presence that Kehar was suffering from the effect of injuries received in "a quarrel or accident." There was, however, no motion to strike out that portion of the answer. It was harmless. It does not constitute reversible error under the circumstances of this case.

[8-10] In describing the injuries sustained by the deceased, the doctor said there were no external abrasions. On cross-examination evidence was elicited to the effect that the ribs of the deceased might have been fractured by his having been run over by a truck. On redirect examination, over the defendant's objection, the doctor was permitted to testify that the fact that the deceased had his clothing on might account for the absence of exterior abrasions of the body. He said in that regard: "I feel the clothes would act as a cushion." It is contended this reply constituted nonexpert testimony which was incompetent. There is no merit in this assignment of error. It is a mere matter of common knowledge that the presence of clothing will tend to prevent abrasions of the skin as a result of a blow or of violent crushing by means of a knee. No evidence was necessary to establish that fact. Jurors will be presumed to know what everybody of ordinary intelligence ought to know. Conceding that expert testimony of facts which amounts to common knowledge is ordinarily inadmissible, this evidence is harmless.

[11-13] In response to a question propounded to Dr. McDonnell by the defendant's attorney, regarding the character of the injuries which were sustained by the deceased, this colloquy occurred: "Q. Doctor, that is more like he had been run over by an automobile, rather than to have been kicked or struck by some instrument? A. Well, it was in my opinion, that it was some heavy or more direct pressure, because the ribs,—three of the ribs that were fractured, had been pushed in, and had punctured the lung." At the trial, without objection, Dr. Lee was permitted to testify that he agreed with the foregoing statement of Dr. McDonnell. Continuing the same inquiry regarding the cause of injury, Dr. Lee, who had made a professional examination of the body of the deceased, over the objection of the defendant's counsel, in response to the question, "If an automobile had run over the deceased, would just the right side have been affected, or would you have found other conditions in the body, to indicate such condition?" replied, "That is my opinion." This appears to have been a legitimate subject of inquiry from a medical expert. The reply may also have involved a fact which is merely common knowledge. Common sense would teach any person of ordinary intelligence that that was true. The question may be argumentative, but it was not objected to on that ground. The reply is also harmless and does not constitute reversible error. It did not constitute error to permit the doctor to assent to the inquiry: "Is it very easy or convenient to definitely determine the extent of the fractured ribs without an X-ray?" Nor was it erroneous to permit the witness Fateh Singh to answer the following question propounded to him by the prosecution, to wit: "How long had you been in jail at that time?" This question was competent as one of the surrounding circumstances under which the witness charged the defendant with attempting to bribe him to refrain from testifying at the trial regarding the affray. Fateh Singh was present at the time of the assault upon the deceased. He had been detained in the county jail at Sacramento as a witness in this case. He had previously testified that the defendant visited him prior to the trial, and said to him: "Do not be a witness, * * * I give you two hundred dollars and do not make any statements. * * * I will arrange a bail for you." It appears the witness was released on bond a few days later. The question "How long had you been in jail at that time?" was therefore competent.

[14] The court did not err in sustaining an objection to the question propounded to the witness Fateh Singh: "Now, where did you have that one drink, one dram of whisky?" The witness had previously admitted that he had one drink of liquor at the place where the assault occurred. The question to which the objection was sustained was asked in an apparent effort to prove that the witness was drunk and did not recollect just what did occur at the time of the affray. Without objection the following colloquy subsequently occurred and it fully covers the subject in controversy:

"Q. You told me you had that dram of whisky to drink at Hukam's place, is that correct? A. Just one.

"Q. Well was that a week later? A. Yes."

With that reply, the subject of his drunkenness at the time of the affray was dropped. The challenged ruling does not constitute error. It is fully covered by the subsequent answers of the witness which were elicited without objection.

[15] There was no error in denying defendant's motion to strike out the statement made by the defendant to Partap Singh when they were about to take the injured man, Kehar, in an automobile, to the Sacramento hospital the following morning. As they were about ready to start, the defendant addressed himself to this witness, saying: "You better come on and get inside the machine, too." We are not informed as to why this was prejudicial. It

appears to be irrelevant and harmless. It does not constitute error.

[16] It was not error for the prosecution to refuse to submit for inspection to a witness for the defendant an unsigned, unapproved, and extrajudicial typewritten report made by the court reporter of statements which were contradictory of his testimony given at the trial. This record was referred to in an effort to impeach the witness under the provisions of section 2052 of the Code of Civil Procedure. Nor was it error for the court to refuse to compel the prosecution to submit the document to the defendant's attorney for inspection. People v. Glaze, 139 Cal. 154, 72 P. 965; People v. Haughey, 79 Cal. App. 541, 250 P. 406; People v. Casey, 79 Cal. App. 295, 249 P. 525; People v. Keyes, 103 Cal. App. 624, 638, 284 P. 1096; People v. Meadows, 108 Cal. App. 67, 291 P. 226. It has been repeatedly held that such extrajudicial statements made by a third party without the signature or approval of the witness is not itself competent evidence with which to impeach him, and that the language of section 2052, supra, to the effect that, "If the statements be in writing, they must be shown to the witness before any question is put to him concerning them," is confined to statements made in writing by the witness himself, or signed or approved by him or such as are officially taken in regular court proceedings. In seeking to impeach a witness by proving that he has made contradictory statements at other times, pursuant to section 2052, supra, there is no objection to counsel referring to a written memorandum, under the circumstances of this case, for the purpose of accuracy or to refresh one's memory, without first submitting the document to the inspection of the witness or his attorney. This is particularly true when the witness denies the accuracy of the statement, as he did in the present case. In response to the question, "You did not make that statement?" the witness replied, "No." Moreover, the witness was subsequently given the opportunity to read that portion of the typewritten statement which was involved in the impeaching question. The district attorney said in that regard: "I will let you read this part of it, right here is where I want to begin with,—Was this question asked you, and did you make this reply?" It does not appear that any specific impeaching question and answer contained in the document was asked of the witness without giving him the privilege of reading it if he so desired. There was no error in the proceedings in that regard.

[17] The appellant has assigned as error the refusal to give to the jury the following instruction, to wit: "The court instructs the jury that matters of fact, if any, which are left uncertain by the evidence, cannot be made certain to the prejudice of the defendant by inference. In the absence of evidence, no inference can be drawn by the jury against this defendant." The refusal of the foregoing instruction does not constitute error. It was fully covered by other instructions favorable to the defendant which were given in the court's charge. The jury was clearly instructed that: "Every fact and circumstance * * * must be viewed by you in the light of the presumption of innocence." The jury was further charged that: "The defendant is presumed to be innocent until his guilt is established by such evidence as will exclude every reasonable doubt." Again, the court informed the jury that: "You are to take into consideration only such evidence as has been admitted by the court, and you should disregard and discard from your minds every impression or idea suggested by questions * * * to which objections were sustained." Also the jury was instructed that all inferences which may be reasonably drawn from the evidence must be reconciled, if possible, in favor of the defendant's innocence. In an elaborate charge, the defendant was protected by numerous instructions warning the jury against indulging in any presumption or inference against the accused which could be reasonably reconciled in favor of his innocence. The defendant may not complain of any omission or error in the charge on that ground.

[18] There was no error in giving to the jury the following instruction: "Duly qualified experts may give their opinions on questions in controversy at the trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable."

The foregoing instruction appears to be a correct declaration of the law. It clearly informs the jury that they are not bound by the opinion of an expert witness, but, upon the contrary, that they should give it such weight as it appears to be entitled to under the circumstances of this case. This is the rule uniformly accepted as the law in California. State Compensation Ins. Fund v. Industrial Accident Commission, 195 Cal. 174, 184, 231 P. 996; Waizman v. Black, 101 Cal. App. 610, 281 P. 1087; 10 Cal. Jur., p. 971, § 228; 22 C. J. p. 728, § 823.

[19] Several remarks of the district attorney which were addressed to witnesses and to counsel for the defendant in the course of the trial are assigned as prejudicial misconduct. We have examined the record with respect to each of these challenged remarks. We are frank to concede they do not indicate that calm, judicious dignity which characterizes the ideal proceeding in court. Several of the

objectionable statements were uttered as impulsive retorts to equally objectionable remarks of adverse counsel. Without doubt, such conduct is incompatible with the due decorum and dignity which should prevail in the trial of a case. The challenged remarks would better have been omitted. Too frequently the trial of a criminal case resolves itself into a contest of wits and sarcasm between opposing counsel, for an effect upon the jury. We also realize that, in the zeal and fidelity for one's cause, indiscreet things may be impulsively said in the course of a hotly contested case which are unwarranted. It seems unreasonable to assume that intelligent jurors would not appreciate the provocation and circumstances under which such statements are usually uttered and make due allowance for the extravagance of the language employed. The mere sarcastic or extravagant statements of a prosecuting officer in the midst of a hotly contested trial are insufficient upon which to reverse a judgment of conviction, in the absence of a showing of prejudice. People v. Bennett, 79 Cal. App. 76, 95, 249 P. 20. We are convinced the challenged remarks of the district attorney do not constitute reversible error.

[20, 21] Finally, it is insisted the district attorney was guilty of prejudicial misconduct by referring in his argument to the jury to the mattress upon which the body of the deceased was placed after the affray by saying: "Hukam Singh denied [the mattress] was there; it never was there, he said, that he never had a mattress in the place, the side room where the mattress was found with the blood of Kehar Singh on it—" Upon interruption of the district attorney at this point, and motion to strike out the remark and instruct the jury to disregard it as unsupported by the evidence, the court said: "The jury are instructed to disregard the statement of counsel that blood was on the mattress." The district attorney thereupon stated to the jury that they were to be governed by their own recollection of the evidence, and that, if he had inadvertently made an error in attempting to quote the evidence, they should not accept his statement thereof.

This erroneous statement regarding the presence of blood on the mattress does not constitute reversible error. The jury was clearly instructed to disregard it. They must have assumed they were not entitled to take into consideration the statement that the mattress contained bloodstains from the person of the deceased. Moreover, the presence of blood on the mattress does not seem to be such a violent inference from the fact that the injured man's ribs were violently fractured and that he suffered from internal hemorrhage of the liver and right lung, and lay in that condition upon the mattress for nearly twelve hours. Under such circumstances, a hemorrhage from the mouth would be likely to follow, leaving bloodstains on the mattress. An attorney is entitled to argue to the jury any inference which may be reasonably deduced from the evidence.

Upon an examination of the entire record, we are convinced there was no miscarriage of justice in finding the defendant guilty of manslaughter.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

136 Cal.App. 186, 188

COAST SURETY CO. v. MUNICIPAL COURT OF CITY OF LOS ANGELES (2 cases).

Civ. 9115, 9220.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1934.

Hearing Denied by Supreme Court March 8, 1934.

1. Statutes ⇐276(1).

Rule that statutory remedies are pursued with full realization that Legislature may abolish right to recover, is inapplicable to existing right of action which has accrued.

2. Bail ⇐76.

Liability of sureties on bail bond is limited to precise terms of contract.

3. Bail ⇐79(1).

Municipal court could not set aside forfeiture of bail because statute under which defendant was charged was repealed two months after forfeiture, where statutes governing obligations of surety were not abrogated by repeal, nor complied with by defendant or surety (Pen. Code, §§ 1305, 1306).

Appeal from Superior Court, Los Angeles County, Appellate Department; W. Turney Fox, Victor R. McLucas, and Edward T. Bishop, Judges.

Application by the Coast Surety Company for a writ of prohibition to restrain further proceedings on certain undertakings by the Municipal Court of the City of Los Angeles. From a judgment sustaining a demurrer to the application, plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Bishop Moore, of Los Angeles, for appellant.

Ray L. Chesebro, City Attorney, Ernest K. Maine, Assistant City Attorney and John L. Bland, Deputy City Attorney, all of Los Angeles, for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

CRAIG, Justice.

Upon the forfeiture of bail in the municipal court of the city of Los Angeles, in each of several cases, motions were made to set aside the forfeitures, which were denied. A petition to the superior court for writ of prohibition restraining further proceedings upon said undertakings was there held insufficient and a demurrer thereto was sustained, from which ruling the petitioner appealed.

In each instance the defendant procured from the appellant herein and there was filed the usual undertaking pursuant to the issuance of a complaint in a criminal proceeding that the principal "will appear and answer the charge above mentioned in whatever court it may be prosecuted, and will at all times hold himself amenable to the orders and process of the court, and if convicted, will appear for judgment and render himself in execution thereof; or, if the said defendant fails to perform either of these conditions, that he will pay to the People of the State of California," the amount therein specified. The defendant failed to perform said conditions by remaining absent when his case was called for trial, and said bail was forfeited. Within the time prescribed by law for the appearance of a surety and its principal to apply and excuse the absence of the latter, the appellant moved without appearance of the defendant that the forfeiture be set aside and that the bail be exonerated, which motion was denied. The sole ground of such motion and of appeal arose from repeal by the Legislature of the statute which created the offense with which the defendant was charged. It is contended that such repeal deprived the surety of the right to bring its principal before the court for the purposes of said motion, and that its undertaking was therefore exonerated as a matter of law. But it is conceded that said statute was in force and effect at the time set for trial and that it was not repealed until about two months after the date of forfeiture. Furthermore, the statutes upon which the obligations of a surety for the defendant in a criminal case are founded, prescribing their form, conditions, and procedure for release therefrom, were not abrogated nor is it contended that the principal or his surety attempted to comply therewith, on the date of trial.

[1-3] Sections 1305 and 1306 of the Penal Code require a forfeiture of bail in such case, which was properly entered. While statutory remedies are said to be pursued with full realization that the Legislature may abolish the right to recover (James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082; Callet v. Alioto, 210 Cal. 65, 290 P. 438), this rule does not apply to an existing right of action which has accrued (Callet v. Alioto, supra). "The liability of sureties on a bail bond is limited to the precise terms of their contract." 6 Cor. Jur., p. 1033, § 292; Black v. State, 154 Tenn. 88, 290 S. W. 20. The obligation to produce the principal prior to the date of repeal of the penal statute, and the obligation arising from a statute unaffected by such repeal, in consequence of statutory and contractual conditions precedent being unfilled, an application for relief from liability thereunder was untimely, and the municipal court had no authority to grant it.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

135 Cal.App. 411

ARMAS et al. v. CITY OF OAKLAND et al.

Civ. 8905.

District Court of Appeal, First District, Division 2, California.

Dec. 23, 1933.

Hearing Denied by Supreme Court Jan. 22, 1934.

1. Automobiles ⇐168(2).

Statutory speed limits are not determinative of negligence, but motorist must drive at careful and prudent speed under existing traffic conditions (St. 1923, p. 553, § 113 (a, b), as amended by St. 1927, p. 1436).

2. Automobiles ⇐175(1).

Operator of fire department automobile is not required to observe general rules of road, but is not protected against arbitrary exercise of statutory privileges (St. 1923, pp. 556, 560, §§ 120, 132, as amended by St. 1929, pp. 539, 542, §§ 48, 56).

3. Automobiles ⇐175(1).

Actions for damages caused by fire department automobiles are limited to cases of arbitrary exercise of statutory privileges, or, in effect, willful misconduct (St. 1923, pp. 556, 560, §§ 120, 132, as amended by St. 1929, pp. 539, 542, §§ 48, 56).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

On application for a rehearing.

Application denied.

For prior opinion, see 27 P.(2d) 666.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

C. Stanley Wood, City Atty., John W. Collier, Senior Deputy City Atty., L. R. Weinmann, George P. Tobin, and George J. Lacoste, all of Oakland, as amici curiæ, for appellant.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Allen C. Cunha, of Oakland, and Edward A. Cunha and Dean Cunha, both of San Francisco, for respondents.

PER CURIAM.

[1] In their petition for a rehearing the respondents complain of our failure to emphasize those portions of section 120 of the California Vehicle Act (amended by St. 1929, p. 539, § 48) which direct the operator of an authorized emergency vehicle "to drive with due regard for the safety of all persons using the highway. * * *" We quoted the section with special emphasis on the latter portion which purported to make such operator liable for "an arbitrary exercise of the privileges, * * *" because that seemed to be the only part of the section which was applicable to the problem under consideration. The duty to drive with due regard for the safety of the public is a duty imposed upon the drivers of all vehicles under the terms of subdivision (a) of section 113 of the act (as amended by St. 1927, p. 1436). The seven separate rates per hour specified in subdivision (b) of that section are all "subject to the provisions of subdivision (a) of this section. * * *" It has been held time and again that these specifications of speed limits are not the measure of the care with which a vehicle may be operated and are not determinative of the question of negligence, but that in every instance the operator must drive "at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic. * * *" Section 113. Hence, when the Legislature, in section 120, attempted to except authorized emergency vehicles from all the provisions of the act relating to speed, and then provided that this exception should not include the primary regulation requiring "due regard for the safety" of the public, it added an exception to an exception which completely nullified the latter.

[2, 3] It was for this reason that we concluded that the only reasonable interpretation of the section was that the driver of these vehicles was to be excepted from these provisions of the act, but that such exception should not protect him "from the consequences of an arbitrary exercise of the privileges declared in this section." If the driver of such vehicle was at all times required to drive with due regard for the safety of the public, as all other drivers are required to do, how could he be charged with an arbitrary exercise of such privileges, and what privileges are granted him by the section? In the Balthasar Case, 187 Cal. 302, page 311, 202 P. 37, 41, 19 A. L. R. 452, the Supreme Court, in construing similar language found in section 132 of the act (as amended by St. 1929, p. 542, § 56) relating to the right of way, said: "It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public' only in so far as such 'due regard' affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus."

To our minds the only reasonable interpretation of the act as a whole is that, because of the public necessity for the operation of these vehicles in cases of emergency, the operators are relieved from the general rules of the road applicable to other vehicles, but that an arbitrary exercise of these privileges is not excused. In this respect the rules applicable to such vehicles are not unlike the rules under the so-called guest law found in section 141¾ of the same act (as added by St. 1929, p. 1580), and which was added at the same session of the Legislature. As a guest is limited in his recovery to proof of "wilful misconduct," it was the apparent intent of the Legislature to limit actions for damage caused by these vehicles to cases of an arbitrary exercise of the privileges, which is but another way of saying wilful misconduct.

But, if we are in error in our interpretation of the act, we cannot escape the conclusion that the question is settled by the Balthasar Case, 187 Cal. 302, 202 P. 37, 19 A. L. R. 452. There the Supreme Court said (page 308 of 187 Cal., 202 P. 37, 39): "It follows that the general rules of the road relating to speed and to the turning of corners contained in the Motor Vehicle Act do not apply to fire or police apparatus." When that opinion was written the act required the operator of every vehicle to drive with "due regard to the safety of the public." At the same time section 20 of Act 1917 as amended by the 1919 act, which was then effective, contained provisions similar to those now found in section 144 of the California Vehicle Act (St. 1923, p. 563). Thus when that decision was written there was no express exception of fire apparatus from the regulations covering speed or the other rules of the road. But the court held that such provisions were not applicable to fire apparatus when responding to an alarm. The only substantial change in these provisions of the act since the Balthasar opinion is the use of the expression "authorized emergency vehicle" in place of the longer expressions descriptive of these vehicles. One of the grounds of negligence charged here is the passing to the left of a standing street car in violation of the provisions of the act. (St. 1923, p. 560, § 134, as amended by St. 1929, p. 542). But that is one of the rules of the road which the Supreme Court held was not applicable to such vehicles. There has been no change in the statute in this respect, and we must take that decision as determinative.

Finally, it should be said that the Supreme

Court did not in the latter case "approve" the instructions upon which respondents are here relying. The court merely said that those instructions "are quite as favorable as the defendant was entitled to." If a verdict had gone for the defendant in that case, we have no doubt that the court would have been compelled to hold that these instructions were prejudicial to the plaintiff.

The petition for a rehearing is denied.

LIVINGSTONE v. MacGILLIVRAY et al.*

Civ. 695.

District Court of Appeal, Fourth District, California.

Jan. 8, 1934.

Hearing Granted by Supreme Court March 8, 1934.

1. Municipal corporations ⇐149(2), 217(6).

Tenure of office of officers and employees of municipality whose scheme of government is established by freeholders' charter is controlled exclusively by charter (Const. art. 20, § 16).

2. Municipal corporations ⇐218(6).

Power of civil service board to determine whether position was properly abolished was not necessarily implied from grant of power to hear appeals by employees who were suspended, reduced in rank, or "discharged" (St. 1925, pp. 1194, 1196, §§ 163, 255, 256).

"Abolition" of office or position is not synonymous with "discharge" from employment as regards jurisdiction of civil service board, although effect on individual who loses employment is exactly the same, since in case of "abolition" duties are either absorbed by other persons or entirely discontinued, while in case of "discharge" the duties remain unchanged, but some individual other than discharged employee is selected to perform them.

[Ed Note.—For other definitions of "Abolish" and "Discharge," see Words & Phrases.]

3. Municipal corporations ⇐216(2).

Civil service commission derives power from charter creating it and may not exercise any power not expressly conferred or necessarily implied from prerogatives so conferred.

4. Municipal corporations ⇐218(6).

Findings and order of civil service board *held* not conclusive on question whether action of board of water commissioners of city of San Bernardino in abolishing civil service position was taken in good faith.

5. Mandamus ⇐167.

In mandamus proceeding by former civil service employee to secure salary warrants, evidence to show motive of water commissioners in abolishing petitioner's position *held* properly excluded where bad faith was not pleaded.

6. Mandamus ⇐168(3).

Proof of extraneous facts to show improper motive of water commissioners in abolishing civil service position would not be allowable in absence of some showing on face of resolution of abolition that it was adopted from improper motives.

7. Evidence ⇐417(3).

In mandamus proceeding by former civil service employee to secure salary warrants, testimony as to whether motion of water commissioners to abolish petitioner's position included more than was included in minutes of commissioners *held* properly excluded.

There was no showing that records inadvertently failed to include matter to which reference was made and action of board of water commissioners is evidenced by motion which was adopted.

8. Evidence ⇐471(2).

In mandamus proceeding by former civil service employee, to secure salary warrants, testimony as to reason for refusing to pay salary *held* properly excluded as calling for conclusion.

Appeal from Superior Court, San Bernardino County; George R. Freeman, Judge.

Application for writ of mandate to compel execution and delivery of salary warrants brought by Bard Livingstone against R. W. MacGillivray and others, as members of the Board of Water Commissioners of the City of San Bernardino. From judgment denying the application, petitioner appeals.

Affirmed.

Grant Holcomb, of San Bernardino, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

JENNINGS, Justice.

Plaintiff instituted this action in mandamus in the superior court of San Bernardino county to compel the defendants, as members of the board of water commissioners of the city of San Bernardino, to execute and deliver to him warrants drawn upon the city treasury in the amount of his monthly salary as an employee of the water department of said city for the months of November and December, 1930. From a judgment denying his petition for the writ of mandate, plaintiff has prosecuted this appeal.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 622.

The record presents the following facts pertinent to the questions here involved: On October 28, 1930, and for many years prior thereto, petitioner was an employee of the water department of the city of San Bernardino. On the above-mentioned date he held the position of assistant superintendent and foreman of said department. This position was one that was included in the classified civil service of said city. At a meeting of the board of water commissioners on October 28, 1930, the said board adopted the following resolution:

"As a preliminary economy measure, motion was made by Commr. Ham that the following classified civil service positions be abolished, effective immediately, and that communication be forwarded to the Civil Service Board, advising such action:

"Sanitary Patrolmen, Lytle Creek,
"Meter Inspector,
"Pipe Line Foreman,
"Foreman,
"Plumbers and meter men,
"Plumbers and pipe fitter Gr. 1,
"Plumbers and pipe fitter Gr. 2,
"Plumbers and pipe fitter Gr. 3,
"Acetylene Welder,
"Assistant Superintendent and foreman,
"Assistant Superintendent.

"Motion seconded by Commr. MacGillivray. Unanimously carried."

On October 29, 1930, the superintendent of the water department informed petitioner that his position as an employee of the department had been abolished and that he was no longer employed by said department. On October 30, 1930, petitioner filed an appeal with the civil service board of the city of San Bernardino wherein he set forth the adoption of the above-mentioned resolution abolishing certain positions and alleged that said resolution was in effect an order discharging him from further employment with the city and that his discharge had been effected without the presentation of any reasons therefor and that thereby he had been foreclosed of any opportunity to be heard in his own defense. Thereafter, the civil service board of said city fixed a date for hearing the appeal and notified petitioner and the board of water commissioners of the time and place of such hearing. Subpœnas were thereupon issued by the civil service board directed to the three members of the board of water commissioners requiring their attendance at such hearing. Two members of the board of water commissioners ignored the subpœnas and did not attend the hearing. The third member was present. Upon the conclusion of the hearing, the civil service board made an order in which it was declared that the order of the board of water commissioners made on October 28, 1930, was not made in good faith and was in fact a mere pretext and subterfuge made with the intent and purpose of discharging petitioner from his employment with the water department of said city. It was accordingly ordered that petitioner be reinstated and restored to his former position and that he be compensated at his former rate of pay from November 1, 1930, until the date of his reinstatement. A copy of this order was served upon the three members of the board of water commissioners. Thereafter the petitioner reported to the board of water commissioners and to the superintendent of the water department that he was ready to perform the duties of an employee of said water department but was not permitted to resume his employment. Demand was then made by petitioner upon the board of water commissioners that they execute and deliver to him warrants drawn upon the city treasurer for compensation at the rate of pay which he drew at the time the order of abolition of October 28, 1930, was made. This demand was refused. The proceeding in mandamus was thereupon instituted.

[1] The petition for the writ was evidently drawn on the theory that the civil service board of the city of San Bernardino had complete jurisdiction of the appeal which was taken from the order of the board of water commissioners abolishing the position of foreman and assistant superintendent and that the order of the civil service board reinstating appellant in his former position was final and conclusive. This is likewise the chief contention advanced by appellant upon this appeal. The correctness or incorrectness of this contention depends in the final analysis upon the provisions of the freeholders' charter under which the municipality operated. This must be true because it is settled in California that the tenure of office of officers and employees of municipalities whose scheme of government is established by such a charter is controlled exclusively by the provisions of the charter. Const. Cal., art. 20, § 16; Craig v. Superior Court, 157 Cal. 481, 108 P. 310; Dinan v. Superior Court, 6 Cal. App. 221, 91 P. 806. It becomes necessary, therefore, to examine those provisions of the charter of the city of San Bernardino which are pertinent to the problem under consideration.

Such examination discloses that the original charter conferred upon the board of water commissioners the power "to employ and discharge at will such help as the necessities of the water service may demand." St. 1905, p. 966, § 163. The section of the charter which enumerated the powers of the board of water commissioners and from which the above-quoted language is taken was amended in 1925 (St. 1925, p. 1196, § 163) to read as follows: "To employ such help as the necessity of the water service may demand." In other words, the power to discharge employees at will was thereby taken from the board of water commissioners. In the same year the charter of

the municipality was further amended by the addition of new sections which established a system of civil service regulating the employment, promotion, and discharge of municipal employees. It will be necessary for the purposes of this opinion to set forth the provisions of only one of such sections. Section 255 of the charter (St. 1925, p. 1194) is in the following language: "Any employee of any department in the city in the classified service who is suspended, reduced in rank, or dismissed from a department by the head of that department, may appeal from the decision of such officer to the civil service board, and such board shall define the manner, time, and place by which such appeal shall be heard. The judgment of such board shall be final; Provided, that the provisions of this Section are at all times subject and subordinate to the provisions of Section 256." Section 256 (St. 1925, p. 1194), to which reference is made in the preceding section, provides for dismissal by the mayor upon the vote of two-thirds of the council and has no application to the question under consideration. It is appellant's contention that, so far as he is concerned, the order of the board of water commissioners abolishing the position which he occupied constituted a discharge from employment entitling him to appeal to the civil service board and that having taken such appeal and the appeal having been heard, the order of reinstatement constituted a final adjudication of the matter. If it may fairly be declared that the order of the board of water commissioners abolishing the position amounted to an order of discharge appellant's contention is meritorious. However, in order to justify such a declaration it must appear that the order of the board of water commissioners abolishing the position which appellant held was not what on its face it purports to be but that in fact it was a mere pretext adopted merely for the purpose of effecting appellant's discharge from employment.

[2, 3] It must, we think, be conceded that abolition of an office or position is not synonymous with discharge from employment although the effect upon the individual who loses employment is precisely the same. In the former instance the duties of the position are either absorbed by other persons or they are entirely discontinued while in the latter case the duties remain unchanged but some individual other than the discharged employee is selected to perform them. It must also be conceded that the power to abolish a position may not be tortured into a mere instrumentality to effect the discharge of an employee protected by the salutary provisions of civil service regulations.

Since abolition of position is not intrinsically equivalent to discharge from employment, can it fairly be declared that, under the provisions of the charter of the city of San Bernardino, the civil service board had jurisdiction of the appeal taken by an employee whose position was abolished and has the order of the civil service board such conclusiveness that nothing remains except to carry it into effect?

The charter does not by its terms confer upon the civil service board jurisdiction to entertain an appeal by a municipal employee whose position has been abolished. It does expressly confer upon it jurisdiction to hear appeals by employees who are suspended, reduced in rank, or dismissed from a department by the head of the department. It is settled that a civil service commission derives its power from the charter creating it and that it may not exercise any power which is not expressly conferred or necessarily implied from the prerogatives so conferred. Cook v. Civil Service Comm., 160 Cal. 598, 117 P. 662; Peterson v. Civil Service Board, 67 Cal. App. 70, 227 P. 238; Haub v. Tuttle, 80 Cal. App. 561, 251 P. 925. We entertain the opinion that the power to determine whether or not a position in the classified service has been properly abolished is not necessarily implied from the express grant of power to hear appeals by municipal employees who have been suspended, reduced in rank or discharged.

Appellant places much reliance upon the decision in Barry v. Jackson, 30 Cal. App. 165, 157 P. 828, 830. This was an appeal by the commissioner of public health and safety of the city of Oakland from a judgment ordering a writ of mandate to issue directing appellant to reinstate respondents to certain positions in the city health department in conformity with the findings and decision of the civil service board of said city. The city of Oakland was governed by a freeholders' charter which contained provisions establishing a civil service system. Following a municipal election at which appellant was selected as one of the new city commissioners, the city council adopted a new ordinance which repealed a former ordinance and abolished many former positions in the health department and created new ones, the final result being a reduction in the number of employees in the health department from 34 to 33 and accomplishing a saving in expense to the city of $600 per annum. The new ordinance created two positions of deputy sanitary and plumbing inspectors at a salary of $1,500 per year and two positions of deputy sanitary and plumbing inspectors at a salary of $1,200 per year. Prior to the passage of the new ordinance, two of the respondents were deputy plumbing inspectors and the third respondent was an assistant sanitary inspector. These were positions in the classified civil service. Immediately after the passage of the new ordinance appellant notified respondents that their positions were abolished and that their employment had terminated. He then advised the civil service board of the passage of the new ordinance and of the notice given to respondents terminating their

employment and acting upon the theory that there was no eligible list for positions created by the new ordinance requested approval of the civil service board of temporary appointments made by him of three men without civil service standing. For the purpose of determining whether there was any eligible list applicable to the places of employment provided for in the new ordinance and further to determine whether the temporary appointees were qualified, the civil service board conducted an investigation and determined that the duties attached to the positions created by the new ordinance were identical with those of the positions held by respondents under the former ordinance. Thereupon respondents availing themselves of a charter provision prosecuted an appeal before the civil service board claiming to have been wrongfully discharged. The board again found that the duties under both ordinances were identical and that the respondents were entitled to reinstatement. In its opinion affirming the judgment ordering the issuance of the writ, the appellate court pointed out that no evidence was introduced at the trial which showed that the conclusions reached by the civil service board were not sustained by sufficient evidence and that therefore the reviewing court as well as the trial court was bound by the conclusions of the civil service board. The opinion concludes with the following language:

"The appellant also claims that under the provisions of the charter the civil service board has authority to hear an appeal only when an employee has been discharged, and not in a case where his position has been abolished. The board, on the investigation made by it for the purpose of classifying the places provided for by the new ordinance, found that the positions of the petitioners had not been abolished. But even if it can be said that in repealing the old ordinance the old positions were, technically at least, abolished, and hence that the board had no jurisdiction to hear the appeal, still it is not questioned that the civil service board, when it made its investigation for the purpose of classification, determined that the places of employment were the same under the new ordinance as under the old, from which it follows that the petitioners were entitled to be restored to the position from which they were removed."

It is apparent from the above-quoted language that the decision is not authority for the proposition that the civil service board of a city operating under a freeholders' charter which confers upon such board jurisdiction to entertain appeals by municipal employees who have been discharged from their positions possesses jurisdiction to entertain similar appeals by employees whose positions have been abolished. Still less is it authority for appellant's contention that the order of such a board reinstating municipal employees whose positions have been abolished possesses a finality which renders it conclusive upon a court which is considering the propriety of issuing a writ of mandate sought by a municipal employee whose position has been abolished.

It is our opinion that the case of O'Neill v. Williams, 53 Cal. App. 1, 199 P. 870, 871, is much more in point upon the problem which is here under consideration. In this case the petitioner for the writ of mandate was a corporal in the police department of the city of Oakland. The city council of said city, proceeding in accordance with charter provisions, had created 14 positions of corporal of police, one of which was held by the petitioner. He was suspended from the police department for alleged cause. The suspension continued until it was annulled by the civil service board on an appeal to that body by the suspended employee. Pending the appeal to the civil service board the city council enacted ordinances whose effect was to reduce the number of corporals in the police department from 14 to 7. In his application for a writ of mandate to compel the city auditor to issue his warrant for salary which was claimed to be due for his services as corporal, petitioner contended that the effect of the resolution of the civil service board was not only to restore him to membership in the police department but also to reinstate him as a corporal in said department and to entitle him to receive the salary attached to that position during the period of suspension. This contention did not prevail in the trial court, which rendered judgment in defendant's favor, denying the issuance of the writ. The judgment was affirmed on appeal. The appellate court held that an office or position created by ordinance may be abolished by ordinance, in which case the incumbent ceases to be an officer and that "even when an officer, by reason of having been appointed for a definite term, or by special statutory provision, cannot be lawfully removed except for cause after a full hearing, his office may be summarily abolished whenever the municipal authorities deem it advisable." It is also said that "it is equally well established by the decisions of the courts of many states that provisions restricting the power of removal, similar to those found in the civil service provision of the Oakland city charter, refer to removals for lapse of duty and the like, and are not a restriction upon the power of the council to abolish as many of the places or offices once provided for as it chooses, by abolishing the offices or places themselves, provided such action be taken in good faith."

[4] It is our opinion that the latter of the two cases above discussed correctly states the legal principles which are here applicable. We understand that it is not disputed by appellant in the present action that the board of water commissioners of the city of San Bernardino had the power under the city charter to abolish the position held by appellant pro-

vided that its action in so doing was in good faith. It was pointed out in the O'Neill Case that bad faith on the part of the city council was not pleaded and that it did not appear in the record that the council's action in abolishing the position was a mere pretext or device adopted to effect the plaintiff's discharge from employment. It is likewise true in the instant action that bad faith on the part of the board of water commissioners was not pleaded. It must be conceded that evidence was presented to the trial court which tended to show that the abolition of the position which appellant held in the water department was a mere subterfuge to effect his discharge. On the other hand, ample evidence was presented tending to show that the action of the water board in abolishing the position was taken in good faith. Unless, therefore, it can be said that the findings and order of the civil service board which declare that the abolition of the position was a mere pretext and therefore actuated by bad faith were final and conclusive upon the trial court the general rule binding upon a reviewing court that the judgment must be affirmed if the record contains any evidence to support it is applicable. We have heretofore indicated that it is our opinion that the findings and order of the civil service board are not, in this instance, conclusive upon the question of whether or not the action of the board of water commissioners in abolishing appellant's position was taken in good faith. It follows, therefore, that we are impelled to declare that appellant's principal contention is unsound.

[5, 6] Complaint is voiced that the trial court excluded certain evidence offered by appellant which it is said related to the motives actuating the board of water commissioners in abolishing appellant's position and to the political nature of the controversy. Three specifications of such alleged errors are noted. The first specification relates to the testimony of a witness who was asked to relate a conversation which he had with respondent MacGillivray in the spring of 1929, some two weeks prior to a municipal election. It was declared that the purpose of introducing this evidence was to show motive. The trial court sustained an objection to the question, remarking that he considered that it was not pleaded with sufficient certainty in the petition to constitute an issue. Inasmuch as bad faith of the board of water commissioners in abolishing appellant's position was not pleaded, the court's action in sustaining the objection was manifestly correct. Furthermore, even if bad faith had been pleaded, proof of extraneous facts for the purpose of showing motive was not allowable in the absence of some showing on the face of the resolution of abolition that it was adopted from improper motives. Odd Fellows' Cemetery Association v. City & County of San Francisco, 140 Cal. 226, 235, 73 P. 987.

[7] A second specification is noted in the court's action in sustaining an objection to a question propounded of respondent, A. M. Ham. This witness, who was a member of the board of water commissioners when appellant's position was abolished, was asked if he had not included something in his motion to abolish the position which was not included in the minutes of the board of water commissioners. The court's action in sustaining the objection to the question was correct. There was no showing that the records inadvertently failed to include the matter to which reference was made in the inquiry. Furthermore, if the question had been permitted to be answered and the witness had given the reply which was apparently sought to the effect that appellant was to remain as a laborer in the water department and was not to be discharged no different result could have been attained. The action of the board of water commissioners is evidenced by the motion which was adopted and this motion contained no reference to the retention of appellant as a laborer.

[8] The third specification of error in rejection of evidence consists of the court's action in sustaining an objection to the following question propounded to the witness A. M. Ham: "Is there any other reason, or is there any reason outside of the reason set up as a defense in the pleadings by the defendants in this proceeding, for refusing to pay the salary of Mr. Bard Livingstone?" The court's action in sustaining the objection was correct. The inquiry called for the expression of a pure conclusion on the part of the witness and was therefore clearly improper.

For the reasons stated the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 97

FORSMAN v. COLTON et al.

Civ. 4914.

District Court of Appeal, Third District, California.

Dec. 27, 1933.

1. Trial ⇐178.

Court may grant nonsuit only when, disregarding conflicting evidence and giving to plaintiff all value to which it is legally entitled, indulging in every legitimate inference which may be drawn from evidence, result is determination that there is no evidence sufficient to support verdict for plaintiff.

2. Automobiles ⇐181(1).

"Willful misconduct," within automobile guest statute, is something apart from negligence, even gross negligence, and involves distinct positive elements rather than merely negative elements of negligence or carelessness (St. 1931, p. 1693, § 141¾).

Willful misconduct is much more than mere negligence, or even gross or culpable negligence, and involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its probable consequences. It is willfully, that is, intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident or injury to the passenger would be probable.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

3. Automobiles ⇐181(1).

To constitute "willful misconduct," within automobile guest statute, there must be actual knowledge or that which in law is deemed to be equivalent of actual knowledge, of peril to be apprehended from failure to act, coupled with conscious failure to act to end of averting injury (St. 1931, p. 1693, § 141¾).

4. Automobiles ⇐181(1).

Driver who fell asleep and turned automobile directly down bank to avoid tipping when wheels became imbedded in soft dirt *held* not guilty of "willful misconduct," so as to authorize recovery by guest for injuries (St. 1931, p. 1693, § 141¾).

5. Automobiles ⇐6.
Constitutional law ⇐168, 307.

Amendment to automobile guest statute eliminating gross negligence as ground of recovery *held* not unconstitutional as destroying right of recovery for negligence (St. 1931, p. 1693, § 141¾; Const. Cal. art. 1, §§ 13, 16; Const. U. S. art. 1, § 10).

6. Constitutional law ⇐106.

Guest injured in automobile accident December 15, 1931, could not object to amendment to guest statute restricting circumstances permitting recovery effective August 14, 1931, since she had no vested right prior to accident (St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Irene Forsman against Julia Colton and another. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

L. C. Smith, of Redding, for appellant.

Hugh K. McKevitt, of San Francisco, and Carr & Kennedy, of Redding, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment of nonsuit in an action alleging willful misconduct, brought by plaintiff against defendants.

[1] The court may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict or judgment in his favor if such were given. Perera v. Panama-Pacific International Exposition Co., 179 Cal. 63, 175 P. 454.

It therefore becomes necessary in order to pass upon the ruling of the court to review the evidence introduced by plaintiff and determine whether or not there was sufficient to support a verdict in her favor.

About 2 o'clock of an afternoon a few days prior to Christmas, 1931, defendants, husband and wife, invited plaintiff to accompany them into the mountains to get a Christmas tree. The invitation was accepted and the three set out in defendants' car. They reached their destination over a narrow mountain road without mishap, and found a tree suitable for their purpose. On the way home Mr. Colton was driving, and seated next to him was Mrs. Colton, and on the outside was Mrs. Forsman. The return was made over the same narrow mountain road they had traveled in going out. The road was muddy, some snow lying about in spots, but the sun was shining and they were traveling downgrade about ten miles an hour. They had not proceeded far on the return trip when on a turn at one of the wider

portions of the highway, the car left the road, turned over, and injured plaintiff.

There are two versions of the cause of the accident. Mrs. Forsman testified they were driving slowly, and immediately before they reached the spot where the car went over the bank there was a lull in the conversation, and the car began gradually to pursue a course from the right to the left side of the road for a distance of about thirty feet. She turned to look at the driver and observed his eyes were closed, his head bowed, and the car heading directly toward the embankment. Whether she made an outcry or not she did not remember, for in the next instant they were over the edge of the road, and the car lying on its side about six feet below the grade. Colton, the driver, denied that he was asleep. He admitted, however, that he had the night before attended a meeting of an organization of which he was a member, and the only sleep he had obtained was upon a work bench at his place of employment. He testified he was driving slowly, not over ten miles an hour; the road was muddy and slippery, and as he approached the turn where the accident occurred the left wheel of the automobile got into the soft dirt on the left side or shoulder of the road; as he attempted to bring the car back again into the road, the wheel mired so deeply into the soft mud that the car slipped toward the left. When he realized he could not bring the car back on the road, he seized the dash to protect his companions from falling, at the same time to avoid upsetting, turned the wheel sharply to the left in an attempt to head the car straight down the bank. He apparently made no attempt to apply the brakes. The car left the roadway and tipped over on its side. The accident happened about 3 o'clock of an afternoon upon a road with which the driver was familiar. The sky was clear and there was nothing to obstruct the vision of the driver, and the car was mechanically in good condition.

The question here for consideration is whether this evidence will support a judgment based upon "willful misconduct" on the part of defendant, as that term is used in section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

The Supreme Court of Massachusetts, in Re Burns' Case, 218 Mass. 8, 105 N. E. 601, 602, Ann. Cas. 1916A, 787, defines "willful misconduct" by saying it "is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences."

This was apparently the meaning that the Legislature intended to adopt, judging from the legislative history of section 141¾ of the California Vehicle Act.

In 1929 ordinary negligence was eliminated as a basis for recovery in guest cases, the proviso then being enacted that the owner, driver, or person responsible for the operation of a vehicle should not be released from liability if the death or injury of a guest was the proximate result of the intoxication, willful misconduct, or gross negligence of such owner, driver, or person responsible for the operation of such vehicle. In 1931 the Legislature went a step further and gross negligence was eliminated, now making it necessary to establish either intoxication or willful misconduct.

[2] As said in Howard v. Howard (Cal. App.) 22 P.(2d) 279, 281, "the intent of the Legislature, as expressed in these enactments, requires that willful misconduct be interpreted as something quite different from negligence, even gross negligence, and that it involves distinct positive elements rather than the merely negative elements of negligence or carelessness."

[3, 4] In Walker v. Bacon (Cal. App.) 23 P.(2d) 520, 522, the court considering the case of Howard v. Howard, supra, said that to conclude that "willful misconduct" is something different from negligence is to invite difficulties, for if there is no negligence there can be no willful misconduct, and, "While negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is 'willful' on the part of the responsible person." The court then proceeds to define willful misconduct as "willfully, that is intentionally, doing something which a driver should not do, or failing to do something which he could do, in the operation of a motor vehicle under circumstances from which an accident or injury to the passenger would be probable. Of course, willful misconduct may be inferred from the circumstances surrounding the accident." Or, as said in Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512: "To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

Applying these rules to the instant case it seems clear that under neither theory can the injuries to the plaintiff be said to be the result of willful misconduct. Whether we accept the explanation of defendant Colton that the wheels of the car became imbedded into the soft dirt of the roadway, causing the car to bear to the side of the road, and finding the

car slipping, he, to avoid tipping, turned sharply to the left in order to go directly off the edge; or whether we accept the theory of plaintiff that defendant fell asleep at the wheel, would not constitute willful misconduct.

In the case of Kaplan v. Kaplan, 213 Iowa, 646, 239 N. W. 682, 684, an Iowa court had before it for consideration a case in which a father invited his daughter to accompany him by automobile on a trip, and while the father was driving, fell asleep, and his daughter was injured in an accident which followed. The action was brought under an Iowa statute (Code 1927, § 5026-b1) which provides that a guest cannot recover if "damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." Upon the trial of the action, the lower court, on motion, directed a verdict in favor of the defendant on the ground that defendant, as a matter of law, was not guilty of recklessness within the meaning of the statute. In the course of its opinion the Supreme Court said: "* * * The fact that the father permitted sleep to overcome him and drove the car while asleep is the only proposition argued by the parties as the cause of the accident. There is no evidence of any other cause. Can it be said that a person, while driving along the highway, who is involuntarily overcome by sleep is guilty of reckless operation of the automobile within the meaning of the law? We think not. * * * His unconscious conduct while asleep, or semiconscious conduct while going to sleep, or the mere fact that he permitted sleep to overcome him, do not evince a heedless disregard of the rights of the daughter." Coconower v. Stoddard (Ind. App.) 182 N. E. 466, 469.

Weighing the evidence adduced in the light of the definition of willful misconduct, we must hold that no willful misconduct is here shown and the order granting the nonsuit was proper.

[5] Appellant also raises the question of the constitutionality of section 141¾ of the California Vehicle Act, claiming that by amending the section by eliminating "gross negligence" as a means of recovery to a guest, it entirely destroys the right of recovery for negligence, which is in violation of section 10, article 1 of the Federal Constitution, and sections 13 and 16, article 1 of the Constitution of the state of California.

We believe the contention is fully answered adverse to appellant in the case of Castro v. Singh (Cal. App.) 21 P.(2d) 169, and the constitutionality of the section had already been upheld in Callet v. Alioto, 210 Cal. 65, 290 P. 438.

[6] The accident here considered occurred December 15, 1931, and the amendment to section 141¾ of the California Vehicle Act became effective August 14, 1931 (St. 1931, p. 1693). It cannot, therefore, be contended that appellant had any vested right or interest prior to the infliction of the injuries of which she complains. She cannot, therefore, object to the action of the Legislature in restricting the circumstances under which a recovery for injuries may be had.

The judgment of nonsuit is therefore affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

136 Cal.App. 6

BOLE v. McADAMS et al.

Civ. 1405.

District Court of Appeal, Fourth District, California.

Dec. 18, 1933.

1. Appeal and error ⇐935(2).

Appellate court favors a hearing on merits wherever possible.

2. Appeal and error ⇐957(1). Judgment ⇐139.

Motion to set aside default judgment is addressed to sound discretion of trial court, and its order will not be disturbed, except for clear abuse of discretion.

3. Exceptions, bill of ⇐51.

Where delay in preparing and serving bill of exceptions was caused by failure of appellant to pay for transcript promptly, refusal of trial court to vacate order denying application for relief from default *held* not error (Code Civ. Proc. § 473).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Robert E. Bole and Robert E. Bole as administrator of the Estate of Helen R. Bole, deceased, against Ed McAdams and others. Judgment for defendants, and plaintiff appeals. From an order denying plaintiff's motion to vacate order sustaining objections to settlement of proposed bill of exceptions and denying plaintiff relief from default in preparing and proposing a bill of exceptions, plaintiff appeals.

Affirmed.

Ernest B. Coil, of Los Angeles, for appellant.

Lane & Lane, of Long Beach, for respondent.

MARKS, Justice.

This is an appeal from an order of the superior court of Orange county made on the 11th day of September, 1931, denying the motion of appellant to vacate and set aside an order made on the 7th day of August, 1931, sustaining objections of respondent to the settlement of a proposed bill of exceptions on appeal from a judgment, and denying appellant relief from his default in preparing and proposing such bill of exceptions for settlement, under the provisions of section 473 of the Code of Civil Procedure.

Judgment was rendered in favor of respondent in the trial court on March 14, 1931, and a notice of appeal was filed within the time allowed by law. On April 21, 1931, appellant obtained an order extending his time to prepare and serve his proposed bill of exceptions on appeal, to and including the 5th day of May, 1931. A copy of this order was served upon the attorneys for respondent, and the original was filed with the county clerk. On May 2, 1931, a further order extending time to and including May 15, 1931, was obtained and filed, but was not served. On May 18, 1931, another order extending time to and including May 25, 1931, was signed, but was neither served nor was it filed on that day. Other orders attempting to extend the time to prepare and serve the proposed bill of exceptions to June 1, 1931, were signed. On the last-named date appellant served his proposed bill of exceptions. Counsel for respondent objected to the settlement of any bill of exceptions, and reserved the right to object to such settlement, and on June 8, 1931, served and filed written objections to the settlement of a bill of exceptions on appeal. Appellant then served upon respondent a written notice that the proposed bill and proposed amendments would be presented to the trial judge on June 20, 1931. This was continued to August 7, 1931, on which date respondent objected to the settlement of the bill of exceptions, and the court sustained such objections and denied the application of appellant to be relieved from his default in his delay in preparing and presenting the bill and dismissing the proceedings to settle the bill of exceptions. It would seem that the principal reason for the delay in preparing the proposed bill was the failure of counsel for appellant to promptly secure from the court reporter the typewritten transcript. On August 24, 1931, appellant gave notice that on September 4, 1931, he would move for the requested order. His motion was denied, and this appeal followed.

Affidavits of counsel for appellant, counsel for respondent, and the court reporter were submitted to the trial judge on the hearing of the motion. From these affidavits it appears that the appellant himself ordered the transcript written up by the reporter; that it was then estimated that the cost would amount to $37.50, which sum was paid by appellant; that the transcript was completed by the reporter on May 4, 1931; that on that date he notified the secretary of counsel for appellant of such fact over long-distance telephone; that on May 6, 1931, he wrote the appellant advising him that the transcript was completed and would be delivered to appellant's counsel as soon as appellant paid him the sum of $20.75, the balance due for his services in making the transcript; that the orders extending time within which to prepare and propose the bill of exceptions were sent the reporter by mail by counsel for appellant; that each order was presented by the reporter to, and signed by, a judge of the superior court of the county of Orange on the day it was received; that the order dated May 18, 1931, which we have referred to, was received by the reporter through the mail on that day and presented to the judge and signed by him. These facts are undisputed, except that counsel for appellant in his affidavit states that the order dated May 18, 1931, was sent to the reporter with a letter from such counsel dated May 14, 1931.

It is admitted by appellant that the orders attempting to grant extensions of time after May 15, 1931, were all void, and that appellant was in default on June 1, 1931, when he served the proposed bill.

[1, 2] It is the established policy of the law in California to favor a hearing on the merits where possible. An order having such a result is regarded with greater favor by an appellate court than one having the contrary effect. It is also equally well settled that "a motion to set aside a default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below." Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148, 149.

[3] In the instant case the following facts seem to be well established: That appellant himself ordered the transcript; that it was ready for delivery on May 4, 1931; that counsel for appellant was informed of this fact on that date; that appellant was informed of it on May 6, 1931, and of the additional fact that the transcript would not be delivered until payment of $20.75 had been made to the reporter; that the reporter acted as the agent of counsel for appellant in presenting the various orders extending time to the trial court; and that therefore appellant is charged with notice that the order which bears date May 18, 1931, was not signed until that date.

Under these circumstances, we have concluded that the delay in preparing and serving the proposed bill of exceptions, caused by not securing the reporter's transcript, is

chargeable to appellant individually, as he did not promptly pay the bill of the reporter nor promptly notify his counsel of his inability to pay so that arrangements might have been made for the delivery of the transcript. Under these circumstances, we conclude that there was no such an abuse of discretion on the part of the trial judge in refusing to vacate the order in question and relieve appellant from his default that we can disturb this order on appeal.

Order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 44

HUDGINS v. STANDARD OIL CO. OF CALIFORNIA et al. (two cases).

RENISON v. SAME (two cases).

Civ. 4924, 4925, 4943, 4944.

District Court of Appeal, Third District, California.

Dec. 22, 1933.

1. Appeal and error ⇐878(4).

On plaintiffs' appeal from judgment for defendants, defendants could not request reviewing court to consider plaintiffs' contributory negligence.

2. Pleading ⇐166.

All statements of new matter in answer are deemed controverted without further pleading except as to written instruments set out in answer.

3. Appeal and error ⇐930(4).

All intendments are in favor of general verdicts and everything necessary to be found by jury not otherwise controverted will be deemed found, and included therein, and any material facts tendered by issues and supported by testimony which are not included within special verdicts, will be deemed to have been found in favor of party in whose favor general verdict is returned.

4. Release ⇐60.

General verdict for plaintiffs and special verdicts finding that plaintiffs had executed releases, that defendants made no misrepresentations and did nothing to prevent plaintiffs from learning contents of releases, *held* not inconsistent, so as to justify judgments for defendants, where interrogatory involving mistake was not submitted, jury being presumed to have found that releases were executed through mistake (Civ. Code, §§ 1542, 1689, subd. 1).

5. Trial ⇐359(1).

Special finding is inconsistent with general verdict only when as matter of law finding as taken by itself would authorize judgment different from that permitted by verdict.

6. Release ⇐16.

Mutual mistake of fact justifies rescission of release from liability for personal injuries.

7. Appeal and error ⇐878(4).

Defendants could not claim in reviewing court that directed verdict was proper where motion for directed verdict was not made (Code Civ. Proc. § 629).

8. Appeal and error ⇐1176(5).

Where motion for directed verdict was not made, and court erroneously set aside general verdict for plaintiffs and entered judgment for defendants on special verdicts on ground that they were inconsistent with general verdict, reviewing court would order trial court to enter judgment for plaintiffs on general verdict (Code Civ. Proc. §§ 625, 629, Civ. Code §§ 1542, 1689, subd. 1).

9. Appeal and error ⇐985.

Orders of trial court denying motions to terminate proceedings to settle transcript will not be interfered with absent abuse of discretion.

Appeals from Superior Court, Yuba County; E. P. McDaniel and Warren Steel, Judges.

Actions by Irwin E. Hudgins and by Russel B. Renison against the Standard Oil Company of California and another. From orders setting aside general verdicts and entering judgments for defendants, plaintiffs appeal, and from orders denying defendants' motions to terminate the proceedings to settle the transcript, defendants appeal.

Orders entering judgments for defendants reversed with directions, and orders denying defendants' motions to terminate proceedings to settle transcript affirmed.

Frank A. Duryea, of Marysville, for appellants.

Rich, Weis & Carlin, of Marysville, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The above-entitled causes being actions for damages resulting from the same automobile collision were tried together before the same jury, are reported in one transcript, and presented to us upon one set of briefs. The jury

returned a general verdict in favor of the plaintiff Hudgins, for the sum of $1,000, and in favor of the plaintiff Renison, for the sum of $500. The jury also returned three special verdicts. The court set aside the general verdicts on the alleged ground that the special verdicts or findings of the jury were inconsistent therewith, and entered a judgment for the defendants. From this judgment, the plaintiffs, respectively, appeal.

The general verdict in the Hudgins case is as follows: "We, the jury, find for the plaintiff, and assess his damages in the total sum of $1,000.00."

In the Renison case the verdict was in similar language, save and except that only $500 was allowed as damages. The special verdicts of the jury consisted in answers to three questions: "Question 1: Did the plaintiff, on or about October 19, 1932, execute and deliver to the defendants, or for them in this case, the instrument dated October 19, 1931, a copy of which is set forth in defendants' answer? Answer: Yes. Question 2: Did the defendants, or any one acting for them, make any misrepresentations to plaintiffs as to the contents, character or legal effect of such instrument? A. No." The third question appearing in the transcript as No. 4 reads: "Did the defendants, or their representative, say anything to the plaintiff or do anything to prevent the plaintiff from becoming fully acquainted with the character, contents or legal effect of said instrument before the signing thereof by the plaintiff? A. No." These three questions were propounded in both cases and the answers were the same.

The complaint alleges in the Hudgins case, which is similar in all respects to the Renison case save as to damages set forth, the incorporation of the Standard Oil Company, the existence of a certain highway known as and called the "Tahoe-Ukiah Highway"; that the collision occurred on said highway at a point between 3 and 4 miles from the city of Marysville; that at the point of collision the highway was and is approximately 40 feet in width; the main traveled portion thereof was and is approximately 18 feet in width; that on the 17th day of October, 1931, near the hour of 6:30 p. m., while it was dark, the plaintiff was a passenger riding in a Ford touring car in a northeasterly direction along said highway, and at a point indicated, as herein stated, it came in contact with a Ford truck belonging to the Standard Oil Company, driven by its agent, Edward E. Chave; that the night was dark; and that the Ford truck belonging to the defendant was being driven without any headlights. As a result of the collision, it is alleged the plaintiff suffered personal injuries, and for which it appears that the jury awarded him the sum of $1,000. In the same collision between the same automobiles the plaintiff Renison is alleged in his complaint to have suffered personal injuries, and for which he was awarded the sum of $500.

As a defense to the action the defendants pleaded contributory negligence, and also that the plaintiffs had executed releases in full. The release in the Renison case was based upon the payment of the sum of $15. The release in the Hudgins case, which is identical in language with the release in the Renison case, save as to the amount of money received, is as follows:

"Release in Full

"Received of Standard Oil Co. of California the sum of Fifty-five and no/100 dollars (55.00)

"In consideration of which sum I hereby release and discharge Standard Oil Co. of California, and E. E. Chave, of and from any and all claims and demands which I now have, on account of, or arising out of an accident which occurred on or about the 17th day of Oct. 1931, three miles north of Marysville, California, resulting in personal injury.

"It is understood and agreed that this release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and all rights under Section 1542 of the Civil Code of California are hereby expressly waived.

"It is further understood and agreed that the payment of said sum is not, and is not to be construed as, an admission on the part of said payors of any liability whatsoever in consequence of said accident.

"Dated at Marysville, Calif., this 19th day of Oct. 1931.

"Irwin E. Hudgins (L. S.)"

In both cases the plaintiffs filed an affidavit denying the genuineness and due execution of the writing entitled "Release in full."

Upon the part of the plaintiffs it is insisted that the court erred in holding that the special verdicts or findings of the jury were inconsistent with the general verdicts. In addition to controverting this position taken by the plaintiff in each case, the defendants contend that the plaintiffs were guilty of contributory negligence in that the Ford automobile in which they were riding was being driven without any headlights; that they were aware of this fact, and, in connection with others who were riding in the automobile, agreed to go on to their destination after the headlights had gone out.

[1] Whatever may be our views as to the merits of the respondents' contention that the plaintiffs were equally guilty of negligence with the driver of the Ford truck belonging to the respondent corporation, and whatever wrong said driver was committing, plaintiffs were likewise committing, we are precluded from considering this contention of the respondents by reason of the fact that respondents are not appellants and are not

in a position to present the question of contributory negligence for our consideration. The correctness of the judgment of the trial court must be measured by what we are about to say, the authorities hereinafter cited, and whether the trial court was correct in its action in view of the limited powers granted by the sections of the Code of Civil Procedure hereinafter considered.

In Rapp v. Southern Service Co., 116 Cal. App. 699, 4 P.(2d) 195, 198, we find the following which we think is the law applicable to the instant case: "It is the general rule that a respondent in whose favor a judgment is rendered is interested only in maintaining the judgment, and that he cannot, on an appeal of the opposite party, ask a court of review to consider any errors against him. 2 Cal. Jur., p. 839. This is true even though errors of which respondent complains were excepted to by him in the trial court and included in a bill of exceptions and are argued or discussed in respondent's brief. 2 Cal. Jur., p. 839; 3 Cor. Jur., p. 1404. 'The party who prevailed at the trial has no errors, committed at the trial, to complain of, and if he had he would not be heard to complain, for he was not injured thereby.' Byxbee v. Dewey, 128 Cal. 322, 324, 60 P. 847. The following California decisions are authority for the above stated rule: Seaward v. Malotte, 15 Cal. 305; Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876; Estate of Olmsted, 122 Cal. 224, 54 P. 745; Coyle v. Lamb, 123 Cal. 264, 55 P. 901; Globe Grain & Milling Co. v. Drenth, 41 Cal. App. 604, 183 P. 285, 286; Meeker v. Cross, 59 Cal. App. 512, 211 P. 229, opinion on application for rehearing."

[2] Under our form of pleading, save and except as to written instruments set out in the answer, all statements of any new matter appearing therein are deemed controverted without any further pleading. This rule is well settled, as appears by the cases cited in 21 California Jurisprudence, page 164. Thus, a plaintiff without any further affirmative pleading may set up fraud, misrepresentation, mistake, rescission, statute of limitations, undue influence, etc.

[3] This brings us to a consideration of the question: Are the special verdicts inconsistent with the general verdicts? It is unnecessary to cite the cases holding that all intendments are in favor of the general verdicts, and that everything necessary to be found by the jury, not otherwise controverted, will be deemed found and included therein. It follows from this statement that, if any material facts tendered by the issues and supported by testimony are not included within the special verdicts, such facts will be deemed to have been found in favor of the party in whose favor the general verdict is returned.

Reverting to the special interrogatories submitted to the jury, and their verdicts or findings thereon, it appears that only three questions were actually passed upon, to wit: (1) That the plaintiffs executed the instrument and delivered the same as set forth; (2) that the agents of the respondents did not make any misrepresentations to either plaintiff as to the contents, character, or legal effect of the release; and (3) that no representative of the defendants did anything to prevent the respective plaintiffs from becoming fully acquainted with the character, contents, or legal effect of the instruments before the signing thereof.

No interrogatory or question was presented to the jury as to whether the respective instruments were not executed through mistake, or through the mutual mistake of the parties thereto. Section 1689, Civil Code, provides for the setting aside of a contract or release under such circumstances. Subdivision 1 of that section reads: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party," rescission may be had. Likewise, section 1542, Civil Code, is applicable in that it is worded as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

[4] In order to render the special verdicts of the jury inconsistent with the general verdicts it would have been necessary to submit an interrogatory involving the subject of mistake, and, there appearing no such interrogatory and no such special finding or verdict on the part of the jury, it must be presumed, in support of the general verdict, that the jury came to the conclusion that the release was executed through the mistake, and, as appears by the testimony hereinafter to be cited, the mutual mistake of the parties thereto.

[5] In 24 California Jurisprudence, page 910, the rule as to presumptions in favor of general verdicts is thus stated: "All presumptions are in favor of a general verdict, and no presumption will be indulged in favor of answers to special interrogatories as against the general verdict. The language of a finding should not be strained to make out a case of conflict, but should if reasonably possible be so construed as to harmonize with the verdict. The findings will be considered as a whole, and obscurities and apparent inconsistencies should be given weight in favor of, rather than against, the general verdict. A special finding is held inconsistent with a general verdict only when, as a matter of law, the finding as taken by itself would au-

thorize a judgment different from that permitted by the verdict." This rule is a little more emphatically stated in 27 Ruling Case Law, pages 880, 881, to wit: "The special facts returned must be of such a nature as to exclude the possible existence of other controlling facts, provable under the issues, relating to the same subject. They must clearly exclude every conclusion that would harmonize with the general verdict, as it is only when the antagonism between the special findings and the general verdict on material questions is of such a nature as to be beyond the possibility of reconciliation under any supposable state of facts provable under the issues that the special findings control. Accordingly in the absence of evidence, and especially where only a part of the facts is embraced in special findings of the jury, the special findings, so far as they will admit of it, will be given an interpretation consistent with the general verdict, and the general verdict will be deemed to be sufficiently supported by the evidence, and to include every element necessary to its validity not negatived by the special findings."

It may very well be, and we are concluded by the special verdicts of the jury, that the plaintiffs in both cases executed the instruments and delivered them on the dates mentioned; that no one for the defendants made any misrepresentations, and that no one for the defendants did anything to prevent the respective plaintiffs from becoming fully acquainted with the character, contents, or legal effect of the instruments set out in the respondents' answers, and yet if those instruments were executed under mistake, or by the mutual mistake of the parties thereto, the findings are not inconsistent with the general verdicts because a finding to that effect which is presumed to be included in the general verdicts would entitle the plaintiffs to have the verdicts stand as rendered, irrespective of the three questions answered in favor of the respondents.

An exactly similar situation is presented in the case of Moore v. Copp, 119 Cal. 429, 51 P. 630. There, four questions were presented to the jury. No. 1 related to the mental incompetency of the plaintiff; No. 2 as to whether it was executed under undue influence; No. 3, through fraud; No. 4, by mistake. The first three questions were answered in the negative; the fourth, answered affirmatively. It was there held that the judgment should follow the affirmative answer as to the contract having been executed by mistake. This case illustrates the insufficiency of the three special verdicts or findings to affect the integrity of the general verdicts.

In Tremble v. Tuman, 175 Cal. 696, 167 P. 142, the rule is stated and followed that a general verdict for the plaintiff imports a finding in favor of the plaintiff of all the averments of the complaint material to his recovery.

To the same effect might be cited a number of cases, but the authorities referred to in 24 California Jurisprudence, supra, and 27 Ruling Case Law, supra, we deem sufficient.

In Gambrel v. Duensing, 127 Cal. App. 593, 16 P.(2d) 284, 288, this court, considering the question of mistake, referred to the section of the Code relating thereto, as follows: "We do not need to cite authorities that a release can be set aside for a mistake of fact, as section 1542 of the Civil Code provides for such procedure." In that case there was a mutual mistake as to the extent of the injuries suffered by the plaintiff, and the record shows that only certain items of damages entered therein.

That the extent of the injuries suffered by the respective plaintiffs was not considered at the time of the said motion and was not taken into consideration by either of the parties thereto, is shown not only by the testimony of the plaintiff in each case, but also by the testimony of the person who negotiated the release on the part of the respondents.

Paul Mackie, called as a witness on the part of the defendant, and the one who conducted the negotiations, testified as follows: "Tell the jury what you said to Mr. Renison, and what he said to you or what anybody else said in the presence of Mr. Renison? A. I believe the first thing we did was to take his statement as to how the accident occurred. I took that down in writing on one of our tablets which he signed. We then discussed settlement and he said he wanted his doctor's bills paid, realizing that both cars were to blame, but he was poor and that was all he was looking for, and we called Dr. Abbott in Marysville and from him obtained the number of treatments which he estimated would have to be taken. I believe he said five or three dollars a treatment, making a total of fifteen dollars. That amount was agreed to by Renison and I made out a release for that amount, which he signed, and were witnessed by both the Standard Oil men."

In relation to the Hudgins case, the same witness further testified as follows: "The money question was brought up. He said he wanted his doctor's bills paid, and loss of wages. I had phoned to Dr. Duncan, and from him I got the nature and extent of the injuries to Mr. Hudgins, and also got the approximate amount of the doctor's bill. Q. Did you talk that over with Mr. Hudgins? A. Yes, sir. Q. How much did you arrive at? A. $25.00 for the doctor bill, and figured to go to Mr. Duncan—figured he would be disabled for 2 weeks. He said he made $2.50 a day, and we figured on that basis he would have made $30.00 for loss of wages, plus the $25.00 doctor bill, making a total of $55.00."

Mr. Renison's testimony as to the same

question is as follows: "I went up to the Standard Oil Company. Q. What was the conversation? A. I just asked him if he thought that he hadn't ought to pay the doctor bill. It was a Standard Oil truck that ran into us, and this chiropractor wanted his money. The witness testified that when he went to the Standard Oil Company he met Mr. Mackie and Mr. Monijhan and Mr. Gardner. Q. Did you tell Mr. Gardner what the chiropractor told you about your injuries? A. Yes, sir. Q. What did you tell him? A. I told Mr. Gardner that the chiropractor said it would take 5 or 6 treatments to fix my back, and he said, 'I think the Standard Oil Company will more than be glad to pay your doctor bill,' and I told him that was all right. I said, 'I haven't any money,' and I felt that I ought not to pay the doctor bill, and they should pay me for laying off, and when I told him that, he didn't say whether they would pay for laying off or not. Q. Did you at that time know how long it would take to restore you under the treatment of the chiropractor? A. No, sir. Q. Did you know at that time that you had injuries which you found out afterwards you had? A. No, sir."

Plaintiff Hudgins testified: "That he signed the release by his initials; that he was not able to read it at that time; that he was in such misery and pain at the time that he could not sit up; that at the first meeting with Mr. Mackie and Mr. Monijhan no conversation was had about doctor bills; that upon the second interview, on the same day Mackie said he was willing to pay all the doctor bills, and they would do what was right, and he told me the doctor's bills would be $25.00, and I told him I didn't feel like settling that way. He said it would be just a matter of a few days until I would be up and go to work; he said about two weeks; he said the doctor told him that; I didn't talk to the doctor myself; I told him then I thought I ought to have wages for two weeks' work; that I would be laid up; he asked me how much I was getting, and told him 25c an hour, or $15.00 a week, and he said he would add $30.00 for that, and he went in another room and wrote that up, marked out the $25.00, and came back with it reading $55.00; I then signed it, nothing further was said about any compensation or damages, than what I have said."

Our attention has not been called to any conflicting testimony to what is here set forth. We do not need to detail the injuries suffered by the respective plaintiffs, but the excerpt from the testimony of Dr. Duncan will show that the extent thereof was never considered. This doctor testified as follows: "I had occasion to treat Irwin Hudgins on or about October 17, 1931, first at my office and then he was sent to the County Hospital. He had a fractured nose and a fractured upper jaw bone, which extended back into the roof of the mouth, and some minor sprains of his finger and hand. I afterward sent him to Dr. Kline, a dentist. The principal treatment was done by the dentist. I don't know whether he has entirely recovered from the effect of that or not; I have not examined him. I never put in any charges; I treated him as a county patient; I did not know at the time he was a private patient, and never made any charge. $50.00 would be a fair charge as a private patient." The dentist stated that $50 would be a fair charge for his services. Dr. Hoffman testified that the injury to the nose would remain unless he was further operated upon.

It may here be stated that the collision between the two automobiles occurred on the evening of October 17, 1931, and that the releases were signed on October 19, 1931, the second day thereafter. Dr. Hoffman testified that he treated the plaintiff Renison between six and eight weeks, and that his bill therefor amounted to $112; that Renison had many other injuries and fracture of the second rib.

Somewhat similar questions were involved in the cases of Davis v. Diamond Carriage & Livery Co., 146 Cal. 59, 79 P. 596, and Mellus v. Potter, 91 Cal. App. 700, 267 P. 563, where the record showed that only certain items of the damages were considered at the time of the signing of the releases.

[6] This testimony shows that the jury may very well have considered and found that the releases were executed and signed by, through, and on account of the mutual mistake of the parties. That a mutual mistake of facts justifies the rescission of a release from liability for personal injuries appears in the well-considered case of St. Louis-San Francisco Ry. Co. v. Cauthen, 112 Okl. 256, 241 P. 188, 48 A. L. R. 1447. This case is so replete with citations that we can only refer to the volume of the Pacific Reporter, where the opinion is set forth in full. That such a finding must be presumed to have entered into the general verdict appears from the authorities which we have cited, and therefore that the court was in error in concluding that the special findings or verdicts of the jury contravened and were inconsistent with the general verdict.

[7] The record shows that no motion was made for a directed verdict, and, therefore, the respondents are not in a position to urge that such procedure was correct under the provisions of section 629, Code of Civil Procedure. A reference to that section demonstrates that no basis was laid for the entry of judgment in favor of the respondents, by reason of what the court should have done but did not do. The first paragraph of that section reads: "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any

time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict."

Had the judgments been entered upon the general verdicts in favor of the plaintiffs, then the respondents, upon motion for new trial, could have presented to the court the issue that the plaintiffs were guilty of contributory negligence as a matter of law, but that was not done. Likewise, if the judgments had been entered in favor of the plaintiffs, then upon appeal to this court the respondents could have urged that the record establishes the plaintiffs guilty of contributory negligence as a matter of law.

The motion that may have been made in the trial court does not appear in the transcript, but as there does appear a recital in the judgments that the court entered the same pursuant to its construction of the special findings, in accordance with the request of counsel for the respondents, the conclusion is unavoidable that the whole proceeding was based upon section 625, Code of Civil Procedure, which section contains the following sentence: "Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly."

[8] As we have said, there being no motion for a directed verdict, the court had no power to set aside the general verdict and enter judgment in favor of the respondents upon any other section of the code than 625, supra, which action we have held to be erroneous. It follows, therefore, that we have no recourse but to set aside the judgments entered upon the special findings, and to direct the trial court to enter judgment in each case in favor of the respective plaintiff therein, based upon the general verdict returned by the jury in favor of such plaintiff. And it is so ordered.

[9] With reference to the respondents' appeals in actions Nos. 4943 and 4944, from the orders of the trial court denying their motions to terminate the proceedings to settle the transcript in the foregoing causes, and the appellants' motions to dismiss such appeals on the ground that no appeal lies from an order refusing to settle the transcript, while it would appear, following the reasoning found in the case of McWilliams v. Hudson, 98 Cal. App. 185, 276 P. 598, 277 P. 529, that no appeal lies from such an order, and that the action of the court on such a proceeding may be considered on an appeal from the judgment, it is not necessary for us to decide this question, as an examination of the transcript presented to us on such appeals leads to the conclusion that the trial court did not abuse the discretion allowable to be exercised by it.

In the case of O'Banion v. California Canning Peach Growers, 109 Cal. App. 328, 292 P. 975, this court has decided that such orders will not be interfered with unless an abuse of discretion is shown. Therefore, the orders of the court are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

135 Cal.App. 770

O'MOORE v. DRISCOLL et al.

Civ. 8874.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1933.

Hearing Denied by Supreme Court Feb. 15, 1934.

1. Pleading ⇐343.

Consideration of motion for judgment on pleadings after general demurrer to complaint was overruled constitutes irregularity, although not prohibited.

2. Judgment ⇐569.

Judgment on pleadings constitutes judgment on merits.

3. Corporations ⇐514(2).

Allegation of complaint that defendant was corporation *held* not to limit other allegations giving rise to inference of religious or charitable character of corporation.

4. Religious societies ⇐30.

Acts of religious order or its agents in obtaining false confessions from member under threats of criminal prosecution *held* not irremediable in civil courts as falling within ecclesiastical discipline.

5. Religious societies ⇐30.

Act of discipline performed by religious order, constituting tort, might give rise to cause of action where within scope, and in furtherance, of its religious purposes.

6. Religious societies ⇐30.

That religious corporation or its funds are dedicated to charitable purposes *held* not defense to civil responsibility for acts done within scope of corporate purposes.

7. Pleading ⇐6.

Facts subject to judicial notice need not be alleged, and will be considered although not pleaded.

8. Religious societies ⇐1.

Catholic Church, Order of Dominicans therein, and Province of Holy Name thereof, *held* religious or charitable institutions, generally dedicated to propagation of Christian doctrine and gospel.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

9. Pleading ⇐34(2).

General allegation of agency is limited by allegations of specific facts giving rise to agency, and, if not sustained by specific facts, will be disregarded.

10. False imprisonment ⇐20(1).

Complaint in action for false imprisonment against incorporated religious order, not showing that tortious acts were done by its agents in accomplishment of its general religious purposes, *held* insufficient to state cause of action.

Allegations of complaint in action for false imprisonment brought against incorporated religious order showed that acts of agents of order were not within scope of authority of representatives of corporate enterprise, and had no tendency to accomplish the general religious purposes of the order, or that the agents, as representatives of the corporation, were acting for the benefit of the corporation, or in the execution of any corporate purpose.

11. Appeal and error ⇐1030.

Where complaint does not state cause of action, judgment for defendants should be affirmed, where procedural irregularity was only apparent error.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Maurice M. O'Moore against Pius M. Driscoll, individually and as Prior Provincial of the Holy Name Province of the Order of Dominicans in California, and others. From the judgment rendered, the plaintiff appeals.

Judgment affirmed.

Henderson, Henderson & Hackley and Henderson, Henderson & Carey, all of San Francisco, for appellant.

Daniel A. Ryan and Thos. C. Ryan, both of San Francisco, for respondents.

McNUTT, Justice pro tem.

[1] Plaintiff (appellant) sued four defendants for damages for false imprisonment, two of whom were impleaded individually. After demurrer to the complaint had been overruled and they had answered, two defendants, Province of the Holy Name, a corporation, and Pius M. Driscoll, as Prior Provincial thereof, moved for judgment on the pleadings, and the motion was granted. Appellant assails the procedural propriety of entering judgment on the pleadings after the disallowance of the demurrer. He argues that, though the right so to move is clear when the complaint fails to state a cause of action, "the motion is to be determined upon the same principles as would be a demurrer to the complaint upon the same ground" (Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, at page 482, 49 P. 573, 574; Evans v. Paige, 102 Cal. 132, at page 133, 36 P. 406), and defendants were thereby permitted to "bring forward their objections by instalments"—citing Bancroft Code Pleading, vol. 1, p. 922, § 634. In De Courcey v. Cox, 94 Cal. 665, at page 669, 30 P. 95, 96, the court says that the consideration of such a motion after the overruling of a general demurrer was "an irregularity, which it is better to avoid." Attention is not drawn to any authority prohibitive thereof.

[2] Since a judgment on the pleadings is a judgment on the merits (21 Cal. Jur. 241), we shall examine the complaint to determine whether as to the moving defendants it states a cause of action. The personal or individual liability of no defendant is involved.

It is alleged that defendant Province of the Holy Name was and is a California corporation, with its place of business at San Francisco; that at pertinent times defendant Pius M. Driscoll was an ordained priest of the Roman Catholic Church and the Prior Provincial of the Holy Name Province of the Order of Dominicans in California, and as such was president of the board of directors of the province; that on July 18, 1928, and long theretofore, plaintiff was engaged as a priest in said Catholic Church, and as a professed Religious of the Dominican Order, a member of said province in California, and hence was entitled to preach the gospel and to minister to the people in said church in said order in said province, in accordance with his calling and conscientious beliefs; that on the 18th of July, 1928, at San Francisco, defendants Driscoll and Connolly and defendant Province of the Holy Name, *by its servants and agents, said Driscoll and Connolly*, maliciously and for the purpose of hindering the plaintiff in his vocation ordered him to go immediately to an asylum at Montreal, Canada, at the same time exhibiting to him a document purporting to be signed by a high official of said church, containing a like command, which asylum is under the jurisdiction of the Catholic Church and is maintained for the insane, the inebriate, the dope fiend, and the epileptic. Plaintiff was so terrorized by intimations of dire consequences of disobedience that he went, arriving July 27th; that *defendants Driscoll, Connolly, and the Province of the Holy Name, and each of them*, instructed the authorities at the asylum to hold plaintiff as a prisoner and subject to further instructions of the defendants; that he was therefore confined therein on the 27th of July, 1928, without his consent and against his will, and then and thereafter deprived from communicating with the outside world up to the 1st of August, 1930; that at all pertinent times Con-

nors (and others named) were *employed by the defendants and each of them* for the purpose of making plaintiff confess that he had committed a *crime*, and at pertinent times the persons *so employed* "were acting within the *scope* of said employment"; that on October 24, 1929, while he was confined as aforesaid the defendants Driscoll and the Province of the Holy Name and each of them, by *their said agents Connors* and others, surreptitiously administered drugs to plaintiff to obtain a confession from him that he had been guilty of the said act, and that because of the administration of said drugs the *defendants* "by their agents as aforesaid" obtained such confession of immorality against his will; some four days later during said imprisonment, *defendants Driscoll*, Connolly and the Province of the Holy Name "*by its agents Driscoll and Connolly as aforesaid*," accompanied by said agents Connors et al., held plaintiff by force in the parlor of the asylum with them, and subjected him for hours to cruel treatment, by continually and persistently harassing and importuning him to sign documents which he alleges on information contained matters derogatory to his good name, and that they further threatened that, if he did not sign the second document or documents, the defendants Driscoll and the Province would produce the previously signed confession and *prosecute him criminally* upon the act therein acknowledged; that under these circumstances, together with threats of continued restraint, he signed the second documents, the contents of which as well as the contents of the confession were false in fact; that from the 18th of July, 1928, to the 1st of August, 1930, by reason of the imprisonment, plaintiff was unable to follow his calling. Damages are then assigned. (Italics ours.)

[3] Appellant contends that the complaint does not clothe the corporate defendant with either religious or charitable character, because count I alleges merely that it is a corporation, organized under the laws of this state with its place of business in San Francisco. That allegation, however, has no power to limit the other recitals of the complaint, from which the inference is irresistible that the corporate defendant is a Province of the Dominican Order within the Catholic Church.

[4-6] Viewing the defendant order as a charitable or religious institution or trust, may *its* liability for the acts complained of be inferred from the allegations of the complaint? Were the acts pleaded so essentially matter of ecclesiastical discipline, as urged by respondents, as to be irremediable in a court of civil jurisdiction? The latter of these questions would seem to answer itself. The wringing of false confessions (and the complaint says they were) of criminal conduct, of a detained person, under pressure of threat of criminal prosecution, cannot be said to fall within the category of ecclesiastical discipline. Matter of discipline, also tortious, might give rise to a cause of action where alleged facts showed that it was within the scope of the corporation's purpose, and was done to further such purpose. There is no doctrine of exoneration of a charitable or religious order from civil responsibility for acts done within the scope of its corporate province, grounded upon the mere dedication of itself or of its funds to a charity, except a case in which negligence of the charity's employee is by implied contract that of the injured person's own employee, a subject apart from this discussion.

[7, 8] The pleading discloses the religious or charitable character of the defendant order. If it did not, the court could by application of the doctrine of judicial notice so find. "It is not necessary to allege facts of which the court will take judicial notice. Such facts will be considered by the court although not pleaded." French v. Senate, 146 Cal. 604, at page 607, 80 P. 1031, 1033, 69 L. R. A. 556, 2 Ann. Cas. 756. Resort to such doctrine fortifies the conclusion to be drawn from the complaint; namely, that the Catholic Church, the Order of Dominicans therein, and the Province of the Holy Name thereof, are generally dedicated to the propagation and promulgation of Christian doctrine and the gospel through the medium of Catholic priests of the Dominican Order. Authority is hardly necessary to support the proposition that the Catholic Church, the Dominican Order, and the Province of the Holy Name are and each of them is a religious (or charitable) institution, and that its properties are dedicated to religious and/or charitable purposes, in the absence of any allegation to the contrary. "The support and propagation of religion is clearly 'a charitable use.'" Pomeroy's Equity Jurisprudence, § 1021, par. 1.

In Estate of Fitzgerald, 62 Cal. App. 744, at page 750, 217 P. 773, 776, it is said: "A gift to a church is a charitable one, for it is well settled that a Christian church lawfully existing is a charity. A gift to a church without restrictions as to the use to be made of the property is a gift to be applied for the promotion of public worship and of religious instruction, which must necessarily influence other than church members, and has all the elements of a public charity." "* * * 'That the Roman Catholic Church is a Christian church, organized not for profit but for religious purposes and to promote the worship of God and to administer to the spiritual needs of mankind and to bring mankind under the influence of religion, and to that end the said Roman Catholic Church follows and spreads the teachings of Jesus Christ, as expounded in the Holy Bible.'" Estate of Fitzgerald, supra, at page 749 of 62 Cal. App., 217 P. 773, 775.

[9, 10] Do the facts alleged show either that the defendant Pius Driscoll in a representa-

tive capacity *was acting within the scope of his authority* as agent of the religious organization or trust, or that the acts said to have been done by him in such capacity were within the performance of any duty imposed upon him by the trust or looked to the accomplishment of any purpose of the trust?

It is alleged that at all times Driscoll was the president of the board of directors of the defendant; that the defendant Connolly was at all times a representative of the defendant order and was "at all times herein mentioned acting *for and on behalf of said corporation.*" (Italics ours.) Paragraph V contains matters of inducement; that defendants Driscoll, Connolly, and defendant province are said to have instructed the asylum authorities to hold plaintiff subject to further orders; that in consequence he was held. Paragraph VII recites that Connors and others were "employed by said defendants and each of them" for the purpose of obtaining a confession, and that at all of the times in the complaint mentioned Connors and others "were acting within the scope of said employment." In paragraph VIII it is alleged that, while plaintiff was confined at Montreal, the defendants Driscoll and Province of the Holy Name and each of them "by their said agents" Connors and others committed certain tortious acts. "* * * Said defendants and each of them by their agents as aforesaid" succeeded in getting a confession. On paragraph IX it is said that while he was imprisoned "defendants Driscoll, Connolly and Province of the Holy Name by its agents, Driscoll and Connolly as aforesaid, accompanied by said agents, H. J. Connors" and others were guilty of further aggressions upon plaintiff, and that "defendants Driscoll, Connolly and Province * * * as aforesaid" produced the signed confession and threatened criminal prosecution unless plaintiff signed further documents, and said defendants Driscoll, Connolly, and the Province as aforesaid threatened to keep plaintiff in the asylum as a prisoner unless and until he signed the documents aforesaid. It is categorically alleged that Connors and others always acted "within the scope of said employment," which means no more than that they did what they were told to do.

Facts otherwise than as above reviewed disclosing any duties of the representatives of the order are not pleaded; what is within the scope of those duties except as indicated does not appear. That tortious acts were done in the accomplishment of the purpose of the order does not appear from allegations of facts, but to the contrary the facts alleged with or without the aid of judicial notice demonstrate that what occurred was not within the scope of the authority of representatives of the corporate enterprise and had no tendency to spread the gospel. Each allegation apparently relied upon to serve as a predicate for the conclusion that there was an agency is, *in itself*, but a statement of the *conclusion of such agency*. To hold that, because Connors and others executed the orders Driscoll gave them, the latter acted within the scope of *his trust* and hence bound the trust in giving the orders, would establish a vicarious responsibility without an immediate predicate in alleged facts.

In the case of Barabasz v. Kabat, 86 Md. 23, 37 A. 720, 721 (Court of Appeals of Maryland), is illustrated an analogous situation so far as concerns the defendant order and Driscoll in his representative capacity. Suit was brought against a priest and *against the Roman Catholic Archbishop of Baltimore*, a corporation sole, for assault and battery on the wife of plaintiff. The material facts are that the priest had ordered that no one should be admitted to services except upon presentation of a ticket; the congregation was advised where tickets might be obtained. He hired a doorkeeper whom he instructed to admit those presenting tickets and to keep out those who had none. Plaintiff's wife sought entrance without a ticket and was ejected. At the conclusion of the testimony the court instructed the jury that there was no evidence to establish liability on the part of the defendant corporation, and the verdict was entered accordingly. The doorkeeper in admitting or rejecting applicants was held to have done so in the course of his employment, and therefore the priest personally might be liable. The court quotes from Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400, as follows: "If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown."

The facts of this complaint do not show that Pius M. Driscoll (or Connolly) as a representative of the corporation was acting for the benefit of that corporation, or in execution of any corporate purpose, while to the contrary in the case of Barabasz v. Kabat, supra, the doorkeeper acted for the immediate personal benefit of the priest in saving him from the molestations or aggressions of obstreperous would-be attendants at service.

In City of Louisville v. O'Donaghue et al., 157 Ky. 243, 162 S. W. 1110, 1111, action was brought by the city to recover the amount of a judgment paid by one Keller who had received injuries as the result of an obstructed sidewalk in front of church premises. The trustee of the church property was named as a defendant. Demurrer was sustained, and judgment dismissing the petition was affirmed. In the opinion we find: "Whether trust property can be subjected to liability growing out of the negligence or tortious acts of the trustee is a question about which there is

room for much difference of opinion, depending on the existence or nonexistence of certain facts, and we will not on this record undertake to announce any ruling on this subject, as the petition does not state a cause of action under which the trust estate could be subjected. It does not aver that Leinert, as trustee, at the time the negligent acts complained of occurred, *was acting within the scope of his authority as trustee*, or that he *was performing a duty imposed upon him by the trust.* In any state of case these averments would be indispensable to state a cause of action that would make the trust estate liable for the acts of the trustee." (Italics ours.) When pleaded facts show that a religious or charitable institution has committed a tort in line with the accomplishment of the purpose for which it exists, liability appears. Cases relied on by appellant illustrate such instances.

In Gallon v. House of Good Shepherd, 158 Mich. 361, 122 N. W. 631, 633, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387, the facts are that the society was organized for the moral reformation of girls and women and the preservation in a state of purity of girls and women whose virtue is exposed to danger. Its buildings and premises "are erected and arranged with the purpose of detaining those whom it desires to detain. It is intended that girls confided to the institution shall remain until discharged." Plaintiff was against her will imprisoned therein and recovered damages therefor. Corporate liability was predicable because the institution was organized to detain young women, and the place of detention was maintained by the defendant for the accomplishment of the corporate purpose. Naturally the agents of the defendant acted within the scope of their authority in locking her up and in detaining her because they were thereby committing the corporation to acts and to a course of conduct in line with this organic purpose.

In Phœnix Assurance Co., Ltd., a Corporation, v. Salvation Army, a Corporation, 83 Cal. App. 455, 256 P. 1106, a cognate situation in fact appears, and the court held that a charitable corporation is as liable as any other corporation for personal injuries to third persons caused by the negligence of its servants and agents in the operation of an automobile used for the purpose of engaging in a part of the religious and charitable work which it is the object of such corporation to perform. "* * * The record shows that at the time of the occurrences out of which the action arose the driver of the automobile was proceeding from one city to another for the purpose of engaging in a part of the religious and charity work which it is the object of appellant to perform."

To the same effect is Basabo v. Salvation Army, 35 R. I. 22, 85 A. 120, 42 L. R. A. (N. S.) 1144 (Supreme Court of Rhode Island), where it is held that a charitable corporation is as liable as any other corporation for injuries to third persons caused by the negligence of its servants in driving its teams for the distribution of its food and charities because its agents at the time were employed for corporate purposes.

The case of Armendarez v. Hotel Dieu (Tex. Civ. App.) 145 S. W. 1030, cited by appellant, announces nothing to the contrary of the views hereinabove expressed as determinative of the liability of respondents.

The scope of respondent Driscoll's authority to bind the corporate order is limited by the only pleaded purpose of the order; namely, to spread the gospel. To imprison one for crime or to obtain a confession of crime under threats of prosecution in court, meanwhile holding him in an asylum not under respondent's jurisdiction or conducted by it, and not maintained for such purpose, is not to accomplish respondent's organic charitable object. True, as said in Lovell v. Marshall, 162 Minn. 18, 202 N. W. 64, there is a general allegation of agency, but the same is limited by the allegations of specific facts supposed to give rise to the agency. The general allegation is in the nature of a conclusion of law, and, if not sustained by the specific facts pleaded, it will be disregarded.

In the case of Davis v. Houghtellin et al., 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737, the sufficiency of the petition turned upon whether it charged that the act of killing Davis was done in the prosecution of defendant's business and within the range of the servant's employment. It charged that Ireland was employed by defendants to guard certain feed belonging to them upon their premises and to seize and detain persons who might disturb such feed. "This is the only allegation of fact in the entire pleading relating to the nature and scope of Ireland's employment." It was further averred that the deceased had occasion to go on defendant's premises, and, while there, Ireland, in attempting to seize and detain him, negligently shot and killed him. There was no allegation that deceased was molesting the feed or attempting to do so, or that it was part of Ireland's duty to arrest persons who happened to be on the premises except those who were there for a specific purpose. Held that the averment that Ireland was "acting for said defendants in the due course of his employment as aforesaid, and pursuant to his instructions and orders, attempted to seize and detain" Davis is a mere conclusion and not a statement of fact showing that the attempted detention was within the range of Ireland's duties.

[11] The complaint does not state a cause of action as to the respondents; therefore the judgment should be affirmed where a procedural irregularity is the only apparent error.

The judgment appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

219 Cal. 598

LONG BEACH CITY SCHOOL DIST. et al. v. PAYNE, County Auditor, et al.

S. F. 14972.

Supreme Court of California.

Dec. 29, 1933.

1. Mandamus ⇐101.

Mandamus lies to compel county auditor to credit school district's account with percentages for delinquent taxes, without formal presentation of itemized demand and subsequent procedure, if school district is entitled to delinquent percentages (Pol. Code, § 4075 et seq.).

2. Taxation ⇐914.

Generally, penalties for tax delinquencies follow tax to particular governmental agency entitled to tax.

3. Taxation ⇐840.

Under statute providing that taxes unpaid by specified dates are delinquent, and that collector must collect additional percentages, percentages for delinquency are not "penalties" (Pol. Code, § 3756, as amended by St. 1931, p. 398, § 2, and § 3816, as amended by St. 1927, p. 1647).

Percentages for delinquency are not "penalties," but are the means prescribed for obtaining the tax itself by presenting an inducement to make voluntary payment on or before the day fixed for that purpose, and this is true, notwithstanding Pol. Code, § 3816, as amended by St. 1927, p. 1647, provides that the additional "penalties" received on account of delinquency shall be paid into the treasury for the use and benefit of the county, since this does not necessarily convert the percentages for delinquency into "penalties."

[Ed. Note.—For other definitions of "Penalty," see Words & Phrases.]

4. Statutes ⇐207.

Effect must be given to both of apparently conflicting statutory provisions if, within reason, that may be done.

5. Statutes ⇐207.

Special statutory provision controls general provision in conflict therewith.

6. Taxation ⇐914.

School district *held* not entitled to percentages for delinquent school taxes, although entitled to redemption penalties (Pol. Code, §§ 3504, 3804, 3817, and §§ 3746, 3756, as amended by St. 1931, pp. 397, 398, §§ 1, 2; and § 3816, as amended by St. 1927, p. 1647).

7. Taxation ⇐37.

Statute allotting percentages for delinquency of school taxes to use of county *held*

not unconstitutional (Pol. Code, §§ 3746, 3756, as amended by St. 1931, pp. 397, 398, §§ 1, 2; Const. art. 9, §§ 1, 6).

In Bank.

Petition by the Long Beach City School District and others for writ of mandate to compel Herbert A. Payne, as Auditor of Los Angeles County, to credit to the account of the petitioning school district the percentages imposed by law on account of delinquent payments of taxes levied for school district purposes and collected by the county officers.

Petition denied.

Hill, Morgan & Bledsoe, A. J. Hill, and Kenneth K. Wright, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Assistant Co. Counsel, both of Los Angeles, for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent county auditor to credit to the account of the petitioning school district the percentages imposed by law on account of delinquent payment of taxes levied for school district purposes, and collected by the county officers, and reported to the auditor between July 1, 1931, and June 30, 1932. The delinquent percentages for that period amounted to $5,798.47, and were credited by the auditor to the general fund of the county, where they now remain.

[1] In their return to the alternative writ, the respondents have interposed a general demurrer to the petition and a denial of the allegation that the petitioners have no plain, speedy, or adequate remedy at law. The respondents contend that the petitioners' remedy is the presentation of a claim to the board of supervisors pursuant to section 4075 et seq. of the Political Code, and an action at law upon the rejection of such claim. If under the statutes these delinquent percentages on taxes levied for school district purposes, when collected, should be credited to the school district fund, then it is the duty of the respondent auditor so to credit the sum alleged to have been collected. The claim, however, is not such a claim as must be pursued by formal presentation of an itemized demand and subsequent procedure. City of Fergus Falls v. Board of Commissioners, 88 Minn. 346, 93 N. W. 126. The proper credit to an appropriate fund is in the nature of a public duty as to which mandamus will lie to compel performance. People v. Reis, 76 Cal. 269, 18 P. 309; Corbett v. Widber, 123 Cal. 154, 55 P. 764.

[2] The sole remaining question is whether the percentages added because of delinquency in the payment of school district taxes are payable into the general fund of the county or into the school district fund.

The general rule is that the penalties follow the tax. This rule is stated with supporting authorities in 61 C. J. at pages 1528 and 1529 as follows: "Unless otherwise directed, interest, penalties, and costs collected on delinquent taxes follow the tax, and go to the state, county, or city, according as the one or the other is entitled to the tax itself; and, in cases where two or more of them are interested in the tax, such interest and penalties should be apportioned among them in the ratio of their respective shares of the tax, the foregoing being sometimes provided for by statute. But the legislature may change this rule and dispose otherwise of interest or penalties. A statute for the distribution of interest and penalties collected in a different manner from the disposition of the taxes on which the interest and penalties are based does not amount to the application of taxes to objects other than for which they were imposed."

In the present proceeding, the petitioning school district is in the same category as the state, county, or city named in the foregoing statement of the general rule. The school district is a separate governmental entity, supported by taxation, and the county is the governmental agency upon which the law imposes the duty to levy and collect the taxes. See Esberg v. Badaracco, 202 Cal. 110, 259 P. 730. It may be assumed that, as to the delinquent percentages involved herein, the petitioning district is entitled to the application of the foregoing general rule, unless the Legislature has otherwise directed.

The position of the petitioners is that the Legislature not only has not otherwise directed, but that by the enactment of certain provisions of section 3816 of the Political Code has definitely confirmed the operation of the general rule. The respondents contend that the Legislature has otherwise provided in section 3756 and certain other provisions of section 3816 of the Political Code. The pertinent provisions of section 3756 (as amended by St. 1931, p. 398, § 2) are as follows: "On the fifth day of December of each year, at five o'clock p. m., all taxes then unpaid, except the last installment of real property taxes, are delinquent, and thereafter the tax collector must collect, *for the use of the county*, or city and county, an additional ten per cent thereon. * * * On the twentieth day of April of each year, at five o'clock p. m., he shall collect an additional five per cent thereon. On the twentieth day of April of each year, at five o'clock p. m., all the unpaid portion of the remaining one-half of the taxes on all real property is delinquent, and thereafter the tax collector must collect, *for the use of the county*, or city and county, an additional five per cent thereon." It is pursuant to the foregoing provisions of section 3756 that *any* per-

centages are added because of delinquencies in payment, and by the terms thereof *all* taxes, including school taxes, are delinquent if not paid within the prescribed time. And it is obvious that provision has been made therein otherwise than in accordance with the general rule in so far as taxes other than county taxes were concerned, for it is there provided, without any uncertainty or ambiguity whatsoever, that the percentages added as to *all* delinquent taxes shall be collected for the use of the county.

Section 3816 of the Political Code (as amended by St. 1927, p. 1647), reads in part as follows: "Whenever property sold to the state, pursuant to the provisions of this chapter, shall be redeemed as herein provided, the moneys received on account of such redemption shall be distributed as follows: The original and subsequent taxes, and percentages, penalty, and the interest paid on redemption, shall be apportioned between the state and county, or city and county, in the same proportion that the tax rate bears to the county, or city and county, rate of taxation; the additional penalties received on account of delinquency, together with the costs, *shall be paid into the treasury for the use and benefit of the county*, or city and county; the total amount received for state poll-tax shall be paid to the state, without deduction of any percentages; the amounts received for road or hospital poll-tax, and *the amounts received for school*, or road district, or other *taxes, together with the penalties thereon, shall be paid into the county treasury, and placed to the credit of the proper funds.* * * *"

The respondents insist that the language above quoted and first italicized is directly in line with the general legislative plan of allocation as evidenced by section 3756, and the petitioners contend that the language last italicized above is an indication of an intention that the general rule should not be disturbed and that the percentages for delinquency should follow the tax itself.

[3] It is necessary to note with care the subject-matter of the two Code sections and the applicability of their language to the problem presented. Section 3756 has to do with tax collections prior to the time when redemption may be made. If taxes are not paid before delinquency on December 5th and April 20th of each year, the percentages for delinquency are added. These percentages are not "penalties" as that term is generally known in law. County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329. They are the "means prescribed for obtaining the tax itself by presenting an inducement to make voluntary payment on or before the day fixed for that purpose." High v. Shoemaker, 22 Cal. 363. The use of the word "penalties" in the phrase in section 3816, to wit: "The additional penalties received on account of delinquency * * * shall be paid into the treasury for the use and benefit of the county," does not necessarily convert the percentages for delinquency into penalties, but should be considered, for the purposes of this case, as limited to the delinquent percentages there dealt with.

When taxes become delinquent, the auditor computes the amount of the percentages and totals the amount of tax and percentages on the tax records, and charges the total to the tax collector. The books are then still in the hands of the tax collector, and the taxes and added percentages are subject to payment to him until after the publication by him of the delinquent tax list and the sale to the state by operation of law, which occurs about the 1st of July of each year. It is an unquestionable fact that delinquent taxes with added percentages are paid to the tax collector while the books are still in his hands between December 5th and July 1st of each year, and it is fair to assume that added percentages for delinquency, which have been so collected by the tax collector, are included in the amount which the petitioners are now demanding that the auditor credit to the school district fund. It is the added percentages with which section 3756 deals, and, as these funds are allocated by that section to the use of the county, the petitioners have no interest in them, and the auditor is justified in refusing to credit them to the school district fund, unless section 3816 requires a different result.

[4-6] After the sale to the state, the real property is then for the first time subject to redemption. The penalties for redemption are heavy, and are provided in section 3817 of the Political Code. In addition to these penalties, the amount of the added percentages for delinquency must be paid before a redemption can be made. After redemption is accomplished, section 3816 provides how the redemption money shall be distributed. It is therein specifically provided, as noted, that "the additional penalties received on account of delinquency, together with the costs, shall be paid into the treasury for the use and benefit of the county." It is therefore important to keep in mind the distinction for purposes of distribution between the percentages which accumulate under section 3756 on account of delinquency prior to the sale to the state and the penalties for redemption as provided in section 3816. When this distinction is observed, we find that the Legislature has in three different places, and without uncertainty, directed that the percentages added and collected because of delinquency in payment shall be distributed for the use of the county—twice in section 3756 and once in section 3816. The petitioners insist that the word "penalties" used in the phrase relied upon in section 3816, namely, "together with the penalties thereon," should be held to include percentages for delinquency and that "the proper fund" is the school fund. It is then

argued that the direction that the school taxes "with the penalties thereon" be paid into the "proper fund" is a special provision with reference to the distribution of percentages for delinquency, and that this special provision is controlling over the other general provisions in the same section and the general provisions in section 3756, directing that the percentages on account of delinquency shall be paid into the general fund of the county. This result does not follow. Effect must be given to both provisions if, within reason, that may be done. If they are inconsistent, it is assumed that the special provision would control the general. It would seem that the general provisions of the sections are inconsistent with the special provision relied upon in so far as the distribution of "penalties" for redemption as between the county and the school district are concerned, but by direct statement of the petitioners "the redemption penalties under section 3817 of the Political Code are not involved in this action." When the Legislature, in the language relied upon by the petitioners, directed that "penalties" on school taxes should be distributed to the appropriate fund, it must be held that the word "penalties" was used in the sense of penalties for redemption as provided in section 3817 and not as percentages for delinquency dealt with either before or after sale to the state. This construction permits both provisions to operate in harmony as to the percentages for delinquency, which result was undoubtedly intended by the Legislature. This conclusion is the same as that arrived at in the opinions of the Attorney General in 1916 and 1917, transmitted to the county and state officials, as to the distribution of percentages for delinquency and redemption moneys under sections 3756 and 3816 of the Political Code. The law now applicable to the subject is the same as it was when those opinions were rendered, and, if a different meaning was intended by the Legislature or a different result desirable, the opportunity has been afforded during the last fifteen years to provide by appropriate legislation to that end.

The petitioners call attention to the fact that section 3804 of the Political Code provides that, when "taxes, penalties and costs" are levied by the county on behalf of any school district, or any municipal or other public corporation and are erroneously, etc., collected, the same may be refunded by order of the supervisors out of any money in possession of the county treasurer "belonging to the appropriate fund of such school district or municipal or other public corporation." It is argued that the foregoing provision requires that the refund for percentages for delinquency must be paid out of the school district fund when in fact, if the position of the petitioners be not sustained, no percentages for delinquency have been paid into that fund. Assuming for the moment that the word "penalties" as used in this section is broad enough generally to include percentages for delinquency paid into the county treasury, the "appropriate fund" out of which to make the refund would be the fund which had received the same, and, since the general fund is the fund which would receive the erroneously collected percentages for delinquency, that fund should bear the burden of that portion of the refund.

[7] The petitioners further contend that, if section 3756 purports to require that the percentages for delinquency be collected by the tax collector for the use of the county, the section is to that extent unconstitutional. Attention is called to section 1 of article 9 of the Constitution providing in general terms for the promotion of intellectual improvement and to section 6 of the same article requiring that the Legislature shall provide for a system of common schools and for the levy of school district taxes by the board of supervisors of each county for public school purposes. But those sections of the Constitution do not purport to deprive the Legislature of the power to provide the means by which such tax levies are to be made and the taxes to be collected. The means of providing revenue by taxation for school purposes is left generally to the Legislature by section 4 of article 9 of the Constitution. Crosby v. Lyon, 37 Cal. 242. Related sections of the Political Code and the School Code were enacted in pursuance of that general power.

The petitioners seek further to fortify their position by reference to section 3746 of the Political Code (as amended by St. 1931, p. 397, § 1), which requires the tax collector to publish notice of the time when taxes will be due, and that, if not paid within the time specified, the 10 and 5 per cent. will be "added to the amount thereof." In reliance upon the phrase last quoted, the petitioners contend that the percentages so added become a part of the tax, and are thereby inviolably set apart for school purposes. We think the quoted phrase is not a substantial enlargement of the nature and character of the percentages so as to constitute it a part of the tax itself. In characterizing such additions under the Montana statute, the court, in School District No. 12 v. Pondera County, 89 Mont. 342, at page 348, 297 P. 498, 501, stated: "These additions are not a part of the tax, but a mere creation of the Legislature, and, as a general rule, that body may dispose of them as it likes, regardless of the purpose of the tax, as against the objection that public moneys raised for one purpose cannot be used for another." See, also, Cooley, Taxation (4th Ed.) § 1821.

There is no case in this state directly in point on the question presented. In Honeycutt v. Colgan, 3 Cal. App. 348, 85 P. 165, the sections of the Political Code here involved were construed, and the distinction between delinquent percentages and redemption pen-

alties was pointed out. The question of the right of school districts in the premises was not involved. Other cases from foreign jurisdictions are not especially helpful. All seem to recognize the general rule and apply it when the legislative body has not otherwise directed. Whether provision has been made otherwise than in accordance with the general rule depends upon the proper construction of the statutes in each case. The conclusion having been reached that the Legislature of this state has otherwise directed, it follows that the position of the petitioners cannot be sustained.

The petition for a peremptory writ is denied, and the alternative writ is discharged.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

219 Cal. 680

SORENSEN v. HALL et al.

S. F. 14897.

Supreme Court of California.

Jan. 18, 1934.

1. Evidence ⇐353(3).

Recitals in trustee's deed of realty, sold on foreclosure of trust deed, are evidence of facts recited in action of ejectment.

2. Courts ⇐93(1).

Court decisions that recitals in trustee's deeds of realty, sold on foreclosure of trust deeds, are evidence of facts recited in cases involving legal title only, cannot be overruled after many years; law announced therein having become rule of property.

3. Evidence ⇐353(3).

Recitals in trustee's deed of realty, sold on foreclosure of trust deed, as to posting and publication of notices of sale, *held* recitals of ultimate facts, not conclusions of law.

4. Ejectment ⇐95(1).

Evidence that plaintiff in ejectment acquired title through trust deed from one defendant to plaintiff's grantor *held* sufficient to show his title as against codefendant acquiring interest through same source long after execution and recordation of trust deed.

5. Mortgages ⇐364.

Sale of realty on foreclosure of trust deed *held* consummated, though actual cash was not paid at precise time of sale.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action in ejectment by Walter Sorensen against Charles R. Hall and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Fred W. Lake, of Los Angeles, for appellants.

Redmond C. Staats and Edward E. Craig, both of Berkeley, for respondent.

CURTIS, Justice.

This is an action in ejectment. The plaintiff claims title to the real property involved through a trust deed executed by defendant Hall and wife; a trustee's deed under proceedings foreclosing said trust deed; and a deed from the purchaser at the foreclosure sale. The defendants are Hall, the original owner of said real property, and Hambly, who derived whatever interest he had in said real property through the defendant Hall. At the trial the plaintiff introduced the three deeds mentioned above and rested. Whereupon defendants moved for a nonsuit, which was denied. The only evidence offered by the defendants to dispute plaintiff's title as shown by the three deeds above mentioned was evidence which tended to refute the recitals in said trustee's deed. This evidence was objected to by the plaintiff, and the objections were sustained by the court. In their answer, defendants denied certain of the allegations of the complaint. They set up no equitable defenses to plaintiff's cause of action. The trial court gave judgment in plaintiff's favor, from which judgment the defendants have appealed.

[1] The main contention of the defendants is that the recitals in the trustee's deed are not evidence of the facts recited therein, and that it was incumbent upon the plaintiff to offer independent proof sufficient in evidentiary value to establish the facts set forth in the recitals. For instance, the defendants contend that there was no evidence before the court showing that the trustee prior to the sale gave any notice of such sale either by posting or publishing notice of sale as required by law and the provisions of said deed of trust, although the recitals in the trustee's deed show that notice both by posting and by publication were given as required. The same contention is made in regard to the substitution of a trustee under the trust deed. The trust deed under which the plaintiff claims title to said real property provides: "Any deed, conveyance, reconveyance or other instrument herein provided for or permitted, may recite any facts relative to the execution of this trust, or relative to any payment made to the Trustee or Beneficiary, or upon which the legality, effectiveness or

regularity of such instrument depends, and such recitals shall be conclusive proof of the truth of the facts recited." Regarding a provision in a trust deed similar to that in the trust deed now before us, this court has ruled: "This provision would not, perhaps, preclude the inquiry, in an equitable proceeding, into the fairness of the sale, or into other matters, which on equitable principles might entitle the party injured to relief; but it must be taken as conclusive in a case involving only the legal title, such as the case at bar." Mersfelder v. Spring, 139 Cal. 593, 73 P. 452, 453. This same point has been before the courts of this state on numerous occasions, and the ruling has been invariably against the contention of appellants. Simson v. Eckstein, 22 Cal. 580, 591; Carey v. Brown, 62 Cal. 373, 375; Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 617, 130 P. 15; Roberts v. Colyear, 179 Cal. 669, 180 P. 937, 938. In the last-cited case this court said: "The trustee's deed did not, by virtue of its recitals, carry to the grantee any better right or title than the trustors had when they executed the deed of trust. But the respondent does not claim any greater effect for it. The recitals are relied upon as binding the interest of the trustors. To this extent, at least, they are effective. [Citing authorities.] The deed containing them is admissible in an action of ejectment, as against the grantor or other person in possession, and no further evidence is necessary to show that the plaintiff has succeeded to such title and right of possession as the trustor had when he made his deed of trust. 3 Jones on Mortgages (7th Ed.) § 1830." The following decisions of the District Courts of Appeal are to the same effect as those of this court: Continental Building & Loan Association v. Light, 6 Cal. App. 684, 92 P. 1034; Turner v. Marshall, 90 Cal. App. 345, 347, 265 P. 860; Kelsey v. Richardson, 101 Cal. App. 762, 768, 282 P. 515, and Ley v. Babcock, 118 Cal. App. 525, 5 P.(2d) 620.

[2] Appellants concede the force and effect of these decisions, but, nevertheless, claim that they were decided upon an erroneous principle of law, and that, notwithstanding their unanimity and the long period of time covered by this uninterrupted series of decisions, this court should overrule them and establish the law upon a correct and legal basis, which the defendants contend would mean the rejection of said recitals as evidence and the requirement of independent and direct proof of the facts set forth therein. We hardly think that the appellants are serious in their contention that these decisions of the court should now be overruled and set aside after the many years which they have stood as containing a correct declaration and exposition of the law upon the subject of the regularity and effectiveness of a trustee's deed. The law announced therein has become a rule of property upon which rests the validity of the title to thousands of pieces of real property in this state of incalculable value, and its revocation at this time by this court would render invalid an untold number of contracts and undertakings which have been entered into by the parties thereto in reliance upon the rule of property established by the decisions above cited. No sufficient showing, in fact no showing whatever, has been made by appellants that would call for or justify such drastic action on the part of this court.

[3] The further claim is made that the recitals in the trustee's deed are not recitals of fact, but conclusions of law only. These recitals are those usually found in trustees' deeds of this character. Regarding posting and publishing of notice, the trustee's deed recites that in compliance with the deed of trust the trustee on the date stated therein "caused to be posted a written notice of the time and place of sale of said real property which notice contained a particular description of said real property in three public places in the City of Berkeley, Township of Oakland, County of Alameda, State of California, in which city, township and county said real property is situate, and also in a conspicuous place on the property to be sold and described in said notice; and * * * said party of the first part [the trustee] did cause to be published a copy of said notice once a week for a period of twenty days immediately preceding the day of sale in a newspaper of general circulation, to-wit: The Courier, printed and published in the city and township in which said real property is situate. * * *" These recitals were of ultimate facts as contradistinguished from conclusions of law. Ley v. Babcock, 118 Cal. App. 525, 527, 5 P.(2d) 620.

[4] The contention that the evidence is not sufficient to show title to the real property as against defendant Hambly is without merit. Both plaintiff and Hambly claim title through a common source, that is, through Hall. It was only necessary, therefore, for the plaintiff to prove title from Hall. No contention is made that Hambly acquired any interest in said real property until long subsequent to the execution and recordation of the trust deed from Hall and wife to plaintiff's grantor.

[5] The contention that the property sold was different from that conveyed by the deed of trust, and that the sale was not consummated because the actual cash was not paid at the precise time of sale, are so lacking in merit that a discussion of them is unnecessary. The record is free from error.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

219 Cal. 665

PADDON v. PADDON.

S. F. 14914.

Supreme Court of California.

Jan. 15, 1934.

1. Executors and administrators ⇨129(3).

Record on appeal from judgment quieting executor's title to property of decedent's estate *held* to show that adverse claimant was accorded every opportunity to prove her claims.

The record showed that adverse claimant was represented by three lawyers, that trial judge requested her to prove her claims at least three times and that her counsel answered in affirmative court's question whether all parties rested, while affidavit, supporting her motion for new trial, contained no evidentiary matter or specific testimony any witness would give on retrial, but consisted of general conclusions and complaints against her former counsel, divorced husband, decedent, and judge, and was completely answered by executor's affidavit.

2. Appeal and error ⇨977(5).

Supreme Court is bound by trial court's denial of appellant's motion for new trial, in absence of showing of abuse of discretion.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by William Locke Paddon against Myron Harris, as executor of the last will and testament of Charles Locke Paddon, deceased, in which defendant brought in Una Margaret Locke Paddon as a party and filed a cross-complaint against her and plaintiff. Judgment for cross-complainant, and cross-defendant Una Margaret Locke Paddon appeals.

Affirmed.

Fred W. Lake, of Los Angeles, for appellant.

R. J. Darter, of Oakland, for respondent.

IRA F. THOMPSON, Justice.

This is an appeal from a judgment quieting title against the claims of plaintiff and appellant to the property of the estate of Charles Locke Paddon, deceased. Inasmuch as four persons who are to be mentioned herein bear the surname of Locke Paddon, it is well to emphasize, as an aid to clarity, that appellant Una Margaret Locke Paddon is the divorced wife of plaintiff, William Locke Paddon. Her claim to the property is based upon a property settlement agreement with her former husband, which included a provision that each should have an undivided one-half interest in any undisclosed property standing in the name of the other. In her pleading herein she alleged that her former husband, the plaintiff, had conveyed property to his brother Charles Locke Paddon in order to secrete the same and to cheat and defraud her of her rights. She also alleged that, if the plaintiff recovered anything by virtue of his action against respondent, she was entitled to a one-half thereof.

Having briefly stated the substance of appellant's claim, let us observe the procedure by which the issue thereon was framed by the pleadings. According to plaintiff's complaint, on May 9, 1928, Evalynne D. Locke Paddon brought suit for divorce against her husband, Charles Locke Paddon, who at the time was in poor health. The plaintiff alleged that he took his brother to Canada and then alone returned to Oakland for the purpose of negotiating a property settlement with his brother's wife, it being agreed between him and his brother that he, the plaintiff, should have one-half of whatever property he could secure for them through agreement with the complaining wife. He further alleged that the property was to be transferred to his brother, and that he was to hold one-half thereof as trustee for plaintiff. As a result of his negotiations with Evalynne D. Locke Paddon, a settlement was agreed upon, he alleged, and the property was conveyed to Charles Locke Paddon; and that all of the estate left by decedent consisted of the property so secured, or the result of the exchange of that property for other property, and asked that he be declared to be the owner of one-half of all the property and that it be conveyed to him.

The respondent brought appellant in as a necessary party and by cross-complaint sought to quiet the title of the estate against the claims of both. As already indicated, the court found in favor of respondent and rendered judgment accordingly.

[1, 2] Three days were occupied in the trial of the case. However, we are furnished with practically none of the testimony and yet there is abundant to answer the plea of appellant that she was not permitted to have her day in court. Appellant was represented by three lawyers and on at least three occasions the trial judge requested appellant to make proof of her claims. Finally, in response to the question of the court as to whether all the parties rested, counsel for appellant answered in the affirmative. The record presented to us is barren of any evidence which tends to lend color to her claim. True, there is an affidavit made on motion for new trial which reasserts the claims made by her in the pleadings, but it is void of evidentiary matter or any specific testimony which it is averred any witness would give on a retrial. It consists, in fact, of general conclusions and complaints against her former counsel, her former

husband, her deceased brother-in-law and the trial judge. It was completely answered by an affidavit filed by respondent. Even though the record did not affirmatively disclose that every opportunity had been accorded appellant to prove her claims, yet we would be bound by the action of the trial court in denying the motion for a new trial, in the absence of a showing of an abuse of discretion.

In addition to what has already been said, we observe that appellant has failed in her brief to disclose any error requiring a reversal of the judgment.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS J.; LANGDON, J.

PRESTON, J., does not participate herein.

219 Cal. 668

In re FERARAZZA'S ESTATE.

DEPARTMENT OF INSTITUTIONS OF CALIFORNIA v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

S. F. 14843.

Supreme Court of California.

Jan. 16, 1934.

Rehearing Denied Feb. 15, 1934.

Army and navy ⇨51.

Guardian of estate of incompetent war veteran could not be compelled to pay claim for maintenance of veteran in state hospital incurred prior to appointment of guardian out of compensation and disability allowance paid by United States to guardian (World War Veterans' Act 1924, § 22 [38 USCA § 454]; Pol. Code, §§ 2176, 2181; Code Civ. Proc. § 690, subd. 20).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding for the allowance of an annual account by the Bank of America National Trust & Savings Association, guardian of the estate of Angelo Ferarazza, an incompetent, in which the Department of Institutions of the State of California, J. M. Toner, Director, filed a claim against the estate and objected to the allowance of the account. From an order allowing part of its claim and overruling objections to the allowance of the account, the Department of Institutions of the State of California appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, both of San Francisco, for appellant.

George L. Lang, of San Francisco, for respondent.

SHENK, Justice.

This appeal is from an order overruling objections to and settling the first annual account of the guardian of the incompetent.

The incompetent is a disabled veteran of the World War. He was committed to the Napa State Hospital for treatment on June 30, 1927, where he is now an inmate. At the date of his commitment he had no estate or means of support. Subsequently he became entitled to and received compensation and disability allowance pursuant to the provisions of the World War Veterans' Act of 1924 (43 Stat. 607 [38 USCA § 421 et seq.]). On May 25, 1931, the respondent, Bank of America National Trust & Savings Association, became the duly appointed and qualified guardian of the incompetent's estate. At the time of the filing of its first annual account the guardian had received for the account of the incompetent veteran compensation and disability allowance in the sum of $965.70, and has continued to receive an allowance from the same source of $40 per month.

The department of institutions filed its claim against the estate of the incompetent for the sum of $1,260, as the amount due to the department for the support and care of the incompetent at the Napa State Hospital at the rate of $20 a month from the date of his commitment to that institution. The court allowed and the guardian paid to the department of institutions the portion of the sum computed from the date of the appointment of the guardian. The court disallowed any portion of said claim accruing prior to the date of the appointment of the guardian. The department of institutions has appealed from that order.

Undoubtedly sections 2176 and 2181 of the Political Code permit a recovery from the veteran's estate for his care, treatment, and support from and after the time he becomes possessed of an estate and means wherewith to satisfy claims therefor to the extent of the estate. Those sections, however, go no further and the question whether the department of institutions may recover for past services depends on the construction to be given to federal and state statutes providing for exemptions of veterans' compensation and allowances from the claims of creditors.

The estate of the veteran Ferarazza consists exclusively of the allowances paid to him by the United States government pursuant to the World War Veterans' Act, supra. Section 22 of that act (38 USCA § 454) states: "The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively, shall not be as-

signable; shall not be subject to the claims of creditors of any person to whom an award is made under Parts II, III, or IV; and shall be exempt from all taxation."

The appellant relies on cases from both state and federal jurisdictions which interpret the word "payable" appearing in that section, and which deal with the various exemptions listed in that section and similar federal statutes. The appellant seeks to apply the result in those cases to obtain a reversal of the order in the present case. The case upon which the appellant appears to rely most strongly is that of State v. Board of Commissioners of Shawnee County, 132 Kan. 233, 294 P. 915, certiorari denied 283 U. S. 855, 51 S. Ct. 648, 75 L. Ed. 1462. The language in the opinion of that case specifically relied upon appears on page 921 of the Pacific Reporter as follows: "We conclude that the intervention of a guardian does not leave the pension funds still in the hands of the government so that they are still 'payable' or 'due' the ward as expressed by 38 USCA § 454 so as to exempt them from assignment, execution, and taxes, but, when paid to the guardian, the title and possession have both passed from the government, and they are no longer 'payable,' and consequently not entitled to any exemption from taxes under section 454."

The court in that case, after reviewing several cases in which a contrary result was reached, also had the following to say: "It is pertinent and significant to observe the natural and proper leaning toward an interpretation which is in perfect harmony with the local legislation of each of three of the four states from which these strong decisions come."

Cases in California do not appear to have answered the question involved. A proper conclusion cannot be reached, however, without due consideration being given to the provisions of the pertinent statutes of this state. Section 690 of the Code of Civil Procedure states: "The following property is exempt from execution or attachment: * * * 20. All money received by any person, a resident of the state as a pension from the United States government * * * whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him."

This section appears to fill the gap left open by the strict construction of section 22 of the World War Veterans' Act relied upon by the appellant. No doubt is raised that the section, if otherwise applicable, covers the funds received from the United States government in this case. The appellant, however, contends that said section 690 is inapplicable because no process of execution or garnishment is sought.

In the case of Matter of Citizens' Trust Co. (In re Murphy's Committee), 134 Misc. 683, 236 N. Y. S. 343, a statute of New York, section 667 of the Civil Practice Act, made an exemption of similar rewards or pensions "from levy and sale by virtue of an execution, and from seizure in any legal proceeding." In that case the Utica state hospital and other claimants sought to have allowed as proper claims against the incompetent's estate, which estate consisted solely of payments made pursuant to the provisions of the World War Veterans' Act, sums accrued for board, care, and maintenance of the incompetent during the time both before and after the appointment of his committee. The Supreme Court of Oneida county held that the committee, under these statutes, could not legally pay the claims nor any part of them and made its order accordingly. On appeal to the appellate division of the Supreme Court, 227 App. Div. 839, 237 N. Y. S. 448, the order of the Supreme Court was modified by providing that the claims, only so far as they arose out of services rendered to the incompetent or materials furnished to him before the appointment of the committee, are not subject to payment, and modified the order so as to allow payment of claims accrued for services, etc., furnished since the date of the appointment of the committee. The contention of the appellant here was apparently not made in that case, and, if it had been made as to a statute similar to all intents and purposes to the statute in this state, it would doubtless not have affected the result. The purpose of such a statute is to prevent recovery in a court of law for the claims exempted thereby. Rules of construction need not be called upon to aid in arriving at a conclusion that in a case in which the exemption applies the court will not render an idle order or judgment.

The appellant relies on cases in New York in which a different result was reached when the question was whether similar funds were exempt from the payment of inheritance taxes. But the principles applying to control the degree of liberality in construing tax exemption statutes are not necessarily applicable in cases involving statutes providing for exemptions from the claims of creditors (see State v. Board of Commissioners of Shawnee County, supra), and the cases relied upon are not conflicting or inconsistent with the Murphy Case.

The appellant has cited no authority nor shown any sufficient reason why the application of the Code of Civil Procedure, § 690, subd. 20, should not produce the same result in the present case as was finally reached in the two cases of In re Murphy's Committee, supra. The exemption in the Civil Practice Act of the state of New York is from "levy and sale by virtue of an execution, and from seizure in any legal proceeding." There is therefore no ground for holding in the present case that the New York statute is broader than section 690, subd. 20, of the Code of

Civil Procedure, wherein the exemption is from execution and attachment.

We conclude that the court properly refused to allow any part of the appellant's claim accruing prior to the appointment of the guardian. No other point requires comment.

The order is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SEAWELL, J.; CURTIS, J.

219 Cal. 673

ARMSTRONG v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14259.

Supreme Court of California.
Jan. 17, 1934.

1. Master and servant ⇐419.

Where compensation for permanent disability was computed on basis of 25 per cent. for amputation and 5 per cent. for stiffness subsequently developing, limitation on claim for compensation *held* extended as to all disability under provision allowing 245 weeks within which to institute compensation proceedings, where injury has caused "new and further disability" (Gen. Laws 1931, Act 4749, § 11(a)(c).

2. Master and servant ⇐416.

Findings of commission that compensation claim for temporary disability was barred and that claim for permanent disability was not barred created implied finding that claimant suffered new and further disability (Gen. Laws 1931, Act 4749, § 11(a)(c).

In Bank.

Proceeding under the Workmen's Compensation Act by Edward A. Wellendorf, claimant, opposed by David G. Armstrong. To review an order of the Industrial Accident Commission awarding compensation for injuries, the employer brings certiorari.

Award affirmed.

Elliott & Aberle, W. L. Baugh, Jr., and F. Britton McConnell, all of Los Angeles, for petitioner.

Everett A. Corten and Arthur I. Townsend, both of San Francisco, for respondents.

IRA F. THOMPSON, Justice.

By this proceeding in certiorari, it is sought to annul the award of the respondent commission, allowing Edward A. Wellendorf compensation for an industrial injury.

[1] The controlling question is whether the claim is barred by section 11 (c) of the Workmen's Compensation, Insurance and Safety Act (Deering's Gen. Laws, 1931, Act 4749, p. 2285), which section reads as follows: "The payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment; provided, however, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period."

The facts essential to an understanding of the problem may be briefly stated as follows:

On November 11, 1931, the applicant, Edward A. Wellendorf, was working for the petitioner upon a circular power saw, and, while so employed, his left hand came into contact with the teeth of the saw, and four distal phalanges were practically amputated; the stumps being jagged and lacerated. The injured man quit work at once and received medical attention, consisting of approximately fifteen treatments, ending about December 29, 1931. He returned to work February 11, 1932, for the same employer and at the same wages, and, although conducting negotiations with his employer for a settlement (which were never concluded), he did not file claim for compensation until October 18, 1932, more than a year after the injury and more than six months after medical attention was last furnished him by his employer. The commission, however, found that the claim for permanent disability was not barred by the period of limitations prescribed by the act, and assign as their reason the fact that disability was computed on the basis of 25 per cent. for the amputation and 5 per cent. for limitation of motion or stiffness, which developed in the joints subsequent to the injury. In other words, the respondent asserts that the applicant is brought within that provision of section 11 (c) above quoted which says, in effect, that nothing contained in the section "shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred forty-five weeks after the date of the injury upon the grounds that the original injury has caused new and further disability. * * *" We are in accord with this position. In oth-

er words, the limitation of motion is not an injury ab initio such as is discussed in Associated Oil Company v. Industrial Accident Commission, 214 Cal. 358, 5 P.(2d) 420. In Henry Cowell Lime & Cement Company v. Industrial Accident Commission, 211 Cal. 154, 162, 294 P. 703, 706, 72 A. L. R. 1118, we said: "* * * The right to file a claim within two hundred and forty-five weeks is given only in case the injured employee sustains a new and further disability, and not necessarily for a permanent disability. It is only when there is a change in the condition of the original injury from a temporary to a permanent disability that a 'new and further disability' is established. Therefore, if the injury is permanent ab initio, no such changed condition can ever take place."

It is manifest in this case that limitation of motion could not be determined as of the date of the injury and would not develop for some considerable period of time thereafter. The respondent commission has impliedly found that it did not develop until some time after the original injury. Such being the case and compensation for stiffness of the fingers being allowed, the respondent commission was authorized to grant compensation for all other disability. This is so by virtue of section 11(a), and our holding in Great Western Power Co. v. Industrial Accident Commission, 196 Cal. 593, 602, 238 P. 662, 666, wherein we said: "The Workmen's Compensation Act provides (section 17 (c) that there shall be but one cause of action for each transaction coming within the provisions of the act. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such transaction, may, in the discretion of the commission, be joined in the same proceeding at any time. Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11 (a), that, when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11 (a)." Also, in Fogarty v. Department of Industrial Relations, 206 Cal. 102, 273 P. 791, it was determined that the commission, having secured jurisdiction to pass upon a claim, was invested with jurisdiction to determine all claims, whether for accrued compensation or otherwise.

[2] The petitioner asserts that there is no finding that the original injury has caused new and further disability. There is no merit in this contention, for the reason that there is, in the findings of the commission that the claim for temporary disability is barred by the provisions of the act and that the claim for permanent disability is not barred, an implied finding that the applicant has suffered a new and further disability.

For the reasons stated, therefore, the award should be affirmed. It is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

219 Cal. 637

SHIMPONES v. STICKNEY et al.

L. A. 12822.

Supreme Court of California.

Jan. 2, 1934.

1. Parties ⇐52.

Statutes authorizing reopening of case and bringing in of new parties when necessary or proper for determination of pending action are to be liberally construed (Code Civ. Proc. §§ 389, 662, 956a).

2. Trial ⇐377(2).

Circumstances in respect to trial of quiet title action *held* to require opening of case for evidence on issue of fraud attributed to attorney excusably absent from trial based on pleadings giving no intimation that issue of fraud would be interjected (Code Civ. Proc. §§ 389, 662, 956a).

3. Fraud ⇐49.

Generally, fraud must be both pleaded and proved.

4. Trial ⇐377(2).

Complaint in quiet title action *held*, as respected right of attorney excusably absent from trial to have case reopened for evidence on issue of fraud attributed to him, not sufficiently specific as to put attorney on notice that he was called on to answer charges of fraud.

5. Quieting title ⇐14.

Plaintiff in quiet title action must, as necessary requisite, do equity.

6. Quieting title ⇐10(1).

Plaintiff, in quiet title suit, is not helped by weakness of his adversary's title, but must stand on strength of his or her own.

7. Quieting title ⇐14.

Mortgagors cannot quiet title against mortgagee without paying debt secured.

8. Evidence ⇐332(1).

Files in prior case against plaintiffs in quiet title action *held* inadmissible on issue of fraud of attorney involved therein, on theory files would show that attorney made false affidavit of service.

9. Mortgages ⇐362.

Trustee in deed of trust may be purchaser if he has taken no undue advantage of trust and bids at sale on equal terms with others.

10. Mortgages ⇐369(7).

Record *held* not to establish that trustee in deed of trust was guilty of fraud in sale of property.

11. Mortgages ⇐369(8).

Order requiring purchaser of property at foreclosure sale to deed property to mortgagors free of incumbrances was void.

SHENK, J., and WASTE, C. J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh and V. N. Thompson, Judges.

On rehearing.

Judgment modified.

Prior opinion, 20 P.(2d) 669.

Wright & McKee and C. M. Monroe, all of San Diego, for appellants.

Edward J. Kelly, of San Diego, for respondent.

SEAWELL, Justice.

Judgment herein went for plaintiff quieting her title to the lots in suit. The petition of defendants for a rehearing and the application of Stickney, Jr., for the right to introduce evidence before this court for relief as provided by section 956a of the Code of Civil Procedure, are based upon several specific grounds of error, both of law and fact, and particularly upon the insufficiency of the evidence to justify the finding of the trial court that the defendant Jefferson K. Stickney, Jr., of the firm of Stickney & Stickney, attorneys at law, was guilty of fraud in bringing about the sale of real property at a trustee's sale, situate in the city of San Diego, this state. The cause was tried without a jury. Defendants also assail, as wholly unauthorized by law, that portion of the judgment which, after quieting plaintiff's (trustor's) title to the trust property in suit, and decreeing that the sale made by the trustee under a trust deed executed by plaintiff was fraudulent and the deed executed thereunder by the trustee to the purchaser at said sale was null and void and of no effect, nevertheless commanded said purchaser to convey by deed said real property so purchased and to which it was decreed that the purchaser held no title, to plaintiff (trustor) "free and clear of all encumbrances which the said defendant (Linley) may have placed or caused to have placed upon said premises." This decree, if allowed to stand, would have the effect of giving plaintiff her property clear of the incumbrance she placed upon it as security for her debt.

[1, 2] It developed in the proceedings soon after the oral arguments were finished and before findings were prepared that other parties were interested in the subject-matter of the action and that said real property had, prior to trial, by mesne conveyance passed into the hands of strangers to the action. We here set out a brief summary of proceedings as shown by the record. The closing argument in the case was made April 21, 1930. On April 29, 1930, the Honorable L. N. Turrentine, then a practicing attorney, was substituted in the place of Stickney & Stickney, John T. Hon, and E. E. Hubbell, as attorneys for defendants and representing other interests. Within ten days after the closing argument, Hon. L. N. Turrentine gave notice that on May 6, 1930, he would move the court for an order reopening the case for the introduction of other and additional evidence, particularly the testimony of Jefferson K. Stickney, Jr., who, it is claimed, was excusably absent at the trial, and whose testimony would have laid before the court his part in the transaction, and on the further ground that C. R. Linley, the purchaser at said trustee's sale, had borrowed from the Bay City Building & Loan Association, secured by trust deed, the exact sum, to wit, $1,550, for which the property was bid in at the Linley purchase. This motion came on for hearing, and was supported by affidavits setting out what appear to have been substantial reasons for the reopening of the case under the authority of section 389 of the Code of Civil Procedure, which provides that, "when a complete determination of the controversy cannot be had without the presence of other parties, the court *must* then order them to be brought in, and to that end may order amended and supplemental pleadings," etc. (Italics supplied.) An affidavit dated May 1, 1930, showed that the property in controversy passed from Linley to said Bay City Building & Loan Association on September 4, 1929, more than six months before

the motion was made to reopen the case and four months before plaintiff filed her complaint herein to quiet her title. The Bay City Building & Loan Association trust deed was recorded in the public records of the county of San Diego on September 18, 1929. Attorney Stickney, Jr., made insistent efforts to reopen the case before the cause had gone to judgment on the ground that the court had adjudged him guilty of fraud at the trial of said cause at which he was not present, based upon pleadings which gave no intimation that it was the purpose or intention of opposing counsel to stigmatize him with fraudulent practices which would be carried into the judgment. Further, that the evidence did not justify the finding that he was guilty of fraud, and that such a finding was not necessary for a decision of the issue before the court. The motion to reopen the case for any purpose after trial and before the filing of findings of fact and conclusions of law was denied on May 8, 1930. In view of sections 389 and 662 of the Code of Civil Procedure and other provisions of the Codes enacted for the purpose of making a complete determination of controversies between litigants in one action and directing the bringing in of new parties when necessary or proper for a determination of a pending action, and which are to be liberally construed, to effect the object for which they were enacted, we are of the opinion that under the peculiar and somewhat confused circumstances of the case the trial court should have reopened said cause to the end that all the evidence available which would have thrown any light upon the issue of fraud could have been laid before the court. The court's judgment has placed upon the reputation of Stickney, Jr., a lawyer's most valuable asset, a stigma which long years only may possibly remove, and one so characterized by a court's decree should have been fully forewarned by the pleadings that his personal and professional integrity was to become an issue at the trial of the case. Reasonable liberality should be indulged in cases where it is doubtful as to whether the attorney stigmatized should have anticipated that his personal integrity would be brought into the case. Appellant Stickney claims that, inasmuch as the complaint contained no allegation or charge of fraud against him, and the most that could be gathered from the complaint were allegations of procedural irregularities which voided the sale, he should have been given an opportunity to meet squarely such evidence taken at the trial from which the inference of fraud was drawn, and repel the conclusion which followed it.

As confirmatory of appellant's contention that the case should have been reopened and new parties brought in, appellants cite the fact that another and a new action, Southern Investment Company v. Edith Shimpones et al., was made necessary by reason of said refusal. Southern Investment Company purchased said real property at a trustee's sale. The Bay City Building & Loan Association furnished the purchase price at the first trustee's sale, whereby the title of said property was placed in the name of Linley. Linley subsequently defaulted in the payment of his obligation, and Southern Investment Company became the purchaser at the trustee's sale for the sum of $2,204.46. Edith Shimpones, formerly Edith Gonzales, refused to surrender possession, claiming title in herself. Southern Investment Company brought an action against her to quiet its title and for possession of said property.

C. M. Monroe, who was one of the attorneys for the defendants and appellants herein, and who is and was one of the attorneys for the Southern Investment Company in the action brought by said company to quiet its title against plaintiff herein and to be let into possession of said property, has given his affidavit in support of the motion herein for relief as provided by the remedial provisions of the Code of Civil Procedure. The averments of said affidavit have not been traversed or denied, and they will not be controverted, as counsel for plaintiff in a letter addressed to this court states that he will not reply to the petition for a rehearing, as there is nothing to be added to the briefs already on file, and for the further reason the respondent is wholly without funds. Said affidavit avers that the court in the Southern Investment Company case found that Linley became the purchaser of said property at the first sale, and that he borrowed $1,500 from the Bay City Building & Loan Association, executing a deed of trust as security therefor, and, having defaulted in the payment thereof, said investment company became the purchaser at a trustee's sale thereof, paying on account of said purchase, including taxes, paying liens, and other charges, the sum of $2,204.46. A judgment, interlocutory in form, was entered according to stipulation, providing for a redemption period in favor of plaintiff herein, but said period has long since expired without any attempt being made on the part of plaintiff to redeem the same. This judgment has long since become final. Said judgment, apparently acquiesced in by all parties, renders the appeal in this case, so far as the ownership of the real property is concerned, moot. This is especially true as to Stickney and Linley, as said property descended by mesne conveyances from the first trustee's sale made by Stickney, Jr., to Linley, and from Linley in regular order to Southern Investment Company. This being so, defendant Linley could not be compelled to convey said property to plaintiff unincumbered, as a court of record in a direct proceeding brought by Southern Investment Company against plaintiff, involving the title

to said property, quieted said company's title thereto, even before the judgment in the pending appeal herein could become final. Linley, owning no interest in said property, had nothing to convey. Neither was Stickney, Jr., injured in having the property follow a course unhampered by the decree from which this appeal was taken. Plaintiff did not pay the amount she borrowed on the property, and she was not entitled to have any one else pay it for her.

This leaves for further consideration the judgment convicting Stickney, Jr., of fraudulent practices in causing said property to be sold under the first trust deed. In determining this question, it becomes necessary to relate as briefly as possible the history of the transaction. Counsel for plaintiff has spent much time and given considerable space in his brief to excoriating the Stickneys, especially Stickney, Jr. His dislike of the Stickneys is very pointedly set forth, and he does not hesitate to apply to them the term "thief" or denounce them as guilty of grand theft. It is to be regretted that counsel has given himself over to unrestrained acrimonious denunciation of his adversary. Harsh language is not a substitute for argument entrenched in fact. Whether or not the findings of fraud are sustained must appear from the case presented. Counsel, in a letter addressed to this court, assures the court that what he has done in this matter was in obedience to his duty to a poor woman deprived of her home, and not because of any personal grievance against the Stickneys. He then proceeds to inform the court that several years ago he filed a complaint against the Stickneys with the bar association. He does not state whether his charges were sustained or dismissed. We must therefore assume that they were not sustained. He also presented to this court as a matter material to the cause an affidavit in which he sets forth the proceedings, findings, and conclusions of the local administrative committee of the state bar for the county of San Diego, recommending the suspension of both Stickneys from the practice of the law for a period of one year. Plaintiff's counsel filed charges with said committee based upon the record and judgment entered in the instant case convicting Stickney, Jr., of a fraud. Upon said judgment the above recommendation was made. Counsel has failed to inform this court, however, that said charges preferred by him, together with the recommendation of the local administrative committee, came regularly before the state bar governors for hearing and decision, and said state bar governors, upon due deliberation, dismissed said charges without so much as a censure. We are advised that the order of dismissal was made by the state bar governors on September 15, 1933.

We have made a careful examination of the entire record in this case, impelled to do so largely by the serious and far-reaching effect of the judgment convicting an attorney at law of fraud, which is forcibly demonstrated by the effect it must have had upon the action of the local administrative committee in making a recommendation of suspension. The same record upon which the judgment herein is based, together with the judgment, was before the state bar governors, and that body refused to make a finding that the Stickneys were guilty of fraudulent conduct or had committed any act involving moral turpitude.

[3] We now come to the consideration of the question whether the complainant, in her action to quiet title against Jefferson K. Stickney, Jr., and his codefendants, was sufficiently specific in her allegations as to put said Stickney upon notice that he was called upon to answer charges of fraud, and therefore his absence at the trial was an inexcusable disregard of the consequences which would be the natural result of a judgment for plaintiff. The general rule is that fraud must be both pleaded and proved. The complaint is in two counts. The first contains the simple and usual allegations necessary to constitute an action to quiet title. The second count alleged her ownership of the real property in controversy; that she was formerly known as Edith Gonzales, but by her marriage her name was changed to Edith Shimpones; that on January 15, 1925, she executed and delivered her deed of trust to M. Hall, as trustee, in the sum of $1,400, to secure her promissory note payable to Annie J. and Morris H. Lane, beneficiaries in said trust, on account of said sum which she borrowed from the Lanes; that Hall died, and W. A. Olson and T. B. Middleton were appointed trustees to succeed him; that Jefferson K. Stickney, Jr., assumed to act as trustee in place of the latter, but at no time was he duly or regularly appointed, and he was wholly without authority to act as trustee.

In passing, it is pertinent at this point to state that the court found that Stickney, Jr., was appointed trustee to succeed Olson and Middleton as prescribed in the deed of trust. This finding is absolutely established by the fact. He was appointed July 10, 1929. The complaint further alleges that Stickney, Jr., published a notice of sale "under and by virtue of the terms of said trust deed, but wholly without authority"; that the plaintiff was not in default; that the sale was unlawfully made; that Stickney, Jr., falsely represented that default had been made under said trust deed, in that the principal sum which was "due under the trust deed on January 15, 1926, had not been paid; that said representation was false in that said principal sum was not due on January 15, 1926, nor at the time said notice of sale was published, or at any time hereafter mentioned." The principal, by the express terms of said trust deed,

became due and payable January 15, 1926. The principal was long past due at the time this action was filed, and the only open, controvertible facts before the court were as to the amount of interest due and whether or not a breach of the obligation for which the transfer in trust was made had occurred, as provided by section 2924 of the Civil Code. On February 6, 1926, Edith Gonzales had defaulted in the payment of all the instalments of interest since executing the deed of trust, and the principal falling due January 15, 1926. Annie J. Lane and Morris H. Lane, the beneficiaries and holders and owners of said note and deed of trust, gave notice of default and election to sell said real property under the deed of trust. This notice of sale was given by the Lanes approximately three years before Stickney, Jr., was appointed by the Lanes trustee in said matter, and it cannot be said that he inspired the filing of said notice of sale or had anything to do with the filing of said election to sell under the trust deed. The complaint further alleges that Stickney, Jr., in acting upon said notice to sell, falsely represented that the Lanes declared that default had been made, and proceeded to sell, and did sell, said real property at public auction on August 20, 1929, without authority of law.

[4] We have summarized the allegations of the complaint, and nowhere are the words "fraud" or "fraudulently" or their equivalent to be found in the complaint. The allegation "That in and by said notice the defendant, Jefferson K. Stickney, Jr., falsely represented that the defendants Annie J. Lane and Morris H. Lane, the owners and holders of said note, did declare that default had been made and did declare the whole of said principal and interest immediately due," falls far below a definite allegation of fraud. It does no more than to allege that certain contentions or claims, or the construction placed on the notice of default, are false and untrue. There is nothing in the entire complaint that would indicate to Stickney, Jr., that he was being charged with fraud, and the complaint is not framed on such a theory. Neither are the deficiencies of the complaint supplied by the allegations of the answers as contended by plaintiff.

We have referred to the pleadings thus extensively for the reason that, if the allegations of the complaint were such in character as to have given notice that he would be charged at the trial with fraudulent practices, he would not be justified in absenting himself from the trial under any ordinary circumstances, and no relief would be granted to him because of his own indifference to consequences. We are of the view that there was no reason for him to anticipate that fraud would be made the gravamen of the action. It further appears from uncontradicted affidavits in support of the various motions in the cause that the trial was carried forward on a crowded ready-for-trial calendar from day to day, and Stickney, Jr., had prepared to leave the city for a few days. That it seemed safe for him to leave when he did for a few days, as the state of the calendar seemed to have given assurance of time in which to return before the case went on trial, is supported by the affidavits of the Stickneys and George W. Edwards, deputy county clerk and courtroom clerk of department No. 1 in which said cause was tried. Said courtroom clerk averred that the trial day for said cause was April 8th, but the trial was continued day after day until April 18th owing to a crowded calendar. He avers that Stickney, Jr., called and made many inquiries of him as to the day when the cause would likely go to trial, and he told Stickney, Jr., that from the appearance of the calendar he did not think it could be heard for some time; that on April 18th it would probably be set for a future day certain. Stickney, Jr., filed an affidavit in which he averred that, prior to the setting of the case for April 8th, he had made arrangements to leave the city on April 12th and return on April 21st; that on April 16th, appellant having remained in San Diego, and said cause not having been reached, affiant understood from his attorney, John T. Hon, that he had arranged with Mr. Kelly, plaintiff's attorney, that the case might be continued until April 21st, and at that time be set for the term commencing May 5th. Stickney, Jr., after four days' absence, returned to San Diego on the evening of April 21st, and learned that the trial of said case had been concluded on the day he returned. The affidavits filed in support of the motion to reopen the cause in view of the finding of the court as to fraud, which could not have reasonably been anticipated as an issue from anything that appears upon the pleadings, and which we are of the opinion was not sustained by the evidence introduced at the trial, were sufficient reasons to entitle the defendant Stickney, Jr., to the relief which he sought to obtain by his motions.

[5-7] Plaintiff in her complaint made an offer of tender to the defendants, or such of them as the court may adjudge entitled thereto, of said principal sum of $1,400, together with all interest due thereon, and all costs, penalties, and sums which might be rightfully due the defendants or any or either of them by virtue of her promissory note or deed of trust, and she alleged that she was ready and willing to pay to said defendants or either of them said sum or sums upon their expression of willingness to accept the same in full discharge of her indebtedness in the premises. As she was asking that her title be quieted, it was a necessary requisite that she do equity under the well-settled authority of this state. When the court's attention was called to the above tender at the close of the case, plaintiff's attorney said the offer was

made before "we knew this situation. Counsel knows he must come into equity with clean hands, in order to get anything. He has come in here with soiled hands and cannot have a judgment now for $1,500, or any other sum." The court refused to require plaintiff to do equity, and quieted plaintiff's title free of debt. Whether as a matter of fact Linley's hands were soiled and he, as the purchaser, would not have been entitled to have his title quieted had he so requested, inequitable conduct on his part or any other defendant would not have in any way removed the equitable obstacles which stood between the plaintiff and a clear equitable title. The plaintiff in a quiet title suit is not helped by the weakness of his adversary's title, but must stand upon the strength of his or her own. The fatal weakness in plaintiff's position is that she did not do equity by paying her debt, but refused to pay it. Here plaintiff is appealing as an *actor* to a court of equity to obtain affirmative equitable relief, and she is bound by the well-known rule that he who seeks equity must do equity. It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured. See a long list of cases sustaining the equitable rule as variously applied collated in 10 Cal. Jur. p. 512 et seq. It was clearly erroneous to quiet her title under the circumstances of her refusal to do equity.

During the trial of the case, over the objection of defendants, the files of the case of Reavis v. Gus Shimpones and Edith Gonzales were offered and received in evidence. Stickney & Stickney were the attorneys for the plaintiff. The action was to recover the price of an automobile truck which Reavis, who was an automobile dealer, had sold under a sales contract to the defendants at the price of $2,715. Shimpones and Edith Gonzales afterwards intermarried. Reavis, believing Edith Gonzales the better risk, would not sell to Shimpones unless Edith Gonzales became a party to the contract. Judgment was taken against Edith Gonzales by default. An attachment issued. The real property described in this action was included in the levy. Mr. Edward J. Kelly, attorney for Edith Gonzales, moved to vacate and set aside the default on the ground that Edith Gonzales had not been served with summons and complaint. The files of the Reavis case were offered and admitted on the theory that they were relevant to the issue of fraud in the instant case, in that they would show that Stickney, Jr., made an affidavit in the Reavis case that he had personally served Edith Gonzales in that action, all of which was false, and her default was thereafter set aside by reason of the falsity of said affidavit as to the services of the summons and complaint upon Edith Gonzales.

[8] We are of the view that the files of the Reavis case were not admissible, and, if admissible, they fell far short of proving fraudulent conduct on the part of Stickney, Jr. In support of the motion, three affidavits were received. Mrs. Shimpones merely averred in general terms "that she had never been *served* with summons and complaint herein; * * * that the affidavit of service upon this affiant is false and untrue." The above constitutes the whole of her averments as to service. Jennie Calles made an affidavit that the service of summons and complaint were made upon her in the presence of one Hazel Soares. She avers that she does not fully understand the English language, and that a gentleman came to her on August 13, 1928 (not stating where she was or whether she was a friend or guest of Edith Gonzales), and asked her either if she was Edith Gonzales, or if she knew Edith Gonzales. To this double question, without anything further being said, she answered, "Yes," and the summons and complaint were placed in her hands. She asked for no instructions or directions. Neither she nor Mrs. Gonzales aver that the summons and complaint did not come into the hands of Mrs. Gonzales. Mrs. Calles does not state that she was or was not at the Gonzales home when she permitted herself to be served as Mrs. Gonzales.

One Hazel Soares made a six-line affidavit wherein she averred that on August 13, 1928, she was in the company of Jennie Calles (without stating where), and that a gentleman inquired of Jennie Calles as to the whereabouts of Edith Gonzales, or if said Jennie Calles knew the said Edith Gonzales, and thereupon served the said Jennie Calles with a summons and complaint. Nothing further is stated as to who the said affiants were, where they were at the time of the alleged service, or as to why Jennie Calles should be in doubt as to whether she said she was Edith Gonzales or merely said that she knew her. It is highly improbable that Stickney, Jr., after having taken the pains to go to the residence of Edith Gonzales, 2825 K street, with the purpose of serving her, should have ended his mission in a state of mental vacuity. The averments of Jennie Calles and Hazel Soares are too inherently improbable to receive serious consideration.

Stickney, Jr., made an affidavit, convincing upon its face, in which he relates in minute detail his visit to the Gonzales residence at 2825 K street, on August 13, to serve Edith Gonzales with summons and complaint. He avers that he gave an alarm at the front door, and, as no one answered, he went through a side gate to the rear door, and was met by a tall, heavy man, who demanded what he wanted, and, being told that he wanted to see Edith Gonzales, he was asked what he wanted with her. Affiant replied that he wished to see her about a matter. Thereupon the man called aloud,

"Edith," and a lady appeared answering the description of Edith Gonzales as he afterwards saw her and knew her to be Edith Gonzales. Affiant asked her if she was Edith Gonzales, and she answered that she was, and he pushed open the screen door and said he had a paper for her, and handed to her the summons and complaint. The woman took it, and, as she was looking at it, the man said, "What is this?" Upon being told he grabbed the paper from her hands in an angry manner and in a loud voice said that Edith Gonzales did not owe Jack Reavis "a damn cent," and, if they wanted to do anything about the matter, for Reavis to come out himself and not send any one else out and they would show him a thing or two. Affiant averred that no one else was present but the three above mentioned.

In no conceivable way can the inference of fraud be drawn from the affidavits of Edith Gonzales and her coaffiants. If the first half of Jennie Calles' affidavit is true and she represented herself to be Edith Gonzales, she deliberately misled affiant. Such would be the natural result if Jennie Calles was at the Gonzales' home (the only place service is pretended to have been made) at the time the person whom she did not describe handed her said papers. If the court believed Jennie Calles and Hazel Soares, it could not do otherwise than exonerate Stickney, Jr., of any charge or imputation of fraud in the Reavis service transaction. The files of the Reavis case, as above set forth, do not support an inference of a fraudulent attempt on the part of Stickney, Jr., to deprive the plaintiff herein of her right of defense by means of a false or improper service. The court may have believed all that affiant Calles averred as to her misrepresentation as to her identity, which in the circumstance of place was well calculated to mislead a reasonable person, and still have held Stickney, Jr., free from any charge of bad faith. In fact, such is the inference which flows from the facts.

Reavis v. Gus Shimpones and Edith Gonzales was an action to recover the sales price of an autotruck on sales contract, and involved no issue set out in the instant case. Reavis was attempting to collect on the contract from Gus Shimpones and Edith Gonzales, and they were attempting to defeat the action. The evidence offered to prove fraud does not tend to establish a conspiracy or prove a plan adopted in furtherance of a common fraudulent purpose, even if fraud had been properly pleaded.

We now come to the consideration of the alleged frauds and attempted frauds which have to do with the foreclosure of the trust lien. Said deed grants broad powers to the trustee and contains the usual provisions which make the recital of the default and all other facts affecting the regularity or validity of the sale conclusive proof of all the facts in the deed recited against the party of the first part, his heirs and assigns, etc. It is specifically urged that the sale was made without notice having been posted on the premises, which consists of a seven-room frame house, built fourteen or fifteen years before sale on a lot 50 x 140 feet. The sale was noticed for August 20, 1929. It is admitted that notice by publication and the other three posting notices were regularly and publicly made by C. R. Linley, but it was disputed that the notice which he testified was posted on the front door of the residence on July 30 was so posted. Edith Gonzales testified that she never saw a notice posted on the premises. This is sufficient to create a conflict as to the fact. Be this as it may, it is an incontrovertible fact that Stickney, Jr., addressed and mailed a letter to Edith Gonzales containing a notice of the election to sell said real property on August 20, 1929. The receipt of the letter accompanying the notice and which informed her that the sale would be held August 20 was admitted, but she said she did not know *when* the letter and notice was received. At any rate, it was received approximately twenty days before the sale, which is a circumstance sufficient to rebut the claim that Stickney, Jr., was surreptitiously and fraudulently plotting to despoil her of her property. There is no question as to the publication and posting of notices in three public places exceeding the statutory requirements. Neither is it claimed that she was not fully aware of the impending sale. A fraudulent purpose can hardly be said to lurk in the above set of circumstances.

[9, 10] Plaintiff specially stresses the fact that C. R. Linley, who is not a lawyer, but an employee of Stickney and Stickney, was the ostensible purchaser of the property on the day it was sold. Also some significance is given to the fact that Linley was not present at the sale, but the property was bid in in his name by Stickney, Sr.; also as to whether Linley was bidding in the property for Stickney, Sr., or Stickney, Jr. All of the foregoing is immaterial, as long as it did not operate to the detriment of the plaintiff, the owner of the property. A trustee may be a purchaser if he has taken no undue advantage of his trust, and bids at the sale on equal terms with all others. We are unable to find in the record anything that would justify us in holding Stickney guilty of fraud, or that he had any designs on the property in question. No attempt whatever was made to acquire it for himself. No concealment of any material fact was attempted. In every action he was acting as an attorney on behalf of a creditor of the plaintiff.

While the purchase of property by a trustee should be carefully scrutinized, and as a general proposition the practice is not to be encouraged, especially where the purchaser is an attorney in the matter, we fail to see any

fraudulent relations existing between the parties to the action. The Stickneys were representing the interests of two clients who were creditors of Edith Gonzales, afterwards Mrs. Shimpones. In the uncontradicted affidavits on file on motion to reopen the cause and for a new trial, appellants have set forth their entire stewardship in attempting to protect the rights of two clients. Linley, no doubt, was acting for the Stickneys, and in no possible way could plaintiff have been injured whether Linley became the purchaser for Reavis or whether a stranger to all the parties was the purchaser. The property was sold twice, and it was bid in both times for a sum equal to the debt plus interest and costs.

[11] As we early pointed out, the case of Southern Investment Company v. Edith Shimpones, a direct quiet title action involving the real property herein, has been called to our attention. Edith Shimpones appeared in that action and litigated her title, but final judgment after the expiration of an interlocutory judgment granting her sixty days to redeem was entered against her on October 19, 1932. Title in that action was deraigned from the Linley purchase. The judgment has long been final. This renders the title of the property in this action as between grantee Linley and his successors on the one hand and Edith Shimpones on the other a closed issue. It is conceded by counsel for plaintiff that Mrs. Shimpones has lost the property through subsequent foreclosure proceedings. Counsel for appellants likewise state that all the legal propositions involved have practically become moot. Appellants state that they do not attack the decision of this court upon which the rehearing was granted as to the irregularities in the sale, but only ask that it be modified as to the direction of the trial court commanding C. R. Linley to deed the property free and clear of all of said incumbrances to Edith Shimpones. Second, they ask that the decree be modified by striking out and expunging the findings of fraud from the findings and judgment as not supported by the evidence. We have considered the affidavits which were filed in support of the motions, inasmuch as counsel for the plaintiffs has, for reasons stated by him, concluded that he will not file a reply to said appellants. It would serve no good purpose to formally reopen the case, inasmuch as the ownership of the property is no longer an issue. We are of the view, however, that the findings and judgment which adjudge Jefferson K. Stickney, Jr., guilty of fraudulent conduct should be expunged from said findings and judgment; also that the order which directs C. R. Linley to deed the real property described in said judgment to Edith Shimpones free of said incumbrances was beyond the power of the court to make and is null and void. Otherwise the judgment will stand as entered.

We concur: CURTIS, J.; IRA F. THOMPSON, J.; LANGDON, J.; PRESTON, J.

I dissent: WASTE, C. J.

SHENK, Justice.

I dissent. The judgment of the majority assumes to expunge from the findings and judgment those portions thereof which find and adjudge the defendant Jefferson K. Stickney, Jr., guilty of fraudulent conduct. No finding is made by this court contrary to the findings of the trial court, and I question the authority of this court to make such an order of expurgation. I agree that the record is insufficient to support the findings of fraud. The question before this court in that behalf is whether such findings are supported by the evidence. Since the findings are unsupported, the appropriate order is to reverse the judgment or to make findings contrary to the findings of the trial court, and, if there be no other infirmity in the findings or judgment, to affirm the judgment on the findings so made.

In my opinion, the allegations of the complaint were sufficient to place the defendant Stickney, Jr., on notice that he was charged with fraudulent practices in the trust deed sale. He was ready and anxious to meet those charges at the trial, and was justified in assuming that the case would not be brought on for trial during the few days of his absence from the city of San Diego. The showing made on his motion to reopen the cause to permit him to rebut, by material evidence, the inferences of fraud developed at the trial in his absence, was sufficient to support the motion, and, in my opinion, the trial court should have granted it. The failure to do so alone would require a reversal.

Again, the judgment of the majority affirms that portion of the judgment which quiets the plaintiff's title to the property, when it is conclusively shown that the plaintiff is not, and was not at the time of the trial, the owner of the property in controversy. At all events, I think the judgment should be reversed, probably with directions to enter a judgment for the defendants.

136 Cal.App. 279

WICKMAN v. LOWENSTEIN et al.

Civ. 9026.

District Court of Appeal, First District, Division 1, California.

Jan. 17, 1934.

1. Appeal and error ⇐989.

Appellate court, in determining whether findings for plaintiff are supported, need only look to testimony presented by plaintiff, and, if sufficient, may disregard any adverse showing made by defendant except where testimony of plaintiff is inherently improbable.

2. Automobiles ⇐245(72).

Pedestrian struck by automobile *held* not contributorily negligent as matter of law.

3. Automobiles ⇐245(6).

Evidence in respect to negligence of driver of automobile striking pedestrian *held* sufficient for submission to jury.

4. Damages ⇐132(1).

$17,500 as award for injuries consisting of cranial fracture along suture line, probable rupture of kidney, with apparent functional restoration, and numerous fractures, with impairment of use of knee, *held* not excessive.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Oscar Wickman, Jr., against Melville Lowenstein and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Crosby & Crosby, of Oakland, for appellants.

Augustin Donovan and Suren Toomajian, both of Oakland, for respondent.

McNUTT, Justice pro tem.

From a judgment on verdict in a pedestrian plaintiff's favor for injuries negligently inflicted by an automobile driven by defendants, the latter appeal for insufficiency of evidence and excessive damages.

At night, while plaintiff was walking westerly across San Pablo avenue, Berkeley, he was struck by an automobile of the defendant company driven southerly along the avenue by its employee, defendant Lowenstein, and was so injured that the jury awarded him damages for $17,500. After denial of successive motions for nonsuit, directed verdict, judgment non obstante, and new trial, defendants appeal on grounds theretofore unsuccessfully urged.

The questions here involved are as follows:

Question No. I. Is the finding of the jury in its affirmative answer to special interrogatory No. 1 submitted to it contrary to the evidence?

Interrogatory No. 1. At the time the plaintiff was struck by defendants' automobile, was plaintiff crossing San Pablo avenue on the southerly unmarked crosswalk of Page street? The jury answered in the affirmative.

Question No. II. Was plaintiff guilty of contributory negligence as a matter of law?

Question No. III. Is the evidence sufficient to support the implied finding of the jury that defendant was guilty of negligence proximately causing the accident and injuries to plaintiff?

Question No. IV. Is the verdict for $17,500 in this case excessive?

Appellants, hereinafter called defendants, contend that, notwithstanding the jury found that the accident in question happened at a pedestrian crossing, the evidence of certain physical facts demonstrates that the plaintiff's testimony that it occurred there is entirely unworthy of belief, and that therefore the evidence does not establish that the accident was proximately caused by the defendants' negligence, and also that the evidence does establish contributory negligence in plaintiff as a matter of law.

San Pablo avenue is a busy automotive thoroughfare and as well carries double street-car tracks. It runs from north to south. It is traversed by Page street and a block to the south by Jones street. No one witnessed the accident save the plaintiff and the defendant Lowenstein. Plaintiff lived to the west of the avenue and to the south of Page street. He had been visiting to the east of the avenue, and was on his way home either at the crossing or somewhere down the block therefrom when struck. His testimony covers his approach to the avenue from the east along the southerly side of Page street, his pausing at the curb to observe vehicular traffic, his observance of certain automobiles bound, respectively, north and south, his observation of their relative distances from him, his permitting a certain north-bound car to pass before stepping into the street, his progress across the street within the projected unmarked crosswalk, the pursuit of his course up to the instant of the impact at a uniform and normal rate of speed without pausing, which rate of speed he twice exhibited to the jury, his looking while progressing in the direction of approaching cars, his visual measurement of distance and determination of safety in such progress, and finally his being struck by the defendants' car a heavy blow which rendered him unconscious. His progressive positions and the relative positions of the traffic described by him were indicated on a map received in evidence. Then, too, there was an electric light on the

corner opposite that whence he started to cross the street, while none was down in the block to the south.

The defendants concede that "if the accident occurred on the southerly crosswalk of Page street, or indeed anywhere within the intersection of Page street and San Pablo avenue, or within either of the cross-walks thereof, then the evidence is sufficient to support * * * the implied finding of the jury that defendant was guilty of negligence proximately causing the accident and injuries to plaintiff."

The testimony of the plaintiff is intrinsically rational, deliberate, and descriptive of a course of conduct consistent with that which should have been followed by a reasonably prudent person in an attempt to cross a crowded thoroughfare in safety. It does not present any substantial internal conflict.

[1] The testimony of the defendant driver, Lowenstein is, of course, in conflict with that of the plaintiff. "But, in determining whether the findings of the court are supported, we are required only to look to the testimony presented by the plaintiff, and, if sufficient, we may disregard, in such consideration, any adverse showing made by the defendant." Keyes v. Nims, 43 Cal. App. 1, 8, 184 P. 695, 698. To the same effect, Sinsabaugh v. Clark, 110 Cal. App. 340, 294 P. 462; Minor v. Foote, 100 Cal. App. 441, 280 P. 197, and other cases.

The only exception to this rule is made where the testimony of the plaintiff is inherently so improbable as to be entirely unworthy of belief. In re Estate of Russell, 189 Cal. 759, 210 P. 249.

Defendants' contention that the physical facts in the case are so inconsistent with plaintiff's version of the accident as to destroy the force of plaintiffs testimony cannot be sustained. Such facts consist of certain tangible evidence of the accident discovered in the street immediately thereafter; at a point 174 feet southerly from Page street, a photograph which plaintiff was carrying in his hand at the time of the impact and a metal figure 8 which was dislodged from defendants' automobile were found. Twenty-four feet further south, or 198 feet from Page street, a cap worn by plaintiff was found. Twenty-one feet further south, or 219 feet from Page street, one of plaintiff's shoes was picked up. Lying unconscious, his head close to the curb, his body projected into the street at distances variously described from 220 to 255 feet south of Page street, plaintiff was found. Two hundred seventy-nine feet south of Page street some metal ornaments broken from defendants' car were picked up. These objects, including the body of plaintiff, were progressively dropped. In disposing of the cogency of such physical evidence, we adopt the views of the trial judge expressed on denial of the motion for a new trial.

"As to 'physical facts': I cannot say as a matter of law that they are so controlling, in the light of all the evidence, as to warrant taking the case from the jury. As said by our Supreme Court: 'Common experience and observation teach us that strange and astonishing things happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. * * * It is for the jury to weigh and balance probabilities.' Neilson v. Houle, 200 Cal. 726, 729, 254 P. 891, and cases cited in the opinion. The jury was justified in inferring that after being hit the plaintiff was carried forward on the front of the automobile of defendant for some distance, and that the various articles shown by the evidence were also carried for different distances and dropped in different places along the route traveled by the automobile. I cannot say that the law of gravitation would require that all or any of them would, without question, be dropped at the place of impact. Tucker v. City and County of San Francisco, 111 Cal. App. 720, 296 P. 101. The law of gravitation urged by defendant would apply to the plaintiff's body as well as to said articles."

[2] Since contributory negligence does not appear as a matter of law and the evidence of plaintiff is ample to support the general verdict of negligence on the part of defendants, it is not incumbent upon this court to account for the jury having accepted the plaintiff's and having rejected the defendants' version of the accident. It is not inappropriate, however, to mention that a police officer testified for plaintiff that, when he arrived on the scene some seconds after the crash, which he had heard 800 feet away, the defendant told him that he had not seen plaintiff until his car struck him, while in his own behalf defendant testified that he had seen plaintiff one to ten feet ahead before the impact.

[3] If any criticism may be made as to the sufficiency of the plaintiff's testimony to support the verdict, it is that plaintiff, having seen the approaching automobile, erroneously judged its speed and distance when he continued his way over the street crossing. His testimony in that regard is that, when he stepped between the westerly car rails, he again looked to his right and saw the second south-bound machine about 250 feet away, and that he continued to walk westerly about 12 feet when, looking once more northerly, he perceived defendants' car within a foot of him and then received the blow. The case is nevertheless one for the jury.

"There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the

question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. *Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury.*" (Our italics.) White v. Davis, 103 Cal. App. 531, 542, 284 P. 1086, 1091.

So much for the integrity of the verdict in point of liability—is the award excessive?

[4] When injured, plaintiff was 22½ years old with an expectancy of about 40 years; he had been employed as an apprentice machinist's helper for over two and a half years until not long prior thereto the place of employment closed; his earnings amounted to $140 to $160 per month. Plaintiff's medical testimony was given by a general practitioner in charge of the patient, and three others, specialists in the matters to which their evidence was, respectively, addressed; all are of the front rank in the profession. Their findings and prognosis follow: Cranial fracture along the suture line with permanently impaired cerebration; probably rupture of a kidney with apparent functional restoration; fractures in left ninth, tenth, eleventh, and twelfth ribs in a row close to the spine; and in corresponding position in the right tenth, and eleventh ribs with fractures further out to the side in the tenth rib; ribs healed; comminuted fracture of fibula with a fracture of a portion of the shin bone or tibia known as the tibial spine, a projection into the knee joint, and a tearing from its lodgment of the cruciate ligament, with permanent instability of the joint; ligaments separated and likely to remain so; excessive motion of the joint by reason of the tearing of the ligament which causes a slipping out and giving way of the knee. The plaintiff's ability to do any hard physical work was thereby affected, as the knee is likely to give way under any heavy lifting, and each time the knee might give way the strain as the result would become more severe. The brain injury has resulted in a definite lack of the power of concentration, ready susceptibility to fatigue, with mental dullness and apathy. Insomnia often results from the condition found; hence on the following day plaintiff would not be in a good physical condition. Plaintiff would in all reasonable certainty be unable to carry on the type of work that he had done before the accident or any other type of work which might require mental effort, and because of his physical condition he is not able to work consecutively at any physical work, and that there is not any prospect of any improvement. Plaintiff suffers and will continue to suffer intermittent dizziness due to head injury.

Plaintiff was irrational for three days after the accident, confined in a hospital for two months, thereafter at home for a month, and for some time thereafter got about upon crutches and with a cane. His special damages were $1,500.

Defense called one medical man, who found the mental function normal, ribs healed, kidney unaffected by the accident, dizziness due rather to liver disturbance than the suggested fracture which he could not see, but conceded weakness and instability in the knee which in his opinion could be cured in only one way, by operating and suturing down the end of the cruciate ligament; that, while the condition was technically operable, he had never done or seen the operation, which, if unsuccessful, would result in a stiff knee. He conceded that an elastic stocking might help the joint, but it would never give it the stability that it had originally.

It is unnecessary to dwell upon the pain and suffering endured by plaintiff. The jury accepted the testimony of plaintiff's professional witnesses. This court is bound thereby. The award cannot be said to be excessive.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

136 Cal.App. 184

PEOPLE v. SCHLACHTER et al.

SAME v. LA PIERRE.

Cr. 2417, 2416.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1934.

Insurance ⇐31.

Statute making it offense to present fraudulent claims on contract of insurance or indemnity *held* to include proofs or claims under accident and public liability insurance (Pen. Code, § 549, as amended by St. 1923, p. 727).

Appeals from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Prosecution by the People against Sadie Schlachter and another; and against Zella V. La Pierre for violation of statute penalizing false proof of loss upon contract of insurance or indemnity. From judgment of dismissal,

after order sustaining demurrers to information, the People appeal.

Judgments reversed, and actions remanded.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Louis Feinstein, of Los Angeles, for respondent La Pierre.

Sigmund S'Renco, of Los Angeles, for respondents Schlachter and Gartman.

YORK, Justice.

The people appeal from two judgments of dismissal, after orders sustaining general demurrers to the informations.

The defendants Schlachter and Gartman were charged with violations of section 549 of the Penal Code, by presenting four separate false proofs of loss against four different companies upon contracts of insurance and indemnity, for personal injuries claimed to have been sustained in four separate accidents. The names of the insurance carriers are set out in the several counts of the information as the parties to whom the false proofs of loss were presented.

Defendant La Pierre was accused of the same description of crime as those above mentioned.

According to appellant's brief: "The demurrer was sustained on the ground that section 549 of the Penal Code is so limited by the headline of the chapter in which it appears, and the headnote of the section itself, that it does not cover false proofs of loss made on policies or contracts of accident insurance."

As originally enacted in 1872, section 549 of the Penal Code read as follows: "Every person who presents or causes to be presented any false or fraudulent claim, or any proof in support of any such claim, upon any contract of insurance for the payment of any loss, or who prepares, makes or subscribes any account, certificate of survey, affidavit, or proof of loss, or other book, paper, or writing with intent to present or use the same, or to allow it to be presented or used in support of any such claim, is punishable by imprisonment in the state prison not exceeding three years, or by a fine not exceeding one thousand dollars, or by both."

Section 549 is a section within chapter 11 of title 13 of part 1 of the Penal Code. Prior to 1923, the chapter headnote read thus: "Fraudulent Destruction of Property Insured." The headnote of section 548 was, "Burning or Destroying Property Insured." The headnote of section 549 was, "Presenting False Proofs in Support of a Claim Upon Policy of Insurance." By amendment in the year 1923 (St. 1923, p. 727), all of these headnotes were eliminated. It follows that the decision of this court in Ex parte Wilson, 30 Cal. App. 567, 158 P. 1050 (year 1916), has no application to the law as it is now. The 1923 amendment of section 549 also changed the descriptive words referring to the subject included, by substituting for the words "any contract of insurance" the words "any contract or policy of insurance or indemnity whatsoever."

We are of the opinion that since its amendment the section is broad enough to cover accident and public liability insurance such as is at issue in the case before us.

The judgments are reversed and the actions remanded to the trial court for further proceedings in accord with this decision.

We concur: CONREY, P. J.; HOUSER, J.

136 Cal.App. 292

MEZA et al. v. SWORD et al.

Civ. 7825.

District Court of Appeal, Second District, Division 1, California.

Jan. 17, 1934.

Hearing Denied by Supreme Court March 15, 1934.

1. Corporations ⇐217.

Action for wrongful death caused by corporation *held* maintainable against stockholders thereof, notwithstanding constitutional provision creating stockholders' liability was repealed, where cause of action arose and complaint was filed prior to such repeal (Code Civ. Proc. §§ 376, 377; Const. art. 12, § 3).

2. Corporations ⇐264.

Action against stockholders for wrongful death caused by corporation brought one year and seven months after death occurred *held* governed by statute allowing three years for bringing such actions, and was not barred by one-year statute of limitations (Code Civ. Proc. § 340, subd. 3; §§ 359, 376, 377).

CONREY, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Isabel S. Meza and others against James O. Sword and others. From a judgment of dismissal, plaintiffs appeal.

Reversed, and cause remanded.

David Schwartz, of Los Angeles, for appellants.

O'Melveny, Tuller & Myers, J. R. Girling, and Jackson W. Chance, all of Los Angeles, for respondents.

YORK, Justice.

This is an appeal from a judgment of dismissal entered after sustaining demurrer to plaintiffs' complaint without leave to amend.

This action is brought by the heirs of Federico Meza, deceased, against the stockholders of Higgins Estate, a corporation, in damages for the wrongful death of said deceased. The death occurred on the 26th day of March, 1929, and the complaint was filed on the 22d day of October, 1930.

The defendants James O. Sword, Margaret A. Kearney, and Teresa Sword interposed a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, and also that said cause of action was barred by the statute of limitations as found in subdivision 3, § 340, Code of Civil Procedure.

The demurrer was sustained without leave to amend.

Respondents in their brief admit that prior to November 4, 1930, upon which date, by vote of the people of the state of California, the constitutional provision creating stockholders' liability in a corporation was expressly repealed, an action could be maintained against stockholders for damages for the wrongful death of a person caused by the corporation, even in the absence of a suit against the corporation itself.

With this admission by respondents, the issues involved in the case before us are narrowed to the following questions:

1. Can an action be maintained against the stockholders of a corporation on a cause of action arising against the corporation on March 26, 1929, filed on October 22, 1930, since the repeal of article 12, § 3, of the California Constitution abolishing stockholders' liability?

2. Is the action for wrongful death against stockholders, as provided for in sections 376 and 377, Code of Civil Procedure, barred by section 340 or by section 359 of the Code of Civil Procedure?

[1] Upon the authority of the case of Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 436, 76 L. Ed. 866, we are constrained to hold that the action herein can be maintained against the stockholders of the Higgins Estate, notwithstanding the constitutional amendment abolishing stockholders' liability. The case of Coombes v. Getz, supra, was an action brought by a creditor to enforce the liability of the directors of a corporation for money embezzled or misappropriated by officers of the corporation. It was there held: "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right [citing cases]) to enforce his cause of action upon the contract."

[2] As to the time within which such action against stockholders must be brought, appellants maintain that section 359 of the Code of Civil Procedure governs, while respondents are equally positive that section 340 of the same Code is controlling.

Section 340, subd. 3 (contained within title 2 of part 2, Code Civ. Proc.), provides that the period for commencement of an action "for libel, slander, assault, battery, false imprisonment, seduction, or for injury to or for the death of one caused by the wrongful act or neglect of another," etc., is one year.

Chapter 4, of the same title 2, is denominated "General Provisions as to Time of Commencing Actions." Within this chapter 4 is embraced section 359, which reads as follows: "This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

In the case before us the action, instead of being brought against the corporation, was brought against the stockholders directly upon their statutory liability for the tortious act. Contrary to the law in many states, each stockholder in California is liable as principal debtor, and "the liability commences and a right of action accrues against both the corporation and the stockholders at the same time," but a "suspension of the remedy against the corporation does not suspend the remedy against or affect the liability of the stockholders." Hyman v. Coleman, 82 Cal. 650, 23 P. 62, 16 Am. St. Rep. 178.

"In those jurisdictions in which the statutory liability of the stockholders is primary (that is, where the creditor can proceed against the shareholder irrespective of judgment and execution against the corporation), an action to enforce this liability is considered to be on the original indebtedness." 7 R. C. L., § 402, p. 414.

"The statute imposing individual liability upon stockholders sometimes expressly provides that an action to enforce the same shall be brought within a certain time, instead of

having such actions subject to the general statutes of limitations. 'The California statute provides that actions against stockholders of a corporation to enforce a liability created by law must be brought within three years after the liability is created, and the constitutional liability of stockholders is held to be a liability created by law within the meaning of this provision' "—citing Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Gardiner v. Royer, 167 Cal. 238, 139 P. 75 and other cases. 7 Fletcher on Corporations, p. 7429, § 4238.

If the action had been brought against the corporation for damages for the wrongful death, we have no hesitation in saying that subdivision 3, § 340, Code of Civil Procedure, would govern, and that the action would be barred through lapse of time, but, since it was brought against the stockholders directly upon their constitutional liability, we are of the opinion, in accordance with the law above cited, that section 359, Code of Civil Procedure, controls the rights of the respective parties hereto.

The judgment of dismissal is reversed, and the cause remanded to the trial court for further proceedings in accordance with this decision.

I concur in the judgment: HOUSER, J.

CONREY, Presiding Justice (dissenting).

I dissent. Without reference to the other questions presented for decision, I think that this action is barred by limitation of time. The right to maintain an action for damages for a death caused by wrongful act is of statutory origin. By act approved April 26, 1862 (Stats. 1862, p. 447), the liability for such damages was created. It contained a proviso "that every such action shall be commenced within two years after the death of such deceased person." In 1872 this legislation was transferred into the new Code of Civil Procedure, section 377, without the proviso, but the same two-year limitation was continued by placing the same in subdivision 4 of section 339 of that Code. By amendment in 1873 this became subdivision 3 of the section. In the year 1905, said subdivision 3 was stricken from the section, and at the same time the period of limitation was reduced to one year by placing such actions in the list of actions subject to the one-year limitation, as provided in section 340, Code of Civil Procedure, in subdivision 3 thereof. As thus amended these provisions of law were in force at the time of commencement of the present action.

In Benjamin v. Eldridge, 50 Cal. 612, an action precisely like the action in the case at bar was commenced against the stockholders of a corporation to recover compensation for the death of one Blair, caused by the wrongful and negligent acts of the corporation. The action was commenced more than two years, but less than three years, after the day of Blair's death. The defendant by demurrer pleaded that the cause of action was barred by the provisions of section 339 of the Code of Civil Procedure, that is to say, by the two-year limitation then in force under the terms of that section. The demurrer was sustained, and on appeal from the judgment this ruling was sustained by the Supreme Court. After reciting the legislative history, the court declared that the cause of action was barred by the lapse of the period of two years after the date of Blair's death.

It cannot reasonably be denied that, if section 340, Code of Civil Procedure, is controlling in the present action, the plaintiffs' cause of action was barred thereby. But it is contended because the action is one to enforce a liability created against the stockholders of a corporation, that by reason of the provisions of section 359, Code of Civil Procedure, such period of limitation has been extended to three years. Said section 359 was enacted in the year 1872, and has not been amended. The decision in Benjamin v. Eldridge was rendered in the year 1875. While the death of Blair occurred in December, 1871, the action was not commenced until the year 1874. At the time of adoption of section 359, in the year 1872, the then existing two-year period of limitation for that action had not expired. It is clear that, if that section had the effect of superseding the provisions of section 340, as applied to an action of this description against the stockholders of a corporation, the Benjamin Case would have been commenced within time, and would not have been barred by the statute. In the Benjamin Case no reference was made to section 359, and possibly the court did not have it in mind. Nevertheless, I think that the decision was right. It is my opinion that the provisions of the two sections, 340 and 359, Code of Civil Procedure, may be harmonized by treating the provisions of section 340, establishing the one-year limitation in actions to recover damages for death by wrongful act or neglect, as an exception to the more general description of "liability created by law" in section 359, and I think that this conclusion is in accordance with the legislative intention. This conclusion is strengthened by consideration of the fact that the amendment of section 340, providing that an action to recover damages for the death of one caused by the wrongful act or neglect of another must be commenced within one year, is an enactment of later date than that of section 359.

PEOPLE v. COVINGTON et al.*

Cr. 2440.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1934.

Hearing Granted by Supreme Court Feb. 16, 1934.

1. **Robbery** ⇐17(7).

Information charging that accused committed robbery by taking from named person personalty in her possession, without her consent, by means of force and by putting named person in fear, *held* sufficient to charge robbery (Pen. Code, §§ 950, 952).

2. **Constitutional law** ⇐265.

State may establish forms of pleading for its own courts, subject to federal constitutional provisions protecting life, liberty, and property (Const. U. S. Amend. 14).

3. **Indictment and information** ⇐129(1).

Charge of robbery *held* not improperly joined with charge of murder, notwithstanding accused were acquitted of murder.

4. **Criminal law** ⇐829(1).

Requested instructions sufficiently covered by instructions given *held* properly refused.

5. **Larceny** ⇐70(3).

In robbery prosecution, evidence *held* to require requested instruction on theft.

6. **Criminal law** ⇐1188.

On appeal from conviction for robbery, where evidence, although sufficient to justify verdict, would have more clearly justified conviction of theft, and court refused requested charge on theft, cause was remanded, with directions to enter judgment finding accused guilty of petty theft.

Appeals from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Revell Kenneth Covington, William Kozak, and R. B. Barnett were convicted of robbery, and they appeal.

Modified and remanded, with directions.

Gladys Towles Root and Lois B. Preston, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

By information in three counts the defendants were accused as follows: By count I it was charged that on March 5, 1933, the defendants murdered one Marjorie Barr; by count II it was charged that on the same date the defendants committed the crime of robbery, said crime being a different offense of the same class of crimes and offenses as the charge set forth in count I, and connected in its commission. It was alleged that the defendants did willfully, etc., take from said Marjorie Barr "the goods and personal property in the possession of Marjorie Barr," without her consent, etc., and "by means of force used by said defendants upon and against the said Marjorie Barr, and by said defendants then and there putting the said Marjorie Barr in fear." By count III it was charged that on said date the defendants committed the crime of burglary by willfully entering the house of one Stephens, with the intent then and there to commit theft. It was alleged that this crime was a different offense, but connected in its commission with the crime set forth in counts I and II.

The defendant Peterson was convicted on count I and count II and acquitted on count III. The other defendants, who are appellants here, were acquitted on counts I and III and were convicted of robbery as charged in count II. This appeal is from the judgment of conviction of appellants on count II, and from the orders of the court denying their motions for a new trial.

The events referred to in the information all took place at the residence of one Delbert Stephens, where he lived with his family. Miss Barr and another young woman known as Miss Hammond were living with the Stephens family. At 6 o'clock in the evening of March 5th, Stephens with his wife and son left the house, and, there being no one else there at home locked the front door. The windows were locked, except one which had no lock, but was screened. During the evening, and while the house was thus vacant, the defendants came to those premises and entered the house. On of them took off the screen and went in through the window, and let the others in by the door. Barnett was acquainted with Stephens and had been in this house before, and, according to his testimony, Stephens had given him permission to enter the place. "We hung around awhile and thought we would go in and wait for Mr. Stephens to come home, so we took off the screen and went inside as he told me to do many times." Stephens, on the other hand, denied that he had given Barnett permission to enter the house at any time when Stephens was absent, although he admitted that Barnett had been his guest on some occasions prior to March 5th. The defendants all were sailors in the navy, and at the time in question were on leave from their ship.

After the defendants had been for some time in the house, the two young women above mentioned came home and proceeded to entertain the defendants as guests. Without entering into details of the story, it

should be enough to say that there was some eating and drinking, and after a while Miss Hammond retired to her room. The evidence shows that while she was thus absent Miss Barr was hit with a sap or blackjack in the hands of defendant Peterson. From the effect of that blow she died a short time afterwards at the hospital to which she had been taken.

According to the testimony of Miss Hammond, while she was in her room as above stated, she heard the deceased scream. Thereupon she jumped out of a window and ran to a neighbor's house. When she returned a few minutes later with a man who came at her request, the defendants had gone, and Miss Barr was in the bathroom and blood "was all over her." A diamond ring and a watch which deceased had been wearing were gone, and an electric clock and a cigarette lighter were missing.

[1, 2] In support of the appeal, the first point suggested is that the information failed to charge the offense of robbery, or any public offense. By the direct terms of the information the defendants were, in general terms, accused of the crime of robbery. But it is contended that the accusation, a substantial part of which we have quoted, is insufficient to allege a public offense "in that it does not contain words sufficient to give the accused notice of the offense of which he is accused." In other words, it is contended that the information does not comply with the requirement of Penal Code, § 950, that in charging an offense each count shall contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." But the rule governing this requirement is more particularly stated in section 952, as amended in 1927 (St. 1927, p. 1043) and further amended in 1929 (St. 1929, p. 303). Among other things, it is there provided that the statement that the accused has committed the specified public offense "may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." We think that the information charged commission of the crime of robbery in terms which sufficiently comply with the requirements of the code. The state has the right to establish forms of pleading to be observed in its own courts, subject only to the provisions of the federal Constitution involving the protection of life, liberty, and property in all the states. People v. Robinson, 107 Cal. App. 211, 217, 290 P. 470. This fact disposes of the contentions of appellants that their conviction under this information is in violation of their constitutional rights. Under point 2 it is contended that the evidence was insufficient to convict the defendants of the crime of robbery. But there is evidence tending to establish the essential facts legally necessary for such conviction.

[3] The next point is that the charge of robbery was improperly joined with the charge of murder, "in view of the fact that appellants were acquitted of murder." Of course, this contention is without merit; for the district attorney could not know in advance that appellants would not be convicted of the murder.

[4-6] Finally, appellants claim that the court erred in refusing to give to the jury certain requested instructions. Some of these requests were properly refused because the subjects thereof were sufficiently covered by other instructions given. Some of the requested instructions as offered by appellants were erroneous in their statement of the law. Omitting from further consideration all of those instructions, there remains one further item which seems to be of substantial merit. Appellants requested the following instruction: "You are instructed that if you do not believe that a robbery or burglary was committed but that a theft was committed by the defendants in the house of Mrs. Stephens you are instructed to find said defendants guilty of petty theft if the value of the property taken was $200.00 or less or grand theft of $200.00 or more." This instruction should have been given, except that the last three words should have been "more than $200.00."

These appellants stand convicted of robbery. While the evidence is legally sufficient to justify the verdict of the jury, it appears to us that such evidence would have more clearly justified their conviction of theft. The jury might well have believed that appellants did not foresee that Peterson would commit the murderous attack, or the robbery of jewelry from the person of Miss Barr, and did not aid or abet the same. But appellants did share in the theft of other articles which were taken away at the same time. If the jury had been given an instruction under which appellants could have been convicted of theft, instead of being left only an alternative between a conviction of robbery or an entire acquittal, it is not unlikely that appellants would have had the benefit of the conviction of theft alone. This would have been a most substantial benefit, because in the absence of proof of the value of the property taken the conviction necessarily would have been limited to petty theft. The offense of robbery "includes larceny, and under the indictment the defendant may be found guilty of larceny" (People v. Chuey Ying Git, 100 Cal. 437, 34 P. 1080; People v. Church, 116 Cal. 300, 48 P. 125), and, upon an information charging grand larceny, petty larceny may be found (15 Cal. Jur. 960).

In accordance with the foregoing state-

ment of the law and upon consideration of the record, and particularly the evidence showing the part taken by appellants in this unfortunate affair, we are of the opinion that the verdict and judgment of conviction should be reduced from robbery to petty theft.

The judgment of conviction of defendants Covington, Kozak, and Barnett of the crime of robbery is modified. The cause is remanded to the trial court, with directions to enter judgment against each of said defendants finding him guilty of petty theft, and to thereupon pronounce judgment upon him as prescribed by law.

We concur: HOUSER, J.; YORK, J.

136 Cal.App. 247

BERTINO v. SANBORN, County Clerk.

Civ. 4757.

District Court of Appeal, Third District, California.

Jan. 11, 1934.

1. Appeal and error ⇐781(1).

Where abstract questions only are involved and issues have become moot as to acts commanded to be performed, appellate court will not retain jurisdiction.

2. Appeal and error ⇐781(1).

Appellate court will not entertain appeal, though liability for costs is involved, where appeal would become moot.

3. Appeal and error ⇐781(4).

Where primary election involved had long since been held and there was no liability for costs involved, appeal from order directing county clerk to certify to secretary of state certain nominating petitions must be dismissed.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Thomas Bertino against George P. Sanborn, County Clerk of Sonoma County. From an adverse order, defendant appeals.

Appeal dismissed.

E. J. Dole, of Santa Rosa, for appellant.

George R. Andersen, of San Francisco, for respondent.

PER CURIAM.

[1-3] This is an appeal by the defendant from an order of the superior court of Sonoma county directing the defendant, as county clerk, to certify to the secretary of state certain nominating petitions of the Communist Party to participate in the primary election of August, 1932. It is evident from this statement that nothing is involved except abstract questions; that no order can be made either affirming or reversing the judgment of the trial court or the mandate issued in pursuance thereof that could in any wise affect the action of the parties to this proceeding relative to the nominating petitions, and the sufficiency thereof determined by the trial court. Where abstract questions only are involved and the issues have become moot as to the acts commanded to be performed, an appellate court will not retain jurisdiction. Foster v. Smith, 115 Cal. 611, 47 P. 591; see, also, cases cited in Vol. 2, McKinney's New Digest, under the title of "Error and Appeal," § 18.

It does not appear in this case that any liability for costs is involved; that, if such liability did exist, the court will not entertain an appeal which would become moot. Turner v. Markham, 156 Cal. 68, 103 P. 319.

The appeal in this cause is dismissed.

136 Cal.App. 268

CHRISTENSEN v. COUEY.

Civ. 1290.

District Court of Appeal, Fourth District, California.

Jan. 15, 1934.

Appeal and error ⇐554(2).

Where no transcript of record was filed, and no bill of exceptions was allowed, and time therefor had expired, appeal was dismissed (Code Civ. Proc. § 953a).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Douglas Christensen, a minor, by Sarah M. Christensen, his guardian ad litem, against E. J. Couey. From the judgment rendered, the plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

Tarance S. Magee and Lucious Powers, Jr., both of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondent.

BARNARD, Presiding Justice.

Motion by respondent to dismiss appeal on the ground that no transcript has been filed. It appears by certificate of the county clerk that notice of request for the preparation

of a transcript was filed on January 16, 1933; that no transcript has been filed pursuant to section 953a of the Code of Civil Procedure or otherwise; that any proceedings in the trial court for the preparation of a transcript were terminated by order of court on September 1, 1933; that no additional time within which to prepare or serve a draft of a bill of exceptions has been allowed by the superior court or any judge thereof; that no proceedings for the preparation of a bill of exceptions or a transcript are pending in the trial court; and that the time within which to institute any such proceedings has expired. The motion should therefore be granted. Steffey v. Standard Stations, Inc., 131 Cal. App. 202, 20 P.(2d) 971.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

136 Cal.App. 269

DUNN v. JUSTICE'S COURT OF SIXTH TP. et al.

Civ. 750.

District Court of Appeal, Fourth District, California.

Jan. 15, 1934.

1. Prohibition ⇐3(1), 5(1).

Prohibition is not proper remedy where there is plain, speedy, and adequate remedy at law, and will not issue to restrain act not involving exercise of judicial functions.

2. Prohibition ⇐1.

Prohibition is remedy to secure preventive relief, and not method of reviewing proceedings already completed.

3. Prohibition ⇐5(1).

Prohibition is proper remedy to prevent performance of judicial acts only, and not mere ministerial acts.

4. Prohibition ⇐3(3).

Where justice of peace rendered judgment, prohibition *held* not proper remedy to restrain justice from taking any proceedings in connection with or based upon judgment, by execution or otherwise, in view of remedy by appeal.

5. Appearance ⇐9(2).

Defendant, if desiring to object to jurisdiction of court over his person, must specially appear for that purpose.

6. Appeal and error ⇐396.

Order granting change of venue, where no notice of appeal was filed in court which entered order, *held* not appealable (Code Civ. Proc. § 940).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Proceedings by Victor A. Dunn for a writ of prohibition prayed to be directed to the Justice's Court of the Sixth Township, Kern County, and Hon. Stewart Magee, Justice of the Peace thereof. From a judgment dismissing the proceeding, and from an order granting a motion for a change of venue, the petitioner appeals.

Appeal from the order dismissed, and judgment affirmed.

W. L. Claiborne and Victor A. Dunn, both of Oakland, for appellant.

Siemon & Claflin, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

The appellant, who is an attorney, was named as a defendant in an action filed in the justice's court of the Sixth township in the county of Kern, which action was based upon certain services claimed to have been rendered to the appellant by two attorneys in Bakersfield. The complaint in that action alleged that the contract, upon which it was based, was entered into in the township named, but did not allege that the contract was in writing. The appellant was served with summons in the county of Alameda on March 20, 1931. On May 21, 1931, he moved for an order quashing the purported service of summons and vacating the judgment which had been entered, which motion was denied. On June 15, 1931, he filed in the superior court of Alameda county a petition for a writ of prohibition asking that the respondent court and justice of the peace be prohibited from taking any other proceedings in connection with or based upon the judgment, by execution or otherwise. An alternative writ of prohibition was issued, and on the return day the respondents filed a demurrer to the petition and moved for a change of venue to the superior court of Kern county, which motion was granted. The demurrer to the petition came on for hearing on August 17, 1931, and the demurrer was sustained without leave to amend. Judgment of dismissal was entered, from which judgment this appeal is taken. The notice of appeal also purports to appeal from the order of the superior court of Alameda county granting the motion for a change of venue to the county of Kern.

[1-4] The first question to be considered is whether a writ of prohibition will lie under these circumstances. It is well settled that this writ cannot be resorted to when there is a plain, speedy, and adequate remedy at law, and that it will not issue to restrain an act

which does not involve the exercise of judicial functions. Valentine v. Police Court, 141 Cal. 615, 75 P. 336. Formerly, there was some conflict in the decisions with respect to the right to raise the question of jurisdiction by a writ of prohibition in view of a subsequent right of appeal. In Jardine v. Superior Court, 213 Cal. 301, 2 P.(2d) 756, 79 A. L. R. 291, certain earlier cases were overruled in so far as they purported to hold that an objection to jurisdiction over the person of the defendant could not be raised by applying for a writ of prohibition. In that case a judgment had not yet been entered in the prior action and, as we understand the case, the holding was that a defendant is not compelled to make an election between his defense on the merits and his defense as to lack of jurisdiction, and that he may, if he desires, attack the jurisdiction of the court before judgment is rendered instead of waiting until after judgment and then raising the question of jurisdiction on appeal. This, however, is quite different from a holding that a writ of prohibition may be resorted to after judgment in lieu of an appeal, of a writ of review or of any other remedy that may be available. The writ of prohibition is designed to be used as a method of securing preventive relief and not by way of reviewing proceedings already completed. It has always been used to prevent the performance of judicial acts only. After judgment has been entered, the issuance of execution has always been held to be merely a ministerial act. In Valentine v. Police Court, supra, it was held that prohibition would not lie after a judgment has become final.

Good reason appears for permitting the use of a writ of prohibition before judgment, because judicial functions then remain to be performed, because a defendant should not be compelled to make an election between his defense on the merits and his defense on the matter of jurisdiction, and because a long and expensive trial may frequently be avoided by first settling the matter of jurisdiction. The same reasons do not apply after judgment is entered. Ordinarily no judicial functions then remain to be performed in that court. No long trial there is then to be avoided, and a defendant then has ample opportunity to raise the question of jurisdiction by appeal from the judgment, by certiorari, or by applying for injunctive relief. Under the circumstances here appearing, we think the petition was insufficient to justify the issuance of the writ asked for.

[5] It further appears from the petition that on March 28, 1931, the appellant wrote a letter to the justice of the peace headed by the name of the court and the title of the case then pending in the justice court. This letter raises the point of lack of jurisdiction because the complaint fails to allege that the contract relied upon was in writing and because the complaint was served in another county. Later on the appellant again refers to the fact that he is therein raising the point of lack of jurisdiction. In between he states: "I have never contracted to pay said attorneys any money at any time for any thing." A considerable part of the letter is devoted to the contention that he did not owe the money claimed in the complaint. It is well settled that, "if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection." Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317, 319; Gulick v. Justice's Court, 101 Cal. App. 619, 281 P. 1031. The proceedings in a justice's court were at that time informal, and even an oral denial could be entered. The appellant appeared by letter raising the issue of jurisdiction, plainly stating that he was raising that issue, and at the same time plainly and flatly denying that he owed anything. While he may have intended this as a special appearance, or as no appearance at all, it comes dangerously near being a general appearance.

[6] The appellant attempted to appeal from the order of the superior court of Alameda county granting a change of venue to Kern county. So far as the record shows, no notice of appeal was filed in the court which entered that order. Code Civ. Proc. § 940.

The appeal from the order of the superior court of Alameda county is dismissed, and the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

136 Cal.App. 298

MASONIC MINES ASS'N et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 9252.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1934.

Hearing Denied by Supreme Court March 19, 1934.

I. Venue ⇐73.

Where statute in force at time change of venue was granted required payment of refiling costs within one year after arrival of record in custody of clerk of court to which case was transferred, amendment reducing time to within one year after order of transfer and making amendment applicable to pending cases, *held* inapplicable to pending case, where, if operative, it would require payment of refiling costs prior to effective date of amendment (Code Civ. Proc. § 399 and § 581b, as amended).

2. Courts ⇐91(1).

Appellate court is bound by decision rendered by it in case where transfer was denied by Supreme Court.

Petition by Masonic Mines Association and others for a writ of mandate to be directed to the Superior Court of California, in and for Alameda County and T. W. Harris, as Judge of said Superior Court to compel the dismissal of an action.

Petition denied.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Fred B. Hart, of Oakland, for petitioners.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, and Edward R. Solinsky, of San Francisco, for respondents.

TYLER, Presiding Justice.

[1, 2] Mandate to compel the dismissal of an action. The petition alleges in substance that on the 13th day of June, 1932, the action sought to be dismissed was filed in Mono county against Masonic Mines Association and others. Thereafter, on August 5, 1932, defendants filed a demurrer and also a demand for change of place of trial. The demand for the change was granted and the action was transferred to Alameda county. The record in the case was thereupon transmitted to the clerk of said county. At the time the order of transfer was made, the statute provided that refiling costs should be paid within one year after the date when such record arrived in the custody of the clerk of the court to which the case was ordered transferred. The record arrived on August 25, 1932. Thereafter the law upon the subject was amended, shortening the time to make such payment to one year after the date of the order of transfer, payment to be made to the clerk of the court which ordered the transfer. The statute in express terms was made to apply to pending cases. This statute went into effect on the 20th day of August, 1933. Plaintiffs paid the filing fees to the clerk of Alameda county on August 21, 1933, and the record in the case was filed. Immediately thereafter the demurrer to the complaint was placed on the calendar of the superior court of Alameda county for hearing. It was overruled and defendants were given time to answer. Thereafter, on August 30, 1933, defendants, petitioners herein, moved the court to dismiss the action on the ground that the refiling fees were not paid within the statutory time. The motion was denied and the present proceeding followed.

It is admitted that the fees and costs were paid within the time limit as required by section 581b of the Code of Civil Procedure as it read prior to the 1933 amendment, but appellants contend that sections 399 and 581b of the Code, as amended, control, and therefore the refiling fees were paid too late. Respondents, on the other hand, insist that appellants' motion to dismiss was properly denied by the lower court because the provisions of sections 399 and 581b of the Code of Civil Procedure, as amended, were not applicable upon said motion. In support of this contention it is argued that to adopt the claim of petitioners it would be necessary to hold that plaintiffs would have been required to pay the filing fees, under the amended section, on or before August 5, 1933, one year after the time the order was made, which would be fifteen days prior to the effective date of the amendments. In support of the petition appellants have cited us to numerous cases on the right of the Legislature to amend statutes and enact laws changing and controlling a remedy and rules of evidence, where said amendments or new laws do not impair the obligation of contracts, destroy vested rights, or create a new bar by which an action may be defeated. We need not be at pains to construe the statutes in question or discuss the cases cited by both counsel to support their different positions, for we are of the opinion that the principles involved have been set at rest by the recent case of Coleman v. Superior Court (Cal. App.) 26 P.(2d) 673. The question in the cited case was as to whether or not the amendment to section 583 of the Code of Civil Procedure, referring to dismissal of action for failure to prosecute the same, effective August 21, 1933, which was made applicable to pending actions, was a bar to an action where the complaint had been filed more than five years prior to that date, irrespective of the date when the answer was filed. The court held that the 1933 amendment to said section, requiring the dismissal of an action if not brought to trial within five years after the complaint is filed (in lieu of five years after the filing of the answer), did not affect a pending action so as to require a dismissal thereof at least until the plaintiff had a reasonable time after the effective date of the amendment to bring the action to trial; that such an amendment will not be held applicable to a pending case where the amendment will, if operative, require the taking of some action prior to the effective date of the amendment. Counsel for appellants concede the force of the decision, but they severely criticize the same as not being in harmony with well-considered cases upon the subject. They further claim that the decision confuses rights with procedure. A transfer was denied by our Supreme Court and we are bound by the decision. This being so, the petition is denied.

We concur: KNIGHT, J.; CASHIN, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

136 Cal.App. 272

NICHOLS v. SMITH.

Civ. 9022.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1934.

Hearing Denied by Supreme Court March 15, 1934.

1. Appeal and error ⇐1060(1).

In guest's action for injuries in automobile accident, guest's volunteered statements showing host was covered with insurance, and her counsel's urging of such testimony and request that her answer be read, *held* prejudicial misconduct.

Facts disclosed that guest, when questioned regarding money she received from host when she was in the hospital, testified that she had no money, that host loaned her money because he was covered with insurance, and later volunteered a purported conversation with the host consisting solely of the statement that he was covered with insurance, and that her counsel urged her to go ahead and later requested that her answer be read.

2. Automobiles ⇐181(1).

Guest, to recover of host for injuries in automobile accident, must under guest statute show that host was chargeable with gross negligence and not merely ordinary negligence (St. 1929, p. 1580).

3. Automobiles ⇐238(7).

Allegation that host negligently and carelessly drove and operated automobile wherein guest was riding *held* insufficient to charge gross negligence under guest statute (St. 1929, p. 1580).

4. Trial ⇐252(1).

Instructions relating to findings which jury could not make and on which there was no evidence *held* properly refused.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Ina Nichols against Frank Smith. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Harry I. Stafford, M. Mitchell Bourquin, and James R. Loofbourow, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff suffered personal injuries while riding as a guest in an automobile driven by defendant Smith. On a trial by jury she had judgment against defendant Smith in the sum of $15,000, from which judgment said defendant appeals.

The injuries were sustained as the result of a collision between the automobile of defendant Smith and a milk truck operated by defendant Ammons for the defendant Dairy Delivery Company. Judgment on the verdict was entered in favor of the defendants Ammons and Dairy Delivery Company, and this appeal involves only the judgment in favor of plaintiff and against the defendant Smith.

During the course of the trial, it developed on cross-examination of plaintiff by counsel for the defendant Dairy Delivery Company that she had received some money from defendant Smith while she was in the hospital, which money was used to defray certain expenses. This evidence was probably admitted on the theory that the payment of the money constituted evidence of an admission of liability on the part of defendant Smith. Plaintiff stated, however, that she received it as a loan. Mr. Loofbourow, counsel for plaintiff, subsequently pursued the subject further and elicited the following answers:

"Mr. Loofbourow: When was the next time he loaned you money?

"Mr. Lamb: The same objection.

"The Court: Same ruling.

"A. Well, it was the end of the next week, I would say.

"Mr. Loofbourow: Was there any conversation at that time? A. No, it was understood. He knew that I had no money. He knew my financial condition. He knew I had no money to continue on with it, and he assumed it knowing he was protected, I presume, with the insurance he carried.

"Mr. Lamb: That's over my objection, Your Honor, and I move that it be stricken out.

"The Court: The answer may go out. It's her conclusion. She is not giving the conversation. The jury is instructed to disregard it."

It will thus be seen that, when appellant was asked for a conversation, she stated that there was none, and then proceeded to volunteer certain remarks which were entirely irrelevant and which could not help but be highly prejudicial. In these remarks she twice referred to the fact that she had no money, and then informed the jury that defendant Smith was protected by insurance.

Shortly thereafter the following occurred during the further examination of plaintiff:

"Mr. Korte: I will withdraw the question and ask it again. Didn't I understand you to say in answer to a question from your counsel that when the question of these advances from Mr. Smith came up, that the offer came from him, just a minute ago? A.

Yes, the offer came from him in this way: He told me that he was fully covered with insurance—

"Mr. Loofbourow: Go ahead, Mrs. Nichols. A. He was fully covered with insurance.

"Mr. Korte: I move that that be stricken out.

"The Court: It goes out as not responsive.

"Mr. Lamb: At this time we move for a mistrial on the ground that this is the second voluntary statement of that nature that has been made by this witness.

"Mr. Loofbourow: You asked for the conversation.

"Mr. Lamb: That is not a conversation.

"The Court: The conversation wasn't asked for at all.

"Mr. Loofbourow: May I have the question read?

"The Court: The answer will go out, and the jury are instructed to disregard it. There is no such question in the case at all.

"Mr. Lamb: For the purpose of protecting my record, I assign it as prejudicial error and misconduct on the part of the plaintiff herself on the stand.

"The Court: It has happened twice now, and I hope it will not happen again. Counsel knows it shouldn't be in the record, and the lady knows it now.

"Mr. Loofbourow: May I have the question read? I don't want to argue it.

"The Court: You had better not. You have been warned in time. You may have the question. (Question read.)

"Mr. Loofbourow: May I have the answer now? (Answer read.)

"The Court: After 'he told me' goes out."

On this occasion, in response to a question in which plaintiff was asked if she had previously given a certain answer to the effect that the offer to advance the money came from Mr. Smith, she answered in the affirmative, and then volunteered a purported conversation with defendant Smith consisting solely of a statement that "he was fully covered with insurance." Her own counsel then urged her to "go ahead," and she again stated "he was fully covered with insurance." During the discussion which followed, counsel for plaintiff asked that said question be read. Counsel was warned by the court, but, as there was nothing objectionable in the question itself, the court said: "You may have the question." But, after the reading of the question, counsel for plaintiff immediately asked for the answer, which was again read, thereby bringing the subject of insurance to the attention of the jury for the fourth time.

[1, 2] Appellant contends that the above-mentioned portions of the record show that both respondent and her counsel were guilty of prejudicial misconduct, and in our opinion this contention must be sustained. Squires v. Riffe, 211 Cal. 370, 295 P. 517; Rising v. Veatch, 117 Cal. App. 404, 3 P.(2d) 1023. In this connection we may state that, under the statute in effect at the time of the accident (St. 1929, p. 1580), respondent was required to show that appellant was chargeable with gross negligence and not merely ordinary negligence in order to entitle her to recover. Upon the evidence, this question was a close one, and, furthermore, the extent of respondent's damage was a matter of serious dispute. Respondent suffered no fractures, and returned to work about six months after the accident occurred. The jury nevertheless returned a verdict in the sum of $15,000. It is impossible for us to state that the verdict would not have been smaller in amount or that the verdict would not have been in favor of appellant in the event that respondent's financial distress and appellant's insurance coverage had not been firmly impressed on the minds of the jurors by the misconduct above mentioned. We are of the opinion that the judgment must be reversed because of such prejudicial misconduct, and, in view of this conclusion, we deem it unnecessary to discuss appellant's contention that the verdict was excessive upon the evidence offered on the first trial of the cause.

There are, however, other questions relating to the pleadings and instructions which should be discussed. The complaint alleged that "plaintiff was riding in a certain Stutz automobile" driven by appellant, and that said appellant "negligently and carelessly drove and operated said Stutz automobile." These are the usual allegations found in pleadings charging ordinary negligence in general terms. Respondent took the position throughout the trial that this was a sufficient pleading of gross negligence. Appellant, on the other hand, claimed that the complaint failed to state a cause of action for gross negligence under the guest statute, and that respondent could recover only upon proof that respondent was a passenger for hire or upon proof that respondent and appellant were engaged in a joint enterprise. Instructions to that effect were offered and refused.

[3] The situation thus presented brings us to a consideration of appellant's contention that the complaint does not state a cause of action warranting a recovery upon the theory of gross negligence. In this connection appellant cites and relies upon Michalitschke Bros. & Co. v. Wells, Fargo & Co., 118 Cal. 683, 50 P. 847, and numerous authorities from other jurisdictions, including Bentson v. Brown, 186 Wis. 629, 203 N. W. 380, 38 A. L. R. 1417; Wilson v. Chippewa Valley Electric R. Company, 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912; Louisville & Nashville Railroad Co. v. Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21; Good v. Schlitz, 195 Wis. 481, 218 N. W. 727; and Townsend

v. Minge, 44 Ga. App. 453, 161 S. E. 661. Both the authorities cited and sound reason support appellant's contention. Respondent could not recover against appellant unless appellant was guilty of gross negligence, which is something more than ordinary negligence. How, then, can it be said that it was sufficient to charge only ordinary negligence? If this were the rule, it would lead to endless confusion. A complaint alleging that the plaintiff was a guest and charging the defendant with ordinary negligence would then be sufficient, yet the plaintiff would be required to go beyond the allegations of the complaint in the proof. Furthermore, findings that all the allegations of such complaint were true would be insufficient to sustain a judgment under the guest statute, but the findings would have to go beyond the pleadings and embrace a finding of gross negligence. In the event of a trial by jury, it would be necessary for the court to instruct the jury that no verdict could be returned in favor of plaintiff upon proof of ordinary negligence as alleged in the complaint, but that such verdict could only be returned in the event that the jury found that the defendant was guilty of gross negligence.

In support of her position that the usual allegations of negligence constituted a sufficient averment of gross negligence, respondent relies upon the dictum found in the opinion of this court in Malone v. Clemow, 111 Cal. App. 13, 295 P. 70. The language referred to was unnecessary to the decision, as may be seen from a reading of the opinion. The complaint in that case alleged that the defendant "drove, operated and controlled said automobile in a grossly negligent manner," and the specific acts relied upon were set forth. Respondent also cites Castro v. Kopper Singh (Cal. App.) 21 P.(2d) 169. The portion of the opinion relied upon was based solely on the dictum in Malone v. Clemow, supra, but there again we do not believe that the language referred to was necessary to the decision. The complaint in that case, in addition to alleging that the specific act was "negligently" done, alleged that it was "wantonly" done. We believe that, in so far as the language of said opinions indicates that the mere allegation that a defendant "negligently drove" an automobile is a sufficient allegation of gross negligence under the guest statute, such language should not be followed.

[4] If the above-mentioned defect in the pleading were the only ground of objection on this appeal, we are not prepared to say that it would require a reversal of the judgment. The jury was instructed in the same manner as though respondent had alleged in her complaint that she was a guest and that appellant was guilty of gross negligence. The jury was further instructed that a "guest is not entitled to a verdict under the law on a showing merely of ordinary negligence on the part of the owner or driver." No exception is taken to the correctness of any of the instructions given by the court. The refused instructions, other than those which were amply covered by the instructions given, related solely to the rules applicable in the event that the jury found that respondent was a passenger for hire or that respondent and appellant were engaged in a joint enterprise. There was no evidence on which the jury could make either of said findings, and therefore said instructions were properly refused. We may therefore assume that the jury found that appellant was guilty of gross negligence, and, although the question was a close one, we believe that the evidence most favorable to respondent was sufficient to sustain such a finding. In the absence of other error in the record, it may well be, in view of section 4½ of article 6 of the Constitution, that the judgment could be affirmed despite the defect in the pleading. Baker v. Miller, 190 Cal. 263, 212 P. 11; Bonney v. Petty, 125 Cal. App. 527, 13 P.(2d) 969. We believe, however, that, upon the reversal of the judgment upon the ground first mentioned herein, respondent should be permitted to amend her complaint before the cause is tried again.

The judgment is reversed, with directions to the trial court to permit respondent to amend her complaint if she is so advised.

We concur: NOURSE, P. J.; STURTEVANT, J.

136 Cal.App. 201

PEOPLE v. STRATTON.

Cr. 1298.

District Court of Appeal, Third District, California.

Jan. 10, 1934.

Rehearing Denied Jan. 25, 1934.

Hearing Denied by Supreme Court Feb. 8, 1934.

1. Criminal law ⇐1134(10).

Reviewing court had jurisdiction to affirm order of trial court relating to count charging burglary, though defendant directed attack solely as to count charging robbery.

Defendant's motion to vacate the judgment was directed to the whole verdict, and the order of the court denying the motion necessarily was as broad as the substance of the motion, and therefore reviewing court had jurisdiction to make order of affirmance.

2. Criminal law ⇐995(6).

Where robbery judgment was later in date than sentences for burglary, owing to complaint of defendant, *held* that there was

no uncertainty as to whether sentences run concurrently or consecutively.

Fact that robbery judgment was later in date as to when it began to run concurrently with sentences imposed for burglary was wholly immaterial, and effect of sentences was that, upon defendant's return to prison, he began serving sentence on account of robbery concurrently with burglary sentences theretofore pronounced upon him.

3. Criminal law ⇐189.
Where original robbery sentence was set aside at defendant's instigation, subsequent proceeding did not constitute double jeopardy.

4. Criminal law ⇐193.
Where defendant procures reversal and cause is remanded, defendant is not entitled to discharge for former jeopardy, even though he had not asked for new trial.

5. Criminal law ⇐1206(1).
Indeterminate Sentence Law is valid (Pen. Code, § 1168).

6. Robbery ⇐11.
Trial court properly determined that robbery committed while defendant was armed was robbery in first degree (Pen. Code, §§ 1097, 1192).

7. Constitutional law ⇐203.
Statute respecting imprisonment *held* not ex post facto as to defendant where act, which did not become effective until after commission of defendant's crime, reduced sentence (Pen. Code, § 1168, subd. 2, as amended by St. 1931, p. 1053, § 1).

8. Constitutional law ⇐197.
Law to be ex post facto must, if applied to defendant's case, work to his disadvantage.

9. Criminal law ⇐1206(1).
Statutes respecting imprisonment, fixing punishment for robbery, and relating to imprisonment for life, *held* not unconstitutional (Pen. Code, §§ 213, 671, 1168).

10. Robbery ⇐30.
In prosecution for robbery, statute respecting imprisonment *held* properly applied rather than section fixing punishment for robbery (Pen. Code, §§ 213, 1168).

11. Criminal law ⇐1208(3).
Statute respecting imprisonment without direct reference to statute providing that court might have sentenced defendant for certain number of years *held* to suspend operation thereof by necessary implication (Pen. Code, §§ 671, 1168).

12. Criminal law ⇐1207.
Statute respecting imprisonment by necessary implication repeals limitation fixed in statute fixing punishment for robbery, as to minimum term to be served by one convicted of robbery in first degree (Pen. Code, §§ 213, 1168).

13. Criminal law ⇐1188.
On appeal by defendant after plea of guilty, court could remand cause to trial court for ascertainment of degree of offense to which defendant had pleaded guilty.

14. Robbery ⇐17(1).
Defendant need only be charged with offense of robbery, and degree of offense may be fixed after testimony is taken.

15. Constitutional law ⇐203.
Criminal law ⇐1206(1), 1213.
Law imposing additional penalty on one who has been previously convicted of felony is not invalid, not ex post facto, and not unusual or cruel in its provisions (Pen. Code, § 1168).

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Axel Stratton, Jr., pleaded guilty to a charge of robbery, and, from a judgment fixing degree of robbery, he appeals.

Affirmed.

See, also, 28 P.(2d) 699; 24 P.(2d) 174.

Hugo McKinley and Thomas Griffin, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal by the defendant from an order and judgment of the trial court fixing and determining, after the taking of testimony, the degree of the offense of robbery of which the defendant had theretofore pleaded guilty. This proceeding was taken and had pursuant to the directions of this court set forth in a former appeal by the defendant from a judgment finding him guilty upon an information charging three separate offenses, two offenses being burglary and one offense being robbery; also, charging the defendant with having been formerly convicted of a felony and having served a term in state's prison in the state of Nevada therefor. To all of the offenses set forth in the information the defendant entered a plea of guilty.

The court, as appears by the record, without any testimony being taken therefor, found the defendant guilty of robbery in the first degree. To correct this error the judgment of the court, so far as it found the defendant guilty of robbery in the first degree, was reversed, and the cause remanded for the sole

purpose of having the degree of robbery fixed and sentence pronounced in accordance with the degree of the crime so ascertained by the court.

The offense, so far as the charge of robbery is concerned, is alleged to have been committed on or about the 25th day of August, 1931. The two counts as to burglary, alleging separate offenses, set forth that both offenses were committed on or about the 29th day of September, 1931.

The record shows that the defendant was found guilty of burglary in the second degree as to both offenses of burglary charged against him.

On the 22d day of May, 1933, the defendant filed a notice of motion to vacate the judgment herein referred to on the following grounds: (1) That the court pronounced a higher and different punishment upon the defendant upon count 1 than prescribed by law (count 1 being that portion of the information charging the defendant with commission of robbery). (2) The motion further set forth that the judgment imposed by the court was without due process of law, and without the equal protection of the law afforded by the United States Constitution, in that the commitment for robbery of the first degree was made without evidence to show whether the crime was committed as the result of torture or whether the defendant was armed with a deadly weapon, etc.; and on the further ground that the judgment was neither definite nor a determinate sentence, and that the court did not fix a maximum term of imprisonment, as provided by section 671 of the Penal Code.

The court denied this motion of the defendant, and thereupon an appeal from such order was taken to this court and heard and determined as hereinbefore stated.

[1] Upon this appeal it is contended that the court was without jurisdiction to affirm the order of the trial court so far as it related to the counts charging the defendant with separate acts of burglary. It is true that the record shows that upon the first appeal the defendant, in this court, directed his attack solely as to the count charging him with robbery, and the action of the court in relation thereto. However, the motion was directed to the whole verdict, and the order of the court denying the motion necessarily was as broad as the substance of the motion, and gave this court jurisdiction to make its order of affirmance.

Upon the remanding of this cause by this court, the trial court proceeded to take testimony and determine therefrom that the defendant was armed with a deadly weapon at the time of the commission of the robbery to which he had pleaded guilty, and pronounced sentence accordingly. It is now contended that the court had no jurisdiction to take such testimony, or to pronounce the sentence adjudging the defendant guilty of robbery in the first degree.

The defendant divides his brief into ten subdivisions, or rather, sets forth his argument under what is denominated therein as ten different points. The argument advanced in support of the ten different points is so interrelated that a clearer understanding of the case is presented by considering the objections as a whole, which present only the following propositions: (1) That the judgment entered in 1933 finding the defendant guilty of robbery in the first degree after taking testimony therefor, as directed by this court, is void for uncertainty, in that it resulted in the imposition of a sentence of imprisonment that would run both concurrently and consecutively with the previously entered sentences on the burglary counts contained in the information; (2) that the hearing had in October, 1933, to determine the degree of the robbery, as directed by this court, and the subsequent judgment thereon, placed the defendant in jeopardy a second time for the offense to which he had pleaded guilty in October, 1931; and (3) that section 213 of the Penal Code, fixing the punishment for robbery, and section 1168 of the Penal Code, being the Indeterminate Sentence Law, are unconstitutional in that they provide an uncertain and indefinite punishment, and increased punishments for offenders with prior convictions.

The contention is also made in connection therewith that the court should have complied with the provisions of section 671 of the Penal Code. A reference to the judgment shows that the sentence pronounced on account of the three counts to which the defendant pleaded guilty ran concurrently, that is to say, the sentences for the two burglary offenses began to run concurrently in 1931, and the sentence imposed by the court for and on account of the robbery charge, to which the defendant had previously pleaded guilty, runs concurrently with the burglary sentences from October, 1933.

[2] The contention of the appellant that there is any uncertainty as to whether the sentences run concurrently or consecutively is without merit. The fact that the robbery judgment is later in date, as to when it begins to run concurrently with the sentences imposed upon the defendant for and on account of the burglary charges, is wholly immaterial, and the effect of the sentences pronounced upon the defendant is and was that upon his return to Folsom prison he began serving the sentence on account of the robbery charge concurrently with the burglary sentences theretofore pronounced upon him.

[3] The act of the appellant in his proceeding to have the sentence originally pronounced upon him for and on account of the robbery charge and a correct judgment thereafter pronounced against him does not have the effect of giving life and vitality to

any part of the period elapsing between the date of the first sentence on the robbery charge and the date of his beginning to serve sentence upon the sentence pronounced upon him in 1933, upon the same charge after the degree of the offense had been determined by the trial court. By his own act the original robbery sentence was set aside, and subsequent proceedings had thereon cannot be pleaded as coming under the restrictions of the law relative to prior and subsequent jeopardy for the same offense. The very case (In re Fritz, 179 Cal. 415, 177 P. 157) upon which the appellant relies establishes the law to the contrary. In that case the defendant had served a number of months under the Indeterminate Sentence Law, and thereafter was returned to the superior court of San Joaquin county and definite sentence pronounced by the trial court. Quoting from the syllabus the Supreme Court held as follows: "Where an offender erroneously sentenced for a term of not less than one nor more than ten years had served ten months under such indeterminate sentence, and two months under a second sentence of one year, he is not entitled to his discharge, since the second sentence was the original and only legal sentence." The defendant's petition for discharge was denied.

[4] The law is well settled in this state that, where a defendant procures a reversal of a former judgment, and the cause is remanded for further hearing, the defendant is not entitled to a discharge, even though in his proceeding to obtain a reversal he did not ask for a new trial, and the plea of former jeopardy is no defense to the latter proceeding. See, also, People v. Olwell, 28 Cal. 456; People v. Barrie, 49 Cal. 342; People v. Lee Yune Chong, 94 Cal. 379, 29 P. 776.

[5] The appellant's contention that the Indeterminate Sentence Law has universally been held void is not borne out by the authorities cited. Cases holding the inapplicability of the Indeterminate Sentence Law to offenses committed prior to the enactment of such law do not in any wise trench upon the validity of the act itself.

The case of In re Lee, 177 Cal. 690, 171 P. 958, cited by the appellant, upholds the law, but held it inapplicable to the particular case then under consideration, and the defendant was remanded for further sentence, it appearing that the offense committed by him antedated the enactment of the Indeterminate Sentence Law.

[6] We do not find anything in section 1097 of the Penal Code favorable to the defendant in this action. The evidence clearly shows that the offense was committed while the defendant was armed, and the trial court, in following the provisions of section 1192, properly determined that the act to which the defendant pleaded guilty was robbery in the first degree.

[7, 8] The contention that section 1168 of the Penal Code is ex post facto law as to the defendant is likewise untenable. It is true that the act, approved May 28, 1931 (St. 1931, p. 1053, § 1), did not become effective until three days after the commission of the robbery to which the defendant pleaded guilty. That, however, does not avail the appellant in this proceeding. Section B of the act, providing for certain minimum penalties, as it stood prior to the amendment of 1931, read as follows: "For a person previously convicted of a felony either in this state or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, fifteen years." By the amendment approved May 28, 1931, the words "fifteen years" were amended to read "ten years."

The law, to be ex post facto, must be an act which, if applied to the defendant's case, works to his disadvantage. 12 C. J., pp. 1097–1102. The change in this instance in the amending of the law as referred to works only to the advantage of the appellant.

[9-11] The contention is likewise made that sections 213, 671, and 1168 of the Penal Code are unconstitutional. No tenable argument, however, is presented to support the contention, nor do we find anything in the argument of appellant which supports the contention that section 213, supra, should be given application in this case, rather than section 1168. Section 671, supra, does apparently provide that the court might have, in this instance, sentenced the defendant for a certain number of years. However, section 1168, supra, without direct reference to section 671, supra, suspends the operation thereof by necessary implication. The very first sentence provides that the trial court shall not fix the term or duration of the period of imprisonment.

[12] Again, subdivision 2 of section 1168, supra, by necessary implication, repeals the limitation fixed in section 213, supra, as to the minimum number of years that must be served by one convicted of robbery in the first degree. The language of subdivision 2 of section 1168, supra, reads: "The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence." The same provision appeared in section 1168, supra, prior to the amendment of May 28, 1931. It is set forth in subdivision 4.

[13] No issue was made on the first appeal in this case, nor upon this appeal, as to the question of the guilt of the defendant. The question was again presented as to the power of the court to remand the cause to the trial court for the ascertainment of the degree of the offense to which the defendant had plead-

ed guilty. The procedure followed in the instant case is supported by the following decisions: Ex parte Stroff (Cal. App.) 22 P.(2d) 770; In re Lee, 177 Cal. 690, 171 P. 958, supra; People v. O'Brien, 122 Cal. App. 147, 9 P.(2d) 902; People v. Scott, 39 Cal. App. 128, 178 P. 298; People v. Stroff (Cal. App.) 26 P.(2d) 315. This latter case also holds that the failure to pronounce judgment within five days is not an error entitling the appellant to a discharge, being only a matter of procedure and covered by section 4½ of article 6 of the Constitution.

The case of Ex parte Fontino (Cal. App.) 27 P.(2d) 413, is readily distinguishable from the cases we have cited, in that no jurisdiction was retained by the trial court, and this court had had no jurisdiction thereof on appeal, and had not remanded the cause for further proceedings. It is simply an independent action attempted five years after the imposition of the original sentence, and the effect of the decision in the Fontino Case is that under the circumstances disclosed in that case the jurisdiction of the trial court over the cause had ceased.

[14] The contention of the appellant that the information only charged robbery, and not robbery in either the first or second degree, is without merit. All that the law requires is that the defendant be charged with the offense of robbery, and the degree of the offense is to be fixed after testimony is taken for the purpose of ascertaining the same. People v. Tognola, 83 Cal. App. 34, 256 P. 455.

[15] Likewise, the contention of the appellant that the law attempts to fix an additional penalty upon one who has been previously convicted of a felony is void, is answered in the negative in the case of In re Rosencrantz, 205 Cal. 534, 271 P. 902. The additional penalty imposed is a punishment for the last offense. Nor is the law imposing additional penalties ex post facto, or unusual or cruel in its provisions.

A review of the record shows that the trial court followed the procedure directed to be taken by this court in the case of People v. Stratton, 24 P.(2d) 174.

We have carefully considered the contentions of the appellant based upon the Fourteenth Amendment to the United States Constitution and the United States Supreme Court cases cited in his brief, but, as they do not appear to be pertinent to any of the issues involved herein, we do not deem it necessary to consider them at length in this opinion.

The judgment and order appealed from are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

136 Cal.App. 210

PEOPLE v. STRATTON.

Cr. 1304.

District Court of Appeal, Third District, California.

Jan. 10, 1934.

Rehearing Denied Jan. 25, 1934.

Hearing Denied by Supreme Court Feb. 8, 1934.

1. Burglary ⇐2.
Constitutional law ⇐250.

Statute defining burglary as entry with intent to commit grand or petit larceny or any felony *held* not to violate constitutional equality clause (Const. U. S. Amend. 14; Pen. Code, § 459).

Probability of one entering a building for commission of any offense which does not come within definition of grand or petty larceny or felony is so remote that language of Pen. Code, § 459 cannot by any reasonable construction be construed as an unreasonable classification.

2. Constitutional law ⇐250.

Statute defining burglary is not defective as not being general in its application (Pen. Code, § 459).

3. Constitutional law ⇐211.

If act applies to all persons under same circumstances and conditions, act is properly designated as general.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Axel Stratton (true name Axel Stratton, Jr.), after plea of guilty, appeals from an order denying his motion to vacate, annul, and set aside a judgment of burglary.

Affirmed.

See, also, 28 P.(2d) 695; 24 P.(2d) 174.

Hugo McKinley and Thomas Griffin, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

On October 2, 1931, an information was filed in the superior court of Stanislaus county, containing, among other things, two counts, each of which charged the defendant with the crime of burglary. Upon being arraigned upon this information the defendant entered a plea of guilty to both of the counts charging him with the crime of burglary.

[1] On the 13th day of October, 1933, the appellant filed a motion in said court, having

for its purpose the obtaining of an order of said court vacating, annulling, and setting aside the judgment of burglary, following the appellant's plea of guilty to the counts contained in the information just referred to. The grounds of the motion were stated as follows: "1. Section 459, Penal Code, which defines burglary, violates the equality clause of section 1, Fourteenth Amendment to the Federal Constitution, in this, to-wit: that it singles out petty larceny from the whole class of misdemeanors, and does not operate uniformly upon all who enter a building, etc., with intent to commit crime. 2. Section 459, Penal Code, violates the said equality clause in this, to-wit: that it singles out that particular mode of petty theft known as stealing, taking, and carrying away, so that a person may enter a building with intent to commit petty theft by trick and device, false pretenses, or embezzlement without committing the crime of burglary."

The cause is now before us upon the appellant's appeal from an order denying such motion. The argument of the appellant is to the effect that section 459, supra, is violative of the Fourteenth Amendment of the United States Constitution, in that it does not afford equal protection of the law, but is unreasonable in its classifications. In pursuance of the argument the appellant quotes section 459 of the Penal Code and attacks that part thereof which reads as follows, "with intent to commit grand or petit larceny or any felony is guilty of burglary," the contention being that the language limits burglary to petty larceny, and does not apply to any other misdemeanor for the perpetration of which one might enter any house, room, or apartment, etc., and so constitutes an unreasonable classification, and does not extend equal protection of the law to all persons.

The act of the Legislature in framing section 459 of the Penal Code was for the purpose of protecting buildings, residences especially, and, in so doing, it necessarily singled out those offenses for which any one actuated by a criminal intent would enter a building for the purpose of committing. In entering a building with intent to commit petty or grand larceny or a felony therein, the one so entering places in peril any one who might be within the building so entered. The probability of one entering a building for the commission of any offense which does not come within the definition of grand or petty larceny or a felony is so remote that the language of section 459, supra, cannot, by any reasonable construction, be construed as an unreasonable classification.

The appellant cites the fact that embezzlement is not named in section 459, supra, overlooking the fact that embezzlement includes the idea of one having been trusted with the possession of property not obtained by unlawful entry of any of the structures mentioned in section 459, supra.

[2, 3] Again, the contention of the appellant that the section is not general in its application is untenable. If the act applies to all persons under the same circumstances and conditions, the act is properly designated as general. 5 Cal. Jur., p. 794. The text there found is as follows: "General laws are those which operate alike upon all persons to whom they apply and apply equally to all persons in the same category within the jurisdiction of the law-making power. An act, to be general in its scope, need not include all classes of individuals; it answers the requirements of the Constitution if it relates to and operates uniformly upon the whole of any single class validly selected. Nor is an act rendered special by the mere fact that it does not cover all subjects which the legislature might have conceivably included in it. It is enough that the subjects covered possess such intrinsic peculiarities as to justify the legislative determination that those subjects required special enactment."

That the intent with which one unlawfully enters a building is a prime element at which the legislative power was exercised in enacting section 459 of the Penal Code appears from the following cases: People v. McGowan, 127 Cal. App. 39, 14 P.(2d) 1036; People v. Myers, 206 Cal. 480, 275 P. 219.

The rule which we have stated herein is also supported by the text found in 12 C. J. page 1128 et seq.

Finding no merit in the appellant's appeal, the order of the trial court denying the defendant's motion is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

In re BRYANT'S ESTATE.

BUSH et al. v. GREENLEAF et al.*

Civ. 9324.

District Court of Appeal, First District, Division 2, California.

Jan. 11, 1934.

Hearing Granted by Supreme Court March 12, 1934.

1. Descent and distribution ⇐6.

Where decedent died before effective date of Probate Code, rights of parties to succeed to property were controlled by Civil Code, and procedural matters after Probate Code became effective were controlled by Probate Code.

2. Evidence ⇐53.

Legal presumption is itself evidence, and, when not controverted, binds court or jury to find according to presumption.

3. Husband and wife ⇐262(1).

In heirship proceeding, property acquired during coverture and not shown to be widow's separate property *held* presumed to be community property, and property acquired by widow thereafter was presumed to be fruits of community property taken by widow at husband's death (Civ. Code, § 164).

4. Husband and wife ⇐273(2).

Widow taking possession of property on husband's death became trustee of his portion of community property for benefit of his estate and could not obtain advantage against estate or heirs thereof (Civ. Code, §§ 2219, 2235).

5. Husband and wife ⇐273(2).

Where wife, on husband's death, took possession of community property without administration, rents, issues, and profits of community property retained community status.

6. Husband and wife ⇐274(4).

In heirship proceeding between deceased widow's next of kin and children of predeceased husband by former marriage, presumption that property was community property, followed by rule that rents, issues, and profits thereof retained community status, *held* proof, binding on court until overcome by other evidence (Civ. Code, § 164; Probate Code, § 1080).

7. Husband and wife ⇐274(4).

Where deceased widow had taken possession of predeceased husband's property without administration, her next of kin, in heirship proceeding, had burden of showing what portion of property, including notes and mortgages taken by her for loans made during years succeeding husband's death, was derived from sources other than community property (Civ. Code, §§ 164, 1401, 1402).

8. Descent and distribution ⇐56.

Where widow died intestate, without issue, children of predeceased husband by former marriage *held* entitled to participate in community property, though husband in devising entire estate to widow, had allegedly expressly disinherited them (Civ. Code, § 1386, subd. 8).

9. Executors and administrators ⇐32(2).

Findings of probate court, on petition to set aside appointment of administrator nominated by decedent's next of kin, relating to community or separate character of property and rights of succession of heirs of predeceased spouse and of decedent, *held* beyond probate court's jurisdiction and not res judicata against predeceased spouse's children in heirship proceeding (Probate Code, §§ 422, 423, 450).

10. Husband and wife ⇐264.

In heirship proceeding, facts found *held* to warrant conclusion that husband's purported bill of sale of his interest in partnership to wife was executed solely for purpose of avoiding probate in event of death and was not valid, and that partnership interest was community property.

Court found that bill of sale was not made in view of pending death, but was executed at request of partner and with understanding that both partners would execute similar documents and that they would not be delivered or take effect until death of either partner; that continuously after execution of bill of sale, and until his death, husband exercised and maintained same exclusive dominion and control over property as before; that partnership books showed husband to be owner of one-third interest therein until after his death, and only then were voluntarily changed by surviving partner to show that wife succeeded to husband's interest; and that all dividends were paid to husband until his death, and bill of sale was not presented to partnership by wife until after husband's death.

Appeal from Superior Court, Los Angeles County; Frank B. Belcher, Judge.

In the matter of the estate of Anna K. Bryant, deceased, in which John I. Bujan was appointed as administrator. Proceeding on the petition of Mrs. J. C. Bush and others for determination of heirship and right to distribution, in which proceeding Margaret Greenleaf and others appeared as contestants. From a judgment awarding a portion of the estate to

petitioners and the remainder to contestants, both the petitioners and contestants appeal.

Affirmed in part, and reversed in part, with directions.

Murphy & Doherty and Harrison Weil, all of Los Angeles, for petitioners.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for contestants.

NOURSE, Presiding Justice.

[1] When Anna K. Bryant died intestate on June 5, 1931, she left an estate subject to distribution under the laws existing prior to the enactment of the Probate Code, which became effective August 14, 1931. Her husband, Thomas Bryant, predeceased her on November 4, 1927. Two groups of heirs claim succession to the property and estate of Anna K. Bryant, the first consisting of three children of Thomas Bryant and a former wife, the second consisting of the next of kin of Anna K. Bryant, a sister, and the children of three deceased brothers. On March 15, 1932, the first group commenced this proceeding under the authority of section 1080 of the Probate Code for the determination of heirship and the right to distribution of the estate. The second group appeared therein as contestants. A judgment was rendered awarding a portion of the estate to the petitioners and the remainder to the contestants. Appeals were taken by both groups and are presented here on the same record. For purposes of convenience the first group will hereafter be referred to as petitioners and the second as contestants. It is well to note that the rights of the parties to succeed to the properties of the estate are controlled by subdivision 8 of section 1386, Civil Code, the decedent having died prior to the effective date of the Probate Code; that, as to all matters of procedure, the Probate Code is controlling.

The three petitioners are the children of Thomas and Nellie Bryant, whose marriage occurred on January 10, 1885. The husband was engaged in mining in the state of Montana, in which he was very successful and built up a considerable fortune. In 1909, at the request of the husband, Mrs. Bryant procured a divorce and immediately thereafter Mr. Bryant married Anna Healy, the decedent herein. No property settlement was made to the wife except a home in Salt Lake City, and no alimony or contribution for the support of the children was awarded. In 1914 Bryant and his second wife moved to California, where he engaged in business and land speculation, through which he made and lost considerable sums of money. In 1923 Mr. Bryant purchased a one-third interest in a partnership operating an electric tramway running between Venice and Ocean Park. The original investment was listed at $60,000 and Mr. Bryant's purchase of the one-third interest therein was evidenced by a note given to Mr. Gibbons, the owner of the remainder. This note was paid out of the earnings of the partnership, and in addition thereto Mr. Bryant was paid in dividends something over $38,000 and as salary something over $11,000. Four years after this investment was made Mr. Bryant died, leaving a will devising all his property to Anna K. Bryant. This will was never offered for probate. When the decedent was divorced from her former husband in 1905 she received no alimony or property, and during the period succeeding her divorce and prior to her marriage to Mr. Bryant she earned some money by giving music lessons, but was supported mainly through a regular allowance contributed by Mr. Bryant. After her marriage to Mr. Bryant she engaged in no income-producing occupation until the death of her husband in 1927. Thereafter she worked intermittently for the tramway concern, receiving a total salary over a period of four years of about $2,400. She had no separate property at the time of her marriage to Mr. Bryant, but thereafter received a small legacy from her mother's estate which, the court found, had not been traced into her estate. During the four years following the death of Mr. Bryant she received in dividends from the tramway concern over $23,000, the interest of Mr. Bryant having been transferred to her on the books of the concern by Mr. Gibbons voluntarily. No administration of the estate of Mr. Bryant was had and all the property accumulated during the union passed into the hands of the wife. Prior to his death Mr. Bryant made separate gifts to his wife of an orange grove located in San Bernardino county, various articles of jewelry, and a note and mortgage known as the "Etz" account, amounting to $3,500. These items are conceded to be the separate property of the decedent to which the contestants herein are entitled to distribution. Subsequent to the death of Mr. Bryant the widow purchased an automobile and made several loans secured by mortgages upon real estate which are listed as bills receivable. As to these items, the petitioners argue that they are the fruits of the community property coming from the dividends of the tramway interest. The trial court found that the tramway interest was community property and as such distributable to the petitioners herein, but made no disposition of the profits thereof received by the decedent. It found that the property conceded to be the separate property of the widow was distributable to the contestants herein and that as to all other property there was a failure of proof as to its community or separate character and for that reason such property was ordered distributed to the contestants.

[2-4] The burden of petitioners' attack on the judgment rests in finding number seven, which reads: "As to certain properties in this estate, there was no evidence of any kind to

indicate their source, character or disposition, and for that reason the Court holds them to have been the separate property of decedent at the time of her death." The error of this finding is one of law. It disregards the settled rule that a legal presumption is itself evidence and that when not controverted the court or jury is bound to find according to the presumption. Simonton v. L. A. Trust & Savings Bank, 205 Cal. 252, 258, 270 P. 672; Smellie v. S. P. Co., 212 Cal. 540, 549, 299 P. 529. It is in the evidence that during the cohabitation of the parties the husband, in partnership with one Gibbons, operated an electric tram line from which he received during a period of about four years over $38,000 as dividends and over $11,000 as salary. The husband died on November 4, 1927. Upon the death of her husband she took possession without administration of Mr. Bryant's interest in the tramway, and in the period of less than four years following his death she received therefrom in dividends over $23,000. The evidence is that she had no separate property and that at a time not disclosed in the evidence she had received a legacy from her mother's estate which the trial court found had not been traced into her estate. The interest in the tramway was found to be the community property of Mr. and Mrs. Bryant, and for reasons which we will hereafter discuss, this finding is not subject to attack. The household furnishings, the automobile, the bills receivable (other than the "Etz" account), and other property not shown to be the separate property of the decedent, must be held to be community property because of the presumption found in section 164 of the Civil Code in so far as any of these properties were acquired during the continuance of the marriage relation and, as to such as were acquired thereafter, they will be presumed to have been the fruits of the community property taken by Mrs. Bryant at the time of her husband's death. This is the settled rule found in Re Estate of Rolls, 193 Cal. 594, 597, 226 P. 608, and In re Estate of Jolly, 196 Cal. 547, 553–556, 238 P. 353. This conclusion is compelled by the further consideration that upon the death of her husband, Mrs. Bryant became the trustee of his portion of the community property for the benefit of his estate. Stafford v. Martinoni, 192 Cal. 724, 739, 221 P. 919; Civ. Code, § 2219. As such trustee she was not permitted to obtain any advantage against the estate or the heirs thereof and any advantage which she might obtain under such circumstances is presumed to have been obtained without consideration. Section 2235, Civ. Code; McKay v. McKay, 184 Cal. 742, 746, 195 P. 385, 386.

The respondents confidently rely upon In re Estate of Simonton, 183 Cal. 53, 190 P. 442, as authority for the rule that in cases of this kind the burden of proof is on the heirs of the predeceased spouse to show that the property is community. An expression to that effect is found in the Simonton opinion, but no authorities are cited in support of it and we do not find that the case has been cited as authority upon that point. Ample authority may be found to the contrary, particularly where the property has been received in trust, as is the case here. In McKay v. McKay, supra, the controversy involved money obtained by the husband from his wife during the marriage. Invoking the presumption under section 2235, Civil Code, that it had been obtained as a loan and not as a gift, the Supreme Court said: "It is the settled rule that the fact of the receipt by the husband of his wife's money presumptively makes him her debtor and imposes upon him the legal duty of returning it to her, and no affirmative proof is required on the part of the wife to show that the husband received the money as a loan, and not as a gift. To the contrary, the burden is upon the husband, or his heirs claiming the money, to show circumstances entitling him, or them, to retain the same. White v. Warren, 120 Cal. 322, 49 P. 129, 52 P. 723; Wormley's Estate, 137 Pa. 101, 20 A. 621; Stickney v. Stickney, 131 U. S. 227, 33 L. Ed. 136, 9 S. Ct. 677 [see, also, Rose's U. S. Notes]."

[5-7] But we do not understand that this issue depends entirely upon the question of the burden of proof. When the appellants rested upon the presumption that the property was community followed by the rule that the rents, issues, and profits thereof retain their community status (In re Estate of Brady, 171 Cal. 1, 151 P. 275), they made proof which was binding on the court until overcome by other evidence. With no proof to rebut the presumption it cannot be said that appellants failed to sustain such burden as the law may have cast upon them. Having taken possession of this property without administration, the wife was accountable to her husband's estate to the extent of one-half of the community property under the provisions of sections 1401 and 1402 of the Civil Code as they read at that time. She accordingly came under the rule of Stafford v. Martinoni, 192 Cal. 724, 734–736, 221 P. 919, and the burden was thus cast upon her representatives of showing what portion, if any, of the property, including the notes and mortgages taken by her for loans made during the four years succeeding her husband's death, was derived from sources other than the community property.

[8] At the outset of their appeal the contestants urge that the petitioners are not entitled to participate in any portion of the estate of the decedent because the predeceased husband had expressly disinherited them in a will which he executed on August 26, 1924. No authorities are cited in support of the point and upon every principle of reason outlined in the various statutes of succession the point is without merit. Section 1386 of the Civil Code, under which the petitioners claim,

relates to an estate not disposed of by will and the provisions of subdivision eight thereof are founded on the *origin* of the property in the predeceased spouse. In re Estate of McArthur, 210 Cal. 439, 292 P. 469, 72 A. L. R. 1318. All the interest of the predeceased spouse may have been left to the surviving spouse by will, yet if the latter dies intestate the heirs of the predeceased spouse succeed under the express provisions of this section of the Code, notwithstanding any expressed desires of the predeceased spouse.

[9] It is argued that the petitioners herein are estopped from asserting any rights to the estate because one of them had theretofore gone into the probate court on a petition to set aside the appointment of the administrator and for the issuance of letters to her, and because in that proceeding the probate court made extensive findings purporting to cover all the issues which might arise at any stage of the probate proceedings. This point is equally without merit. Under the provisions of section 422 of the Probate Code the next of kin of the decedent were entitled to letters of administration in preference to the relatives of the predeceased spouse. Under the provisions of section 423 of the Probate Code any person so entitled might nominate a competent person as administrator. Thereupon the probate court has discretion to appoint such nominee or to appoint a person of a class subsequent in rank. But the court is not required to select one of a subsequent rank, and hence when two such persons seek letters of administration the primary question before the probate court is whether the nominee is a competent person for the appointment. This discretion having been exercised, one having a *prior* right may petition for revocation of the letters under the terms of section 450. The right to so petition, however, seems to be limited in that section to a "surviving spouse, child, parent, brother or sister of the intestate or the public administrator * * *" or a party acting upon the written request of any one of these. The petitioner, as the daughter of the predeceased spouse, does not come under the category of those mentioned in this section of the Code and it would seem therefore that the probate court had no jurisdiction to entertain the petition in the first instance. Assuming, however, that the petitioner was competent, the only issue before the court was whether the petitioner had a prior right to the one who had been appointed. This claim is denied by the express provisions of sections 422 and 423. There was nothing more before the probate court than this issue and for this reason the findings relating to the character of the property, the disposition of the interest in the tramway concern, the effect of the bill of sale thereto and the rights of succession of the various parties herein were all immaterial to and beyond the issues raised in that proceeding. These findings of the probate court on matters which were beyond the jurisdiction of that court and immaterial to the issues in the proceeding before it are not res judicata against the petitioners in this proceeding. 15 Cal. Jur. p. 153; Chapman v. Hughes, 134 Cal. 641, 655, 58 P. 298, 60 P. 974, 66 P. 982. This rule is particularly applicable to the petitioners Thomas Bryant, Jr., and J. Ross Bryant, who were in no sense parties to the proceeding in the probate court for the revocation of letters of administration.

[10] Contestants rely with some apparent confidence on a purported bill of sale which Thomas Bryant executed covering his interest in the tramway partnership. After a full and fair hearing on this question, the trial court found on conflicting evidence that this bill of sale was not made in view of pending death; that it was executed at the request of the partner and with the understanding that both partners would execute similar documents, but that they would not be delivered nor take effect until the death of either partner; that continuously after the execution of the bill of sale and until his death Mr. Bryant exercised and maintained the same exclusive dominion and control over the property as he had exercised prior thereto; that the books and records of the partnership showed Thomas Bryant to be the owner of a one-third interest therein until after his death, and that then, and not until then, they were voluntarily changed by Mr. Gibbons so that Mrs. Bryant appeared to have succeeded to the interest of her husband; that all dividends payable from the interest of Thomas Bryant were paid to him up to the date of his death; and that the bill of sale was at no time presented by Mrs. Bryant to the partnership until after the death of her husband. These findings are fully supported by the evidence. They compel the conclusion that there was no valid gift of the interest in the tramway, but that the bill of sale was executed solely for the purpose of avoiding probate in event of death, that it was thus testamentary in character and invalid for any purpose. These findings fully support the court's conclusion that this interest was community property and as such distributable to the petitioners.

The portion of the judgment awarding the tramway interest to petitioners and determining that they are entitled to distribution thereof is affirmed. The portions of the judgment attacked in petitioners' appeal are modified by affirming the award to contestants of all properties which have been conceded to be the separate property of the deceased and by reversing as to such other properties with directions to retry the issues as to such properties alone. Petitioners to have their costs.

We concur: STURTEVANT, J.; SPENCE, J.

136 Cal.App. 263

In re RINDGE'S ESTATE.

Civ. 9136.

District Court of Appeal, First District, Division 1, California.

Jan. 15, 1934.

1. Executors and administrators ⇐131.

Executor occupying premises belonging to deceased, merely to protect property and exhibit it to persons desiring to inspect it with view of renting or buying, was not chargeable with rental value.

2. Executors and administrators ⇐130(1).

Executor in lawful possession of property is bound to exercise diligence and prudence in its preservation.

3. Executors and administrators ⇐506(3).

Executor's testimony that account was correct, and that, where debts were paid without verified claims, debts were justly due, *held* sufficient prima facie showing (Probate Code, § 929).

4. Executors and administrators ⇐510(4).

Objectors to executor's account failing to question any item of long account will not be permitted to object for first time on appeal.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Accounting by Adrian Cavagnaro, executor of the last will of Elyse C. Rindge, deceased, wherein objections were filed by Carrie M. Merrill and others. Order overruling objections and approving and settling account, and the objectors appeal.

Affirmed.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellants.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

TYLER, Presiding Justice.

This is an appeal from a decree settling the first account of the executor herein. The facts necessary to a discussion of the case show, in substance, that Elyse C. Rindge died in November, 1927. At the time of her death she was the owner of an estate appraised at the sum of $147,119.73, including a house and lot situated on the northwest corner of Pacific avenue and Gough street, appraised at $100,000. Her will, after making specific bequests of jewelry and other personal property, and a specific devise of a certain parcel of real property, then left $50,000 in trust for her minor son with her brother Adrian Cavagnaro, who in his capacity of executor is respondent here. Other bequests were $12,500 to respondent personally; to her sister Albena Cavagnaro, $12,500; to appellant Mrs. Jack Lee, $5,000; to appellant Carrie M. Merrill, $5,000; to appellant Melvin Walker, $2,000; and, to Celia Smith, $1,000. The only property of the estate other than that specifically devised and bequeathed is the house and lot on Pacific avenue, and the furnishings thereof.

Respondent was appointed executor November 28, 1927, at which time the house was rented and remained so rented until April 30, 1928. Thereafter the property was again rented for a period of some six months. The rent obtained totaled $13,425 for approximately eleven and one-half months, or between $1,100 and $1,200 a month. After the last tenant vacated the premises on April 1, 1929, respondent placed the same in the hands of real estate agents for rent, but was unable to procure a tenant. He thereupon moved into the premises with certain members of his family and continued to occupy the same up to February 1, 1932, at which time the settlement of his first account came on for hearing. Upon such hearing of the account, appellants objected to its settlement on the ground (1) that the executor failed to include therein the rental value of the property during the time he occupied the same; (2) that except in two instances no claims were presented for what apparently were debts of the deceased; and (3) that the account sought to credit the executor with the amount paid as inheritance tax, whereas such payment should have been charged to the respective shares of the different legatees. After a hearing, appellants' objections were all overruled, and the court approved and settled the account without making any findings of fact. It is this order from which the present appeal is taken.

It is here claimed in effect that the evidence is insufficient to justify the implied finding that the executor should not be charged with the rental of the premises during the time he occupied the same. It is further claimed that the evidence is insufficient to justify the implied finding that any claims were ever presented to said executor in the manner provided by law or that any claims were ever allowed or proved for any debts paid. The account contains some three hundred items. The record before us consists of a bill of exceptions. The only testimony offered at the hearing was that given by the executor, and it had to do almost exclusively with the reason for his occupancy of the premises. He testified in effect on cross-examination that previous to her death deceased leased the property in question for the sum of $1,250 a month, the tenant remaining in possession about seven months. The premises contained some thirty rooms and twelve baths. It was fully and expensively fur-

nished, the furnishings being valued at the sum of $18,499.50. When the first tenant gave up the property the executor endeavored to procure another tenant, and to this end he listed the property with nearly all the real estate firms in San Francisco. A tenant was finally procured who leased the premises for a period of about seven months for a total rent of $7,175. After this tenant vacated the premises, every attempt was made to procure another tenant, but owing to the size of the premises and the amount of the rent such attempts were unsuccessful. The estate had no funds with which to pay a caretaker, and the executor, in order to preserve the property and care for the same, moved into the premises with his relatives, who took care of the furniture and furnishings, at the same time showing the house to prospective renters and buyers at any time they would call. The only reason respondent so occupied the premises was to protect the property and exhibit it to persons desiring to inspect it with a view of renting or buying. The use that respondent executor made of the property was simply incidental to its care and upkeep.

The executor further testified that, when he paid debts and no verified claim was presented, the debts were justly due, were paid in good faith, and the amount paid was the true amount of the indebtedness due, and there were no payments or offsets to any of them. This was all the testimony had at the hearing. The account itself shows in detail the nature of every expenditure, and vouchers were on file for all the items of disbursements contained in the account.

[1, 2] With reference to the first objection, we are of the opinion that respondent is not chargeable with the rental value of the property of the estate under the circumstances of the case. While it is true that a representative of an estate who occupies and uses its property for his own benefit must account for the rental value thereof, it is also true that he is bound whenever he is in lawful possession of property to exercise diligence and prudence in its preservation. Respondent made every endeavor to rent the premises, but owing to the size of the dwelling and the amount of rent reasonably required it was impossible to procure a tenant. Respondent did not care to occupy the premises, as his relatives had a home of their own, and he only did so to preserve the property and care for the expensive furnishings contained therein, and avoid the expense of a caretaker. Respondent did not profit by his occupancy, and under such circumstances he was not liable for the rental value of the property. In re Catanach's Estate, 273 Pa. 368, 117 A. 178.

[3, 4] As to the second contention, that respondent should not have been credited with amounts claimed to have been paid for debts for which no verified claims were presented, it is sufficient to say that respondent testified that the account was true and correct, and that in all such cases the debts were justly due. This was a sufficient prima facie showing under the Code (Code Civ. Proc., § 1632; Probate Code, § 929), and the trial court was justified in so concluding. Counsel for appellants did not cross-examine respondent upon a single item of the long account, contenting himself with attempting to establish that the executor should be charged rent because of his occupancy of the premises. Appellants had full opportunity to question any objectionable item. Not having done so, they should not be permitted to object for the first time on appeal.

And, finally, as to the objection that the order should have directed that the amount paid for inheritance taxes should be charged against the shares of the legatees on which the taxes were based, respondent has conceded that this will be done, although no provision therefor was made in the order settling the account. It is conceded by appellants that this matter is not sufficiently serious to justify a reversal of the order, it being sufficient to give appropriate directions on this subject. The order in this respect is accordingly so modified, with directions to the lower court to deduct from the amount due the different legatees their proportion of the tax charged against the estate. With this modification the order is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

136 Cal.App. 180

MACKAY v. CITY OF LOS ANGELES et al.

Civ. 8966.

District Court of Appeal, First District, Division 1, California.

Jan. 8, 1934.

Hearing Denied by Supreme Court March 8, 1934.

1. Eminent domain ⇐167(1).

Proceeding for acquisition of land for park purposes was "pending" at time ordinance of intention was passed, as respected right to proceed under law in force before adoption of charter.

[Ed. Note.—For other definitions of "Pending," see Words & Phrases.]

2. Eminent domain ⇐9.

Municipal corporation has no inherent power of eminent domain.

3. Eminent domain ⇐9.

Board of tax commissioners could not by implication exercise power of eminent domain not expressly authorized by Legislature.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by Mira Davis Mackay against the City of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

John J. Beck, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Jerrell Babb and Robert J. Stahl, Deputy City Attys., all of Los Angeles, for respondents.

McNUTT, Justice pro tem.

Plaintiff sued to quiet title to lands which were sold to the city of Los Angeles (defendant) for a delinquent assessment levied against them to pay the expense of their acquisition by condemnation for park purposes. A demurrer was sustained, and judgment was entered against plaintiff, who has appealed on the judgment roll.

The acquisition of said lands resulted from proceedings instituted by the respondent city of Los Angeles under section 2 of the Park and Playgrounds Act of 1909 (St. 1909, p. 1066), which reads as follows: "Before ordering the acquisition of any land or lands for any purpose authorized in section 1 of this act, the city council shall pass an ordinance declaring its intention so to do." Section 1 of the act provides that, "whenever the public interest or convenience may require, the city council of any municipality shall have full power and authority to acquire by condemnation any land situate in such municipality for public park or public playground purposes."

Appellant contends that, pending the accomplishment of the proceeding thus instituted, the city of Los Angeles adopted a charter, one of the provisions of which, numbered section 176 (St. 1925, p. 1083), follows: "No real property shall be acquired by the city for park sites unless such sites are first approved by the Board of Commissioners. Said board shall have full control over all park sites and no such sites shall be devoted to any other purpose in whole or in part without permission from said board;" and that therefore the proceedings were abortive because the sites in suit were not first approved by the board of park commissioners. The argument is grounded upon the propositions that "City Charter provisions are strictly construed and must be strictly followed" (O'Melveney v. Griffith, 178 Cal. 1, 171 P. 934); that the ordinance of intention to acquire the park sites in question was not finally adopted until after the charter provision requiring the approval of the board of park commissioners had become effective; that the park sites were not acquired as a matter of law until after the adoption of the aforesaid charter provision.

That proceedings under charter provisions are stricti juris may be true as a legal abstraction, but, when another provision of the said charter is considered, it is apparent that there was in this case no noncompliance with the charter.

The chronology of the significant events follows:

June 30, 1925, ordinance of intention passed by city council. Clerk's Trans. p. 3, l. 8.

July 1, 1925, section 176, Los Angeles City Charter, supra, became effective.

July 3, 1925, ordinance of intention approved by mayor. Clerk's Trans. p. 3, l. 15.

July 8, 1925, first publication of notice of intention. Clerk's Trans. p. 3, l. 16.

September 18, 1925, protests denied by Los Angeles city council. Clerk's Trans. p. 3, l. 22.

October 26, 1925, condemnation ordinance finally adopted. Clerk's Trans. p. 4, l. 22.

Section 439 of the same charter provides that: "No special proceedings relating to local improvements or to local assessments, pending at the date this charter takes effect, shall be invalidated or affected in any respect, by reason of this charter taking effect, but all such special proceedings shall continue, in accordance with the law applicable thereto."

[1] The subject-matter of this action was a special proceeding relating to local improvements or local assessments, and it was pending at the date the charter took effect. Without regard to whether the ordinance of intention had been finally adopted, the proceeding was pending because the first step necessary to be taken in the condemnation proceeding under the Park and Playgrounds Act was the passage of such ordinance.

The framers of the charter of 1925 apparently apprehended the procedural overlapping relied upon by appellant and averted the consequences by the saving clauses of section 439 (St. 1925, p. 1152).

[2, 3] In the closing brief of appellant is found the following: "Conceding for the sake of argument, but not admitting, that section 176 of the Los Angeles City Charter does not apply in this instance, we are nevertheless faced with the question: 'What is the law applicable to the proceedings in question?' In other words what did the preceding city charter of Los Angeles say on the subject?" She further contends that the charter of Los Angeles adopted in January, 1889, and amendments thereto, confer no power upon the city council to select and purchase park sites, but that said charter, as amended in section 118 (St. 1911, p. 2112), provides: "(c) To purchase and lease property for park purposes, * * * and to have

general supervision, control, care and custody of all real and personal property owned by the city of Los Angeles and used in and about the parks or park system of said city, and generally to do any and all things that may be necessary to carry out the spirit and intent of this charter in establishing, maintaining, operating, improving and enlarging the public parks and park system of the city of Los Angeles." To this supplemental argument respondent did not reply. Perhaps, if the park commissioners whose powers are thus defined had had money with which they desired to purchase public parks, they might have done so, but the section quoted does not confer upon that board the right to institute condemnation proceedings. Since a municipal corporation has no inherent power of eminent domain and can exercise it only when expressly authorized by the Legislature (City of Los Angeles v. Koyer, 48 Cal. App. 720, 192 P. 301), it follows that the board of park commissioners, a department of the city, could not by implication exercise such power.

No other ground for reversal being urged, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

136 Cal.App. 195

EUREKA CASUALTY CO. v. MUNICIPAL COURT OF CITY OF LOS ANGELES.

Civ. 8193.

District Court of Appeal, Second District, Division 2, California.

Jan. 9, 1934.

Audita querela ⇐1.

Proceeding equivalent to petition for "writ of audita querela" is authorized when duly taken by motion for new trial or for relief from judgment granted through mistake, inadvertence, surprise, or excusable neglect, but motion must be made in court of original jurisdiction, hence is not available in superior court to have municipal court judgment vacated (Code Civ. Proc. §§ 473, 657).

"Writ of audita querela," in jurisdictions where used, is proceeding permitted only in court wherein record lies, to review judgment on account of some matter occurring after judgment, amounting to a discharge of its obligations.

[Ed. Note.—For other definitions of "Audita Querela," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Proceeding by the Eureka Casualty Company to require the Municipal Court of the City of Los Angeles to vacate its judgment upon an undertaking. From an order denying the petition, petitioner appeals.

Affirmed.

See, also, 28 P.(2d) 709.

A. Brigham Rose, of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, and John L. Bland and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, Justice.

An order having been entered in the superior court denying a petition that the municipal court of the city of Los Angeles be required to vacate its judgment theretofore rendered upon an undertaking, the petitioner appealed.

Said petitioner furnished its undertaking as surety upon appeal by one Earle Wilson from a judgment of the municipal court declaring him guilty of having violated the state statute forbidding the possession or sale of intoxicating liquor, and undertook that he would surrender himself in execution of judgment, if affirmed or modified, or, should the appeal be dismissed, or in the event of a reversal thereof, that he would appear for a new trial and submit himself to the orders and processes of said court. Thereafter, a commitment having issued, and the defendant failing to appear, said bond was forfeited. The petitioner herein alleges that, after diligent search for the principal, his demise in a foreign country was then first discovered; that a motion was thereupon made pursuant to the provisions of sections 1305 and 1306 of the Penal Code that said forfeiture be set aside, but that such motion was denied and judgment was entered accordingly. A petition was subsequently filed in the superior court by which the surety alleged that it had acquired newly discovered evidence which, had it been known and presented in the municipal court, would have entitled the petitioner to a different result, and praying that said municipal court be directed to vacate its judgment and to hear the matter again.

Such proceeding was entitled "Petition for a Writ of Audita Querela." This proceeding has been entitled in jurisdictions where used as one permitted only "in the court wherein the record lies, to review the judgment on account of some matter occurring after judgment amounting to a discharge of its obligation." Smith v. Young, 136 Mo. App. 65, 117 S. W. 628, 634; Manning v. Phillips, 65 Ga. 548; Coffin v. Ewer, 5 Metc. (Mass.) 228; Parker v. Jones, 58 N. C. 276, 75 Am. Dec. 441;

McRae v. Davis, 58 N. C. 140; Ross v. Shurtleff, 55 Vt. 177.

However, a proceeding equivalent to that outlined by the petitioner's allegations below is authorized by our Code of Civil Procedure when taken in the manner and at the time prescribed, by motion for a new trial (Code Civ. Proc. § 657), or for relief from a judgment (Code Civ. Proc. § 473), provided the same be granted through mistake, inadvertence, surprise, or excusable neglect. Both such motions must be made in the court of original jurisdiction. Should it be contended, on the other hand, that by proper proceedings the petitioner might have been entitled to the writ recognized under the statutes of this state, it is sufficient to say that the pleadings do not bring its case within the provisions thereof. Section 1068 of the Code of Civil Procedure authorizes the issuance of a writ of review "when an inferior tribunal * * * has exceeded the jurisdiction of such tribunal; * * *" and section 1085 of the same Code permits the issuance of a writ of mandamus "to any inferior tribunal * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. * * *" It is not contended that a ruling upon a motion to vacate a judgment is other than discretionary and within the jurisdiction of the trial court. It results that said petition cannot be maintained.

The order is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

136 Cal.App. 261

EUREKA CASUALTY CO. et al. v. MUNICIPAL COURT OF CITY OF LOS ANGELES.

Civ. 8191.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1934.

Audita querela ⇐1.

Proceeding equivalent to petition for "writ of audita querela" is authorized when duly taken by motion for new trial or for relief from judgment granted through mistake, inadvertence, surprise, or excusable neglect, but motion must be made in court of original jurisdiction, hence is not available in superior court to have municipal court judgment vacated (Code Civ. Proc. §§ 473, 657).

"Writ of audita querela," in jurisdictions where used, is proceeding permitted only in court wherein record lies, to review judgment on account of some matter occurring after judgment, amounting to a discharge of its obligations.

[Ed. Note.—For other definitions of "Audita Querela," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Petition by Eureka Casualty Company and another to require the Municipal Court of the City of Los Angeles to vacate judgment on an undertaking. From an order denying the petition, named petitioner appeals.

Affirmed.

See, also, 28 P.(2d) 708.

A. Brigham Rose, of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, and John L. Bland and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, Justice.

An order having been entered in the superior court denying a petition that the municipal court of the city of Los Angeles be required to vacate its judgment theretofore rendered upon an undertaking, the petitioner appealed.

Said petitioner furnished its undertaking as surety upon appeal by one Earle Wilson from a judgment of the municipal court declaring him guilty of having violated the state statute forbidding the possession or sale of intoxicating liquor, and undertook that he would surrender himself in execution of judgment if affirmed or modified or should the appeal be dismissed, or, in the event of a reversal thereof, that he would appear for a new trial and submit himself to the orders and processes of said court. Thereafter a commitment was issued, and, the defendant failing to appear, said bond was forfeited. The petitioner herein alleges that, after diligent search for the principal, his demise in a foreign country was then first discovered; that a motion was thereupon made pursuant to the provisions of sections 1305 and 1306 of the Penal Code that said forfeiture be set aside, but that such motion was denied, and judgment was entered accordingly. A petition was subsequently filed in the superior court by which the surety alleged that it had acquired newly discovered evidence which, had it been known and presented in the municipal court, would have entitled the petitioner to a different result, and praying that said municipal court be directed to vacate its judgment and to hear the matter again. Such petition was entitled "Petition for a Writ of Audita Querela." This proceeding

has been entitled in jurisdictions where used as one permitted only "in the court wherein the record lies, to review the judgment on account of some matter occurring after judgment amounting to a discharge of its obligation." Smith v. Young, 136 Mo. App. 65, 117 S. W. 628, 634; Manning v. Phillips, 65 Ga. 548; Coffin v. Ewer, 5 Metc. (Mass.) 228; Parker v. Jones, 58 N. C. 276, 75 Am. Dec. 441; McRae v. Davis, 58 N. C. 140; Ross v. Shurtleff, 55 Vt. 177. However, a proceeding equivalent to that outlined by the petitioner's allegations below is authorized by our Code of Civil Procedure when taken in the manner and at the time prescribed, by motion for a new trial (Code Civ. Proc. § 657), or for relief from a judgment (Code Civ. Proc. § 473), provided the same was granted through mistake, inadvertence, surprise, or excusable neglect. Both such motions must be made in the court of original jurisdiction. Should it be contended, on the other hand, that by proper proceedings the petitioner might have been entitled to the writ recognized under the statutes of this state, it is sufficient to say that the pleadings do not bring its case within the provisions thereof. Section 1068 of the Code of Civil Procedure authorizes the issuance of a writ of review "when an inferior tribunal * * * has exceeded the jurisdiction of such tribunal; * * *" and section 1085 of the same code permits the issuance of a writ of mandamus "to any inferior tribunal * * * to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station. * * *" It is not contended that a ruling upon a motion to vacate a judgment is other than discretionary and within the jurisdiction of the trial court. It results that the said petition cannot be maintained.

The order is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

136 Cal.App. 785

EUREKA CASUALTY CO. (a Corporation), Petitioner; Los Angeles Surety Co., Inc. (a Corporation), Petitioner and Appellant, v. The MUNICIPAL COURT OF THE CITY OF LOS ANGELES et al., Defendants and Respondents.

Civ. 8190.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1934.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

A. Brigham Rose, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Robert A. Cushman, Deputy Co. Counsel, both of Los Angeles, for respondents.

CRAIG, Justice.

An application for a writ of mandate directing the respondent municipal court to set aside an order forfeiting bail bonds and entries of judgments thereon having been denied by the superior court, the petitioner appealed.

The questions presented having been determined in Seaboard Surety Corp. v. Municipal Court, 208 Cal. 596, 283 P. 289; Los Angeles Surety Co., Inc., v. Municipal Court, 111 Cal. App. 133, 295 P. 591, and Eureka Casualty Co. v. Municipal Court (Cal. App.) 28 P.(2d) 709, the petition cannot be granted.

The order is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice, pro tem.

136 Cal.App. 786

LOS ANGELES SURETY COMPANY, Inc. (a Corporation), Petitioner and Appellant, v. The MUNICIPAL COURT OF THE CITY OF LOS ANGELES et al., Defendants and Respondents.

Civ. 8192.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1934.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

A. Brigham Rose, of Los Angeles, for appellant.

Charles P. Johnson, City Prosecutor, and John L. Bland and Joe W. Matherly, Deputy City Prosecutors, all of Los Angeles, for respondents.

CRAIG, Justice.

In the above-entitled cause the petitioner sought in the superior court a writ of audita querela to compel the municipal court to set aside an order forfeiting bail and entering judgment, which petition was denied. From the latter ruling the petitioner appealed.

The questions here presented having been

determined in considering controversies between the same parties adversely to the appellants, their discussion is not further required. Los Angeles Surety Co. v. Municipal Court, 111 Cal. App. 133, 295 P. 591; Eureka Casualty Co. v. Municipal Court (Cal. App.) 28 P.(2d) 709.

The order is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice, pro tem.

136 Cal.App. 286

In re COMBS' ESTATE.

KOVACS v. ST. PAUL'S ENGLISH EVANGELICAL LUTHERAN CHURCH.

Civ. 9322.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1934.

1. Wills ⇐565(1).

Bequest of "personal property" to testatrix' daughter *held* properly limited to "personal effects," in view of fact that, if "personal property" was given statutory and broad construction, provisions for other children would have to abate (Probate Code, §§ 102, 103, 106).

Under Probate Code, § 106, requiring words in will to be used in their ordinary and grammatical sense, fact that statute defines words "personal property" in their broad meaning of including everything which is subject of ownership not coming under denomination of realty does not necessarily make such definition the ordinary meaning of the term, such term having many meanings, including its popular usage in a somewhat restricted sense to include only goods and chattels, tangible things, subjects of personal use.

[Ed. Note.—For other definitions of "Personal Effects" and "Personal Property," see Words & Phrases.]

2. Wills ⇐458.

Rule that in construing will court should not be confined to examination of meaning of words used in one particular sentence, but should consider all of sentences, and when possible give effect to each, is peculiarly applicable to holographic will (Probate Code, § 103).

Appeal from Superior Court, Los Angeles County; May D. Lahey, Judge.

Proceeding by Theresa Gertrude Kovacs, formerly Theresa Gertrude Patterson, to settle her account, and for distribution of the estate of Theresa Dorothea Combs, deceased, opposed by St. Paul's English Evangelical Lutheran Church. From the decree, petitioner appeals.

Affirmed.

Hare & Walden, of Los Angeles, for appellant.

Clarence B. Runkle, of Los Angeles, for respondent.

STURTEVANT, Justice.

The decedent left a holographic will in words and figures as follows:

"Los Angeles, California June 17th 1926

"I Theresa Dorothea Combs, being of sound mind and body, and fully cognizant of what I am doing, hereby make this my last will and testament. I wish to appoint my daughter Theresa Gertrude Patterson, that she, without bonds have ample legal power to administer said Estate.

"I bequeath the sum of $1,500.00 (fifteen hundred dollars) to St. Paul's english evangelical lutheran church located at Euclid Avenue and Eagle Street, Los Angeles, California, to be applied on a pipe organ.

"I bequeath the sum of $700.00 (seven hundred dollars) to my dear sister Mrs. Amalia Simis; also $200.00 (two hundred dollars) to my nephew Theodore E. Simis, son of my sister Mrs. Amalia Simis.

"The sum of $200.00 (two hundred dollars) to our highly esteemed Pastor, Rev. J. E. Hoick.

"Besides $100.00 (one hundred dollars) to my dear friend Mrs. Anna Engnell, in consideration of love and kindness received, when mostly needed.

"To my beloved grandsons, Theodore Franklin Combs Jr. and Paul Howard Combs, each $500.00 (five hundred dollars), this amount to be kept on investment, until said grandsons become of age, twenty one years resp., thereby increasing the amount.

"All the rest, residue and remainder of my Estate I hereby devise and bequeath to my dearly beloved children, Leslie Gustav, Theodore Franklin, and Theresa Gertrude Patterson, share and share alike.

"My personal property to go to my daughter Theresa Gertrude Patterson.

"Theresa Dorothea Combs
"Signature Theresa D. Combs."

The will was admitted to probate and on September 28, 1928, an inventory was return-

ed and filed which showed the estate to consist of the following items:

Moneys belonging to said deceased, which have come to the hands of the	$
Cash in Bank of Santa Maria	1,446.61
Cash in California Bank, L. A. ...	900.00
Promissory note of Theo. Combs for $500.00 due Oct. 17—1925—Interest 7%—appraised at	500.00
Promissory note of Harry and Edith Hahn for $4250.00 due April 16—1927—Interest 7½% and secured by a mortgage on real property—appraised at	4,250.00
Unsecured note of Sarah Barney for $500.00 due July 2—1927—for 7%—appraised at	500.00
Unsecured note of Carl Stevenson for $1500.00 due July 8—1928—Int. 7%—appraised at	1,500.00
Unsecured note of Albert Grabe for $1,000.00 due Nov. 1—1927—Int. 7%—appraised at	1,000.00
Also real property situate in the County of Los Angeles, State of California, described as follows, to-wit: The Southeast 40 feet of Lot 16 Block "B," of Mountain View Tract, as per map in Book 24, p. 25 Misc Records of said County—appraised at	4,200.00
Total	$14,296.61.

Thereafter, August 5, 1932, she filed an account showing total receipts of $16,915.91, disbursements $5,846.34 and personal property on hand $11,069.57. With the account she filed a petition for final distribution in which she set forth:

"That according to the terms of the Last Will and Testament of said deceased, duly admitted to probate herein, said estate should be distributed as follows:

"That according to the terms of the Last Will and Testament of said deceased, duly admitted to probate herein, all of the personal property belonging to said deceased is bequeathed to Theresa Gertrude Patterson, now Theresa Gertrude Kovacs, your petitioner herein.

"That the only property belonging to said deceased at the time of her death undisposed of by will, after the foregoing specific bequest, was a parcel of real property which was appraised at the sum of $4,200.00. That said real property was improved with a small cheap house which was quite old, and very expensive to maintain, and which your petitioner was unable to sell until very lately, and during the interim between the death of said deceased and the time of the sale the property had so greatly depreciated in value by reason of the change of the vicinage to that of a less desirable nature, that your petitioner was unable to obtain a sum greater than $2,000.00. After paying an agent's commission and escrow charges, the net result of the sale was only $1,848.35.

"From the foregoing it will be seen that said sum of $1,848.35 is insufficient to pay the costs and expenses of administration, and your petitioner is informed and believes and upon such information and belief alleges that all of the bequests to St. Paul's English Evangelical Lutheran Church, Mrs. Amalia E. Simis, Theodore E. Simis, Rev. J. E. Hoick, Mrs. Anna Engnell, Theodore Franklin Combs, Jr., and Paul Howard Combs cannot be paid, and that each and every of said last named general bequests fail by reason of the fact that there are no funds belonging to the estate with which to make such payment, and that distribution of all of said estate should be made to your petitioner the said Theresa Gertrude Patterson, now Theresa Gertrude Kovacs."

St. Paul's English Evangelical Lutheran Church, one of the legatees, appeared and filed written objections to the petition for distribution. The court made a decree which, among other things, provided as follows:

"* * * and orders distribution thereof as follows:

To St. Paul's English Evangelical Lutheran Church	$1,500.00
To Mrs. Amalia Simis, the sum of	700.00
To Theodore E. Simis, the sum of ..	200.00
To Rev. J. E. Hoick, the sum of ...	200.00
To Mrs. Anna Engnell, the sum of	100.00
To Theodore Franklin Combs, Jr., the sum of	500.00
To Paul Howard Combs, the sum of	500.00

"The said legacies of Theodore Franklin Combs, Jr., and Paul Howard Combs to be kept on investment until they become of age.

"All personal effects of said deceased to go to Theresa Gertrude Kovacs, formerly Theresa Gertrude Patterson.

"All the rest, residue and remainder of said estate, wheresoever situate and whether described herein or not be and the same is distributed to the children of said deceased, share and share alike, to-wit, Leslie Gustav Combs, Theodore Franklin Combs, and Theresa Gertrude Kovacs, formerly Theresa Gertrude Patterson.

"The property of said estate hereby distributed so far as same is known is described as follows:

Cash	$5,819.57
Promissory note of Harry & Edith Hahn, payable in the sum of	4,250.00
Promissory note of Sarah Barney, payable in the sum of	500.00
Promissory note of Theodore Combs, payable in the sum of	500.00."

[1, 2] From that decree the surviving daughter appealed. She contends the trial court erred in holding the words "personal property," as used in the last sentence, were used in a restricted sense and meant "personal effects." She quotes section 106 of the Probate Code and she quotes from In re Brown's Estate, 119 Cal. App. 195, at page 197, 6 P.(2d) 319, 320, as follows: "The intent of the testator must be determined, if possible, from the language of the will. Estate of Young, 123 Cal. 337, 344, 55 P. 1011; Fay v. District Court of Appeal, 200 Cal. 522, 536, 254 P. 896. The authorities are uniform in declaring that: '"The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used.' Estate of Blake, 157 Cal. 448, 459, 108 P. 287, 291." The respondent replies that it admits the rules stated, but says there are other rules which must also be considered. It then presents several arguments each based on different assumptions. In the first place, it assumes that the testatrix knew when she wrote her will that her real estate was of a value of only $4.200; that she also knew the minimum costs of administration would amount to $2,052.39. Subtracting those costs from $4,200 would leave $2,147.61 to pay $3,700 in specific bequests. Again it says that, if we deduct $3,646.34, the actual costs of administration, not counting depreciation of real estate, from $4,200, the value of the real estate, there is left $553.66 to pay $3,700 in legacies. In either event the appellant's construction would entirely cut out the rights of her brothers to receive anything. Furthermore, such construction operates to render nugatory every part of the will except the last clause. The respondent then asserts that a construction which gives effect to every provision of the will is preferred to one which will render some provisions inoperative. Probate Code, § 102; In re Estate of Robinson, 159 Cal. 608, 115 P. 49. These contentions of the respondent we think are well founded. Furthermore, as the respondent contends, we see no violation of the provisions of section 106 of the Probate Code. That rule commands us to take the words of the will "in their ordinary and grammatical sense. * * *" The trial court did so. Because the statute defines the words "personal property" the appellant contends that the statutory definition is the ordinary meaning. In that assumption she begs the question. The words "personal property" have many meanings. "Although popularly the term personal property is used in a somewhat restricted sense to include only goods and chattels, tangible things, the subjects of personal use, in its broad and general sense it includes everything which is the subject of ownership not coming under the denomination of real estate. * * *" 50 C. J. 760. The broad meaning happens to coincide with the statutory definition. When under such circumstances a court is construing the meaning of a will it will not be confined to an examination of the meaning of the words used in one particular sentence without regard to other sentences contained in the will. But it will consider all of the sentences and when possible give some force and effect to each one. Probate Code, § 103. That rule is peculiarly applicable to a holographic will. Estate of Stratton, 112 Cal. 513, 519, 44 P. 1028. In the case entitled Estate of Ladd, 94 Cal. 670, at page 674, 30 P. 99, 101, the court quoted with approval as follows: "'The different parts of a will, or of a will and codicil, shall be reconciled, if possible, and, where a bequest has been once made, it shall not be revoked unless no other construction can be fairly put upon the language used by the testator.' [Citing cases.]" In the case entitled In re Estate of McCauley, 138 Cal. 432, on page 434, 71 P. 512, the court takes up the same subject and cites many authorities to the same effect. The decision in Re Estate of Koch, 8 Cal. App. 90, 96 P. 100, is helpful, but not closely in point in the instant case. Our attention has not been called to any case in this state that is directly in point. The respondent cites Stender v. Stender, 181 Mich. 648, 148 N. W. 255; Gist et al. v. Craig, 142 S. C. 407, 141 S. E. 26; In re Moore's Estate, 241 Pa. 253, 88 A. 432. All of those cases are directly in point and support the contentions of respondent.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

NICHOLS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 9367.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1934.

Hearing Granted by Supreme Court March 15, 1934.

1. Divorce ⇐201.

Trial court had no authority to appoint receiver of husband's property in wife's suit for divorce, property division, etc., before service of process on or appearance by him.

2. Courts ⇐92.

General language of Supreme Court opinion respecting validity of order appointing receiver of husband's property in wife's action for maintenance *held* entitled to weight only as obiter in mandamus proceedings for vacation of like order, made in wife's suit for divorce, property division, etc., before service of process on husband.

3. Divorce ⇐202.

Husband, appearing in wife's suit for divorce, property division, etc., 17 months after filing of complaint, and moving about 8 months later to vacate order appointing receiver of his property before service of process on him, *held* not estopped by "acquiescence" to question validity of order, where service by publication was not made effective until nearly 10 months after appointment and receiver had sold most of property.

[Ed. Note.—For other definitions of "Acquiesce; Acquiescence," see Words & Phrases.]

4. Mandamus ⇐143(2).

Laches does not bar attack on judgment void for lack of jurisdiction.

Word "laches" has been defined as importing merely passive assent while "acquiescence" implies active assent.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

5. Judgment ⇐577(2).

Void judgment or void order appointing receiver is no judgment, though not set aside, and all acts performed thereunder and claims flowing therefrom are void.

6. Mandamus ⇐53.

Mandate is proper remedy to compel court to vacate order appointing receiver of husband's property before service of process on him in wife's suit for divorce, property division, etc.

Application by Charles W. Nichols for a writ of mandate to the Superior Court of the State of California in and for Los Angeles County, Emmet H. Wilson, Judge.

Peremptory writ granted.

Schauer, Ryon & Goux, of Santa Barbara, and Paul J. Fritz, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and J. F. Moroney, Deputy County Counsel, both of Los Angeles (Wilton W. Webster, of Pasadena, of counsel), for respondents.

HOUSER, Justice.

From the record herein it substantially appears that the wife of petitioner sued him for a "divorce, division of community property, alimony pendente lite, injunction and receiver"; and that persons other than this petitioner were joined with him as defendants in said action; that thereafter, pursuant to an order to show cause that was served on the said defendants other than petitioner, but without any service of the complaint or the summons in said action theretofore having been made upon him, and in the like absence of any appearance by him in said action, an order was made by the trial court by which in effect a receiver was appointed of the property of petitioner, and which receiver was authorized and directed to pay to the plaintiff in said action certain sums of money as alimony and for attorney's fees incurred by her therein; that thereupon, in pursuance of such order, the said receiver proceeded to and did take the custody and possession of all the property of this petitioner, sold the same, or the greater part thereof, and from the proceeds of said sale paid to the plaintiff in said action the alimony and the attorney's fees provided by such order to be paid to her. Eight months after the complaint was filed in said action, an order was made by the trial court for the publication of summons as to petitioner; and seventeen months after said action was commenced, by filing his demurrer to the complaint and his answer thereto, petitioner appeared in the action. Eight months after petitioner had thus appeared, he gave to the plaintiff in said action notice of motion to vacate and set aside the order of the trial court by which the said receiver was appointed. Following the denial by the trial court of said motion, petitioner has applied to this court for a writ of mandate by which the trial court will be required to grant the said motion.

[1] That in the situation here presented the trial court was without authority to make the order of which complaint is made is attested by the rule announced in the case of Baker v. Baker, 136 Cal. 302, 68 P. 971. To the same effect is Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954.

[2] The case of Murray v. Murray, 115 Cal.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 380.

206, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97, contains some language which readily might be taken to indicate a conclusion to the effect that, without first procuring service of process on the defendant, or, in the absence of his appearance in the action, "the court had power to make the order and appoint the receiver at the beginning of the action." However, an examination of the opinion therein discloses the fact that the question of the validity of the order by which the payment of alimony was directed and the receiver was appointed, as far as such order related to the time when it was made, was not considered. Nor does an examination of the briefs presented to the court by respective counsel of the parties to that appeal reveal the fact that such question was at issue. In that connection, the only question litigated, and the only one in that regard which the court was requested to decide, was whether the appointment of a receiver was proper in an action for maintenance brought by a wife against her husband. It follows that the general language of the opinion with reference to the validity of an order such as here is at issue, made before service of process was procured on the defendant, and before he appeared in the action, must be regarded as obiter and entitled to weight as such only.

[3] But it is contended by the respondents herein that by the appearance of the defendant in the action, and by his "acquiescence" in the order for a long period of time after he made such appearance, he is estopped from questioning the validity of the order.

In nearly all the cases upon which the respondents rely as authority for their position in that regard, it may be noted that, on the face of the record therein, the invalidity of the judgment did not appear. In other words, as far as was ascertainable from the record itself, the judgment was unimpeachable. As to the case of First National Bank v. Superior Court, 12 Cal. App. 335, 107 P. 322, which apparently sustains the position assumed by the respondents, it is stated in the case of Moore v. Superior Court, 127 Cal. App. 692, 694, 16 P.(2d) 324, that "under the issues of that case also the question of the propriety of the writ or the legality of the receivership were not in issue."

In connection with the suggestion that the defendant had "acquiesced" in the order, at the outset it should be noted that the substituted service of summons in the action by publication thereof was not made effective until nearly ten months after the order for alimony and the appointment of a receiver had been made; and that, according to the allegations contained in the petition herein, "subsequent to the purported appointment of said receiver and prior to the service by publication of the summons in said action, said receiver did sell, dissipate and waste most of the properties and assets of the petitioner"; to which allegation exception is taken by respondents only by the admission contained in their answer that "respondents deny each and every allegation therein contained, save and except that the receiver therein referred to has sold a portion of the properties and assets of which he took possession under and pursuant to the terms of the order providing for his appointment."

It should be clear that in such circumstances the defendant may not fairly be said to have "acquiesced" in the order by virtue of which the greater portion of his properties was sold by the receiver. But in that regard attention should be directed to the additional fact that respondents' claim of "acquiescence" on the part of defendant relates only to the period which elapsed between the date when he made his appearance, which was seventeen months after the complaint was filed in the action, and the date when he presented his motion in the trial court to have the order in question vacated, which was approximately eight months after he made his appearance. It is to such latter period only that the alleged "acquiescence" of the defendant is questioned and as to which consideration is invited. But it must be apparent that, even though such question should be determined favorably to the contention of the respondents, such a conclusion in no way could affect the period during the passage of which the greater part of the property of which the defendant was the owner was sold by the receiver and the proceeds thereof, presumably in accord with the order of the court, directly disbursed to the plaintiff in payment of attorney's fees and alimony pendente lite theretofore awarded to her.

[4] Even as to laches, the rule, as expressed in 15 California Jurisprudence, 57, is that it has no application to an attack upon a judgment void for lack of jurisdiction. And in 15 Ruling Case Law, at page 694, may be found the declaration that "if the judgment is void on its face, it is usually held that no limitation can with propriety be interposed, for the reason that no amount of acquiescence can make such a judgment valid." But it appears that, in legal effect, a considerable difference exists between the import of the word "laches" and that which should attach to the word "acquiescence." Following some introductory observations regarding the dissimilarity in the meaning of the two words respectively, in the case of Lux v. Haggin, 69 Cal. 255, 270, 4 P. 919, 10 P. 674, 678, the following occurs:

"Speaking of the distinction between 'laches' and 'acquiescence,' Wood remarks: 'While the words "laches" and "acquiescence" are often used as similar in meaning, the distinction in their import is both great and important. "Laches" import a merely passive, while "acquiescence" implies active, assent;

and while, when there is no statutory limitation applicable to the case, courts of equity would discourage "laches," and refuse relief after great and unexplained delay, yet, when there is such a statutory limitation, they will not anticipate it, as they may when "acquiescence" has existed. "Laches," in fact, amount only to that inferior species of "acquiescence" described in the following terms by Lord Kindersley in Rochdale Canal Co. v. King, 2 Sim. (N. S.) 89: "Mere 'acquiescence' (if by 'acquiescence' is to be understood only abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not, in general, deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations."' Lim. § 62."

To the same effect see Kenyon v. National L. Ass'n, 39 App. Div. 276, 57 N. Y. S. 60, 74; Johnson-Brinkman C. Co. v. Missouri P. R. R. Co., 126 Mo. 345, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675; Purdy v. Bankers' L. Ass'n, 101 Mo. App. 91, 74 S. W. 486, 492; Hall v. Otterson, 52 N. J. Eq. 522, 28 A. 907, 912.

Neither in the petition nor in the answer herein are any facts alleged which indicate that the defendant either failed to do, or did anything by which either laches, or "acquiescence" respectively on his part in the order in question, might be legally inferred; and by no one is it suggested that the filing either of a demurrer to the complaint, or of an answer thereto, could constitute such an "active assent" as should be established before an estoppel to question the order may properly result.

[5] The general rule regarding the effect of a void judgment is indicated in various quotations set forth by the court in the case of Kreiss v. Hotaling, 96 Cal. 617, 622, 31 P. 740, 741, as follows:

"The judgment entered by the clerk being absolutely void because not supported by a valid statutory agreement of submission, we entertain no doubt of the power of the court to set it aside, with or without a motion therefor. 'If a judgment is absolutely void, and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not.' Black, Judgm. § 355. 'A void judgment is, in legal effect, no judgment. By it no rights were divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers.' 1 Freem. Judgm. § 117. 'Each court has such general control of its process as enables it to act for the prevention of all abuse thereof. Hence it may, to prevent the annoyance which might be occasioned by the attempted execution of a void judgment, either stay or arrest the process.' Freem. Ex'ns, § 32. In People v. Greene, 74 Cal. 405, 16 P. 197 [5 Am. St. Rep. 448], Chief Justice Searls, speaking for the court, said: 'A judgment which is void upon its face, and which requires only the inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists.'"

Similar in effect are Morgan v. Clapp, 207 Cal. 221, 277 P. 490; People v. Davis, 143 Cal. 673, 77 P. 651; People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448; Baird v. Smith, 216 Cal. 408, 14 P.(2d) 749; 22 Cal. Jur. 473.

And the rule applies to a void order by which a receiver has been appointed. Wiencke v. Bibby, 15 Cal. App. 50, 113 P. 876; Bibby v. Dieter, 15 Cal. App. 45, 113 P. 874.

[6] That in circumstances such as are presented herein, mandate is a proper remedy. See Jackson v. Wilde, 52 Cal. App. 259, 198 P. 822; Hensley v. Superior Court, 111 Cal. 541, 44 P. 232; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804.

It is ordered that a peremptory writ of mandate issue out of and under the seal of this court directed to respondents herein, commanding the respondent court to make an order granting the said motion of petitioner to vacate, set aside, and annul the said order by which a receiver was appointed in the action to which reference hereinbefore has been had, and which action on the records of said court is entitled Ida Mae Nichols, Plaintiff, v. Charles Wadsworth Nichols et al., Defendants, No. D—94514.

We concur: CONREY, P. J.; YORK, J.

In re PRICE'S ESTATE.

WEST v. BROWN.

Civ. 9325.

District Court of Appeal, First District, Division 2, California.

Jan. 12, 1934.

Rehearing Denied Feb. 10, 1934.

1. Guardian and ward ⇐145.

Guardianship accounts may be rendered and settled without personal presence of guardian.

2. Guardian and ward ⇐58.

Guardian is not entitled to allowance for traveling expenses, in absence of showing of necessity for trip, and where business could be transacted by correspondence.

3. Guardian and ward ⇐58.

Traveling expenses incurred by guardian before and after appointment, where none of expenses were incurred in execution of trust, *held* not allowable in guardian's final account (Probate Code, §§ 1502, 1556).

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge.

Proceedings in the matter of the estate and guardianship of Alfred H. Price, an incompetent person. From an order settling the account of Estella Brown, as guardian of the estate of the incompetent, Glenn West, as executor of the last will and testament of Alfred H. Price, deceased, appeals.

Order reversed with directions.

Glenn West, of Lodi, in pro. per.

A. A. Ludwigs, of Lodi, for respondent.

STURTEVANT, Justice.

This is an appeal from an order settling the account of the guardian of the estate of an incompetent person. The account as rendered shows that the guardian was allowed sums as compensation for her services and as compensation for her attorneys. No claim of error is made as to those items. However, she was allowed certain sums to reimburse her for moneys expended in traveling and for her board and room. It is claimed that the last-mentioned items were improperly allowed. The expenditures so objected to were incurred in the following manner: For some years Alfred H. Price had been engaged as a railway telegrapher by the Southern Pacific Company. As such he had been located at Lodi. He had been married, but had not been living with his wife for many years. By his marriage he had one son whom he had not seen for a long time and whose whereabouts he did not know, but who survived him. He had a sister, Estella Brown, who resided at Winchester in the state of Indiana. In 1929 Mrs. Brown heard that her brother was ill. Soon thereafter she came to California to see her brother, who at that time was a patient in the Southern Pacific Hospital. On that trip, which we will call the first trip, she expended for railroad fare and expenses $364.23. Thereafter she returned to her home in Indiana and remained there until late in 1930 when she heard that her brother's health had become worse. Toward the end of that year she made a second trip to California which occupied one hundred and twenty days. The cost of her board and room and traveling expenses on that trip amounted to $399.23. While she was out here, on her application, Alfred H. Price was declared incompetent and was committed to the State Hospital at Stockton. He continued an inmate of that institution until his death. Shortly after he was committed, Mrs. Brown applied for and was granted letters of guardianship of his estate. While here, she attended to the transaction of her duties as guardian of his estate. Thereafter she again returned to her home in Indiana and remained there until her brother died. On being informed of his death she sent for his body and had it shipped to Winchester, Ind., where it was buried. In the meantime she had become possessed of a document dated September 8, 1927, which purported to be the last will and testament of her brother. After consulting an attorney in Winchester, she came to California for the purpose of probating the will. On arriving here she learned that a later will had been made, April 5, 1929, and she took no steps to have the will dated September 8, 1927, probated. The will dated April 5, 1929, was offered for probate. She filed a contest, which was overruled, and the will later in date was admitted to probate. Pursuant to the terms of that will Mr. Glenn West was appointed executor thereof. On this third trip her expenses for board, room, and railroad fare amounted to the total of $328.68. While in California, she presented and filed her final account in the guardianship proceedings. In the account she set forth the expenses of each of said trips and asked to be reimbursed therefor. The executor of the last will of Alfred H. Price appeared and objected to the allowance of any of the expenses of any of said trips hereinabove mentioned. His objections were overruled and each of the foregoing sums was allowed.

[1-3] The executor asserts that the power of the trial court was limited to reimbursing the guardian in the amount of her reasonable expenses incurred in the execution of her trust. Probate Code, § 1556. Thereupon he continues and claims none of the expenditures so objected to were incurred in the execution of her trust, but were her personal expenses. The respondent replies that Mrs. Brown did

not make any one of the trips because she had a personal desire to do so, nor because she wanted to take a vacation, but solely because she desired to render services which were beneficial to her brother and to his property. The appellant answers that the reply is insufficient. He calls to our attention that there is no evidence that Mr. Price either directly or indirectly asked Mrs. Brown to make the first trip; that when Mrs. Brown made the second trip Mr. Price was incompetent and was unable to make any legal request; and that when Mrs. Brown made the third trip her brother was deceased. Thereupon, the appellant asserts, that in all she did Mrs. Brown acted as a volunteer. We think the contention must be sustained. The first trip was made before the respondent was appointed guardian. However commendable may have been the action of a sister in crossing the continent to visit her sick brother, in no sense could the expenses of the trip be said to be in the execution of a trust which at that time had not been created. Assuming that Mrs. Brown made the second trip solely for the purpose of commencing the guardianship proceedings, such act on her part was for the purpose of applying to have the trust created and herself appointed as trustee, but not in the execution of the trust. It has been expressly held that an administratrix may not be reimbursed for such expenses. In re Estate of Byrne, 122 Cal. 260, 54 P. 957, 1015. No authority is cited showing that a guardian has any other or better claim. When the respondent made the third trip, it may be assumed she did so for the express purpose of applying for letters testamentary. Under such circumstances the rule in the Estate of Byrne, supra, is controlling. If, on the other hand, it be assumed that her trip was made solely for the purpose of presenting her final account as guardian, her claim has no better standing. It is the settled law of this state that accounts may be rendered and settled without the personal presence of the representative. Moreover, no allowance should be made to such persons where there is no showing of any necessity for the making of the trip and where the business can be transacted by correspondence. In re Estate of Emerson, 175 Cal. 724, 167 P. 149.

The respondent cites section 1502 of the Probate Code and several decisions based thereon. They are not helpful because an examination of the facts discloses that no question was presented regarding expenses incurred "for the suitable support, maintenance, and education" of the incompetent person.

The order appealed from is reversed and the trial court is directed to reframe its order in terms not inconsistent with what has been said above.

We concur: NOURSE, P. J.; SPENCE, J.

PER CURIAM.

Appellant's petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the Third Appellate District [22 P.(2d) 655], is denied, but the court withholds any opinion with regard to the question as to the proper interpretation of section 20 of article 11 of the Constitution.

135 Cal.App. 451

C. F. CROW, Petitioner and Appellant, v. BOARD OF SUPERVISORS OF COUNTY OF STANISLAUS, State of California, Composed of W. H. Brink, E. K. Finney, F. R. Raines, C. C. Crowell, and Hartwell Summers, Defendants and Respondents.

Civ. 5055 (3).

Supreme Court of California.

Jan. 23, 1934.

In Bank.

Appeal by petitioner from a judgment of the Superior Court of Stanislaus County, J. J. Trabucco, Judge, of dismissal of an action to set aside and annul an order of the Board of Supervisors of Stanislaus County adopting a budget for the fiscal year 1933–1934 and fixing a tax rate.

Dennett & Zion, of Modesto, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., amici curiæ.

R. R. Fowler, Dist. Atty., and F. O. Hoover, Deputy Dist. Atty., both of Modesto, for respondents.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, amici curiæ.

219 Cal. 727

PEOPLE v. HARRIS.

Cr. 3682.

Supreme Court of California.

Jan. 24, 1934.

1. Criminal law ⇐1115(1).

Record *held* to show that defendant in murder prosecution was informed at preliminary of right to counsel and to continuance to secure such assistance, but elected to proceed with preliminary examination without counsel (Pen. Code, § 858).

2. Criminal law ⇐245.

Defendant in murder prosecution, failing to move to set aside information on ground he had not been legally committed by magistrate, could not object after trial that he was not instructed concerning rights prior to preliminary hearing (Pen. Code, §§ 858, 995, 996).

3. Criminal law ⇐438.

Pictures showing injuries to head of deceased and that it was nearly severed from body *held* admissible in murder prosecution as tending to establish nature and character of act with which defendant was charged.

4. Criminal law ⇐1030(1).

Counsel must object at time of asserted misconduct and give trial court opportunity to undo harm, if any, or he cannot raise point on appeal.

5. Criminal law ⇐1037(1).

Prosecutor's references in murder prosecution to stipulation of defendant's counsel that article was stolen by defendant on day deceased "was killed" and on day he "was murdered" could not be objected to on appeal, where no objection was made at trial.

6. Criminal law ⇐1171(1).

Prosecutor's references to stipulation of defendant's counsel that article was stolen on day deceased "was killed" and on day he "was murdered," merely to identify day on which goods were stipulated to have been stolen, *held* harmless, where killing of deceased was not disputed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Criminal law ⇐730(1).

In murder prosecution, prosecutor's statement to defense counsel in presence of jury that defense counsel wanted defendant to plead guilty and get life *held* not reversible error, where prosecutor was immediately rebuked, jury instructed to disregard remarks, and only question of penalty was involved.

8. Criminal law ⇐1037(1).

Question of conduct of prosecutor in murder prosecution in reminding jurors that they would violate oath in not rendering verdict causing defendant to be hung could not be raised on appeal, where prosecutor or court was given no opportunity to correct alleged error.

9. Criminal law ⇐720(9).

Prosecutor's statement that he believed cause one of cold, premeditated murder, with robbery as object, that defendant deserved only extreme punishment, *held* not improper.

10. Criminal law ⇐768(4).

Refusing instruction that, if defendant was guilty of first degree murder, but reasonable doubt existed as to whether he should suffer death penalty or life imprisonment, doubt should be resolved in favor of defendant, *held* not error.

11. Homicide ⇐311.

Instruction that, if there were extenuating circumstances entitling defendant found guilty of first degree murder to punishment of life imprisonment, verdict should be for life imprisonment, *held* not error.

In Bank.

Appeal from Superior Court, Contra Costa County; C. W. Miller, Judge.

Daniel Harris was convicted of murder in the first degree, and he appeals.

Judgment and order affirmed.

Alva S. Sherlock, of Concord, Forrest H. Bailey, of San Francisco, Hugh H. Donovan, of Pittsburg, and Michael M. Dowling, of Richmond, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, Justice.

[1, 2] By an information filed by the district attorney of Contra Costa county, the defendant was charged with the crime of murder, to which he interposed a plea of not guilty and also a plea of not guilty by reason of insanity. In three additional counts the defendant was charged with three prior convictions—one of forgery and two of burglary, to which he pleaded that he had been convicted as alleged. The jury returned a verdict of guilty of murder in the first degree, and also found defendant to be sane. From the judgment pronounced thereon the defendant prosecutes this appeal, as well as an appeal from an order denying his motion for a new trial. He urges as reasons for a reversal the following grounds: (1) That the defendant was not instructed concerning his rights as required by section 858 of the Penal Code prior to the preliminary hearing; (2) that the court erred in admitting photographs of the body of the deceased, which he says inflamed the minds of the jurors against him; (3) misconduct on the part of the district attorney; (4) that the court erred in giving certain instructions and refusing other requested instructions.

We shall examine the claims of error in the order named. Section 858 of the Penal Code requires the magistrate, "when the defendant is brought before" him "on a charge of having committed a public offense," to "immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." There are several complete answers to appellant's suggestion. In the first place, the justice of the peace before whom the appellant was arraigned and before whom the the preliminary hearing was had testified that he read the complaint to appellant, told him that he was entitled to time to procure counsel and to secure witnesses in his behalf; and to the processes of that court to compel the attendance of witnesses, and that, when he had so instructed him, the defendant indicated a willingness to then and there proceed with the preliminary hearing. During the course of the trial, the testimony of appellant given at the preliminary hearing was introduced, and appellant assumes that, inasmuch as the reporter's transcript does not include the admonition testified to by the magistrate, it could not have been given. We do not so read the record. It appears therefrom that the case was called and the defendant was asked his true name. And then follows the notation: "Defendant arraigned," succeeded by the question by the court: "Are you ready to proceed with the preliminary examination?" There is no doubt that under the heading "Defendant arraigned" occurred just what the magistrate testified to upon the trial. Hence there is no inconsistency between his testimony and the record of the preliminary hearing. Appellant says, however, that the magistrate's testimony does not disclose that defendant was advised of his right to the aid of counsel in every stage of the proceedings. It is perfectly manifest, however, that before the examination defendant was informed and had knowledge of his right to the aid of counsel in the proceeding and of his right to a continuance for the purpose of securing such assistance, but elected

to proceed with the examination without counsel.

Another answer to appellant's contention is that he failed to move to set aside the information under the provisions of section 995 of the Penal Code on the ground that he "had not been legally committed by a magistrate," but elected to plead and stand trial. Section 996, Penal Code, reads: "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section." The authorities support the Code section in all of its integrity. Ex parte Moan, 65 Cal. 216, 3 P. 644; People v. Bawden, 90 Cal. 195, 27 P. 204; In re Northcott, 71 Cal. App. 281, 235 P. 458, 459; In re Heinze, 116 Cal. App. 286, 2 P.(2d) 561. In the Northcott Case it was said: "Said judgment (that of conviction) is not related to, nor is it dependent upon, the order of the committing magistrate holding the defendant to answer for trial; its foundation being in the evidence adduced at the trial and the verdict of the jury, and not in the proceedings occurring before the committing magistrate."

[3] We therefore turn to examine the claim that the court erred in admitting into evidence certain photographs of the body of the deceased. They are not in the record, and were not mentioned by counsel in their application for the transcript. However, we fairly judge their nature from the testimony. It appears therefrom that on the morning of December 5, 1932, around the hour of 9 o'clock, the appellant went into the jewelry store of the deceased, from which place he stole several diamond rings, watches, and other articles. A short time thereafter decedent's body was found in the store lying in a pool of blood. He had been struck on the head five times with some blunt instrument, each blow causing a fracture of the skull. In addition, his head had been completely severed from his body except for the spinal column. While admitting that he killed the deceased, the appellant swore that he entered the store after he had observed deceased leave the store, and that during his appropriation of the articles the deceased re-entered and endeavored to prevent the appellant from leaving, whereupon a struggle ensued. He testified that in the heat of the battle he struck deceased over the head with his closed knife and that later he opened the knife and cut the deceased, but denied that he had cut his throat all the way around. The pictures were taken and introduced for the purpose of showing the injuries to the head and that it was severed except as already noted. They were therefore admissible as tending to establish the nature and character of the act of which appellant was guilty. People v. Elmore, 167 Cal. 205–212, 138 P. 989; People v. Gomez, 209 Cal. 296–300, 286 P. 998; People v. Burkhart, 211 Cal. 726–732, 297 P. 11.

[4-6] The next assertion is that the district attorney was guilty of misconduct, and appellant assigns three separate incidents as constituting this specification. During the course of the trial there was a stipulation that the defendant entered the premises of Mr. Whited (the deceased) on December 5, 1932, for the purpose of robbing the place and stole certain jewelry. Thereafter in offering designated pieces thereof in evidence the district attorney referred to "the stipulation of counsel that it was stolen by this defendant from the premises on the day that he was killed." The same wording was used three times without objection. On the fourth occasion the district attorney substituted the word "murdered" for "killed." Defense counsel interposed no objection, but interjected "Now, now, now," by way of warning to the district attorney that he considered the language objectionable. It is a familiar rule that counsel must object at the time of the asserted misconduct and give the trial court an opportunity to undo the harm, if any has been done, in the absence of which he is foreclosed of raising the point upon appeal. Aside from this reason for holding the contention to be without merit is the fact that in the present case the district attorney was merely identifying the day on which it had been stipulated the goods were stolen. While we are not disposed to approve of the method of identification generally, yet it was not in dispute that Mr. Whited had been killed, and hence no harm or injury could have resulted to defendant.

[7] The next claim of misconduct is based upon a remark of the district attorney during a discussion concerning stipulations as to the testimony of some of the witnesses. Counsel for defendant had said they were willing to stipulate that certain of them would testify with respect to some of the articles having been stolen by defendant. They could not agree upon the testimony of one. During the remarks, the district attorney observed that many of the witnesses had come from Los Angeles, and, if counsel had been seriously disposed to save expense, they could have notified him three days before, whereupon the following occurred:

"Defense counsel: We will save the expense of staying here.

"Another defense lawyer: We have made other offers to you, Mr. District Attorney, by which you could save money.

"District attorney: You made it to the court—you wanted this man to plead guilty and get life."

An exception was taken, and the court was asked to admonish the jury. The district attorney was immediately rebuked by the trial judge, and the jury "was instructed to disregard entirely the remarks of the district attorney." Subsequently the jurors were also instructed that statements of counsel were not

evidence and were not to be considered by them in their deliberations. The testimony of appellant was such as to remove all questions from the case except the one of whether he should suffer the extreme penalty or that of life imprisonment. In view of this fact and the prompt admonition to the jury to disregard the remark, together with a rebuke to the district attorney for having made it, it is impossible to conclude that the harm, if any in fact was done, was not undone.

[8, 9] Appellant says the district attorney was guilty of misconduct because in his examination of the jurors and in his argument he "repeatedly and constantly reminded the jurors of the fact that they would be violating their oath if they did not render a verdict in this case which would cause the defendant to be hung." Our attention is not directed to any portion of the transcript where we may find an instance of the conduct of which complaint is made. We have, however, read the transcript, including the argument of the district attorney, in full, and find that on no occasion was such claimed misconduct assigned as such, and that at no time was the district attorney or the court given an opportunity to correct the error, if any was made or rectify the damage, if any was done. Furthermore, we do not believe the district attorney strayed beyond the limits of legitimate argument. The sum and substance of his statements is that he believed the cause was one of cold, premeditated, brutal murder, with robbery as the ultimate object, and the perpetrator thereof deserving of only the extreme punishment; that he had asked all of them upon their examination if in a proper case they would hesitate to vote such a verdict; that they had answered in the negative, and finally, upon the premises of his stated belief that it was a proper case for the death penalty, he asked them not to flinch from their responsibility for fear of criticism or from the effects of misapplied sympathy.

[10, 11] Finally, appellant says the court committed error when it refused to instruct the jury as follows: "If you are satisfied that this defendant is guilty of first degree murder and there is a reasonable doubt in your mind as to whether he should suffer a sentence of death or a sentence of life imprisonment, you should resolve that doubt in favor of the defendant, because it is wholly within the discretion of the jury as to which punishment should be meted out or given to the defendant," and in connection with the refusal to so instruct the jury it is claimed that the trial judge misdirected them by giving an instruction in these words: "If you find from the evidence and beyond a reasonable doubt, that the defendant is guilty of murder of the first degree, and that there are some extenuating circumstances, which entitle him to the punishment of imprisonment in state's prison for life, then the form of your verdict would be," etc. The refusal of the court to give the requested instruction was proper. People v. Ross, 134 Cal. 256, 66 P. 229. A comparison of the instruction asked and refused in the cited case with the one here demonstrates that they are in substance the same. It was there held that the court did not err.

With respect to the instructions given, the cases of People v. Rogers, 163 Cal. 476-483, 126 P. 143, and People v. Harris, 169 Cal. 53-70, 145 P. 520, conclude appellant's argument. In those cases the court went further than in the instant case by saying to the jury that, if the evidence did not show "some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment."

Finally, it should be said that the record herein demonstrates beyond any doubt that appellant was guilty of a most cruel, cold-blooded murder. There can be no question in the mind of one who reads it that there are no circumstances which would have justified the jury in affixing anything less than the extreme penalty of the law.

Judgment and order affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

219 Cal. 677

BAER v. LORIMER et al.

S. F. 14856.

Supreme Court of California.

Jan. 17, 1934.

Rehearing Denied Feb. 15, 1934.

1. Appeal and error ⇐850(4).

Where action for declaratory relief was submitted on agreed statement of facts and issues, appellate court could disregard trial court's findings as surplusage and determine merely whether judgment was proper result of law applicable to facts.

2. Principal and agent ⇐3(1).

Contract whereby plaintiff, a professional boxer, agreed to place himself under management of defendants and take part in boxing contests and theatrical performances required by defendants, *held* not to make defendants the plaintiff's agents so as to entitle him to terminate contract on theory of agency.

3. Master and servant ⇐3(1).

Where agreed facts disclosed no regulation of commission forbidding professional boxer from receiving only one-half of net proceeds of contests, boxer *held* not entitled to terminate contract with managers on theory that contract provision requiring boxer to accept half of net proceeds as his share violated law, especially where contract provided for waiver of performance of unlawful portions (Gen. Laws 1931, Act 6129).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Max Baer against J. Hamilton Lorimer, also known as H. Lorimer, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Philip S. Ehrlich, of San Francisco (Albert A. Axelrod, of San Francisco, of counsel), for appellant.

Myron Harris, of Oakland, Butler, Van Dyke & Harris and Gerald M. Desmond, all of Sacramento, and Wilber S. Pierce and John G. Robertson, both of Oakland, for respondent J. Hamilton Lorimer.

Frank L. Guerena, of San Francisco, for respondent Ancil Hoffman.

IRA F. THOMPSON, Justice.

On October 6, 1930, the plaintiff, Max Baer, entered into a contract with the defendants, wherein he agreed to place himself under the management of defendants and to take part in all boxing contests, vaudeville, and theatrical performances required by the defendants and arranged by them. It was further agreed that defendants engaged "the sole professional services" of plaintiff for such contests and exhibitions. The contract was to continue until February 29, 1936, with the proviso that defendants should have the option to extend it for the further period of five years upon payment of $5,000 before February 29, 1936. The parties agreed that the net proceeds of all such contests and exhibitions should be divided one-half thereof to plaintiff and one-half thereof to defendants, except that from such contests conducted in cities or states where the law requires a party to take less compensation than that provided for in the agreement then "as soon as thereafter permitted by law" it shall be increased by such amount as will adjust the compensation received to that provided for. It was also covenanted that plaintiff would faithfully carry out the terms of the agreement, and not participate "in any boxing contests, athletic contests, exercises or performances," except as directed by the defendants, it being recited by the parties that the services of plaintiff "are exceptional, extraordinary and unique and that this contract shall not be terminated except by the mutual consent of the respective parties * * * in writing or by decree of court. * * *" Defendants guaranteed plaintiff that his share of the net proceeds should be "not less than five hundred ($500.00) for each and every year of the contract. * * *" Finally, there was a paragraph which provided that, if any provision of the contract was found to be unlawful, "the performance of such unlawful portion" might be waived by the party to whom performance was due thereunder, and the remaining portions remain in full force and effect.

Differences arose between the parties, and on November 12, 1931, plaintiff gave defendants a notice purporting to cancel and terminate the contract, specifying thirteen different reasons which he claimed justified his refusal to continue with the agreement, including various alleged breaches of the contract by defendants, and the provision requiring plaintiff to accept 50 per cent. of the net proceeds as his share, which he said violated the laws of California.

Subsequently plaintiff began this action seeking to have his rights under the contract and the notice of termination declared. It was submitted on an agreed statement of facts, and judgment went for defendants, from which plaintiff prosecutes this appeal.

The substance of the stipulated facts may be summarized as follows: (1) An actual bona fide controversy exists between the parties; (2) that the parties entered into the contract already described; (3) that on November 12, 1931, appellant notified respondents, in writing, that the contract was terminated and canceled; (4) that the sole issues presented by the agreed statement of facts were whether plaintiff had the legal power to terminate the contract, and whether he had done so by giving the notice; and (5) that the cause should be res adjudicata only as to the two issues mentioned.

[1] Upon this agreed statement the court made findings. The appellant urges as a reason for the reversal of the judgment that the court went beyond the stipulation. We need not concern ourselves with the contention as stated. Any findings made by the court under such circumstances may be disregarded as surplusage. Crawford v. Imperial Irrigation District, 200 Cal. 318, 253 P. 726. We may, however, rephrase the inquiry and address ourselves to the question of whether the judgment is the proper result of the law applicable thereto.

[2, 3] It is manifest that respondents were not the agents of the appellant. The writing

of the contract very clearly indicates that appellant was being employed to participate in contests and exhibitions, rather than that respondents were being employed by him. We cannot say, therefore, that plaintiff was empowered to terminate the contract on the theory that respondents were his agents. On this theory, therefore, the notice was not effective. With respect to the alleged breaches of the contract by respondents, the agreed statement of facts was silent. Hence, it must follow that there was no evidence before the trial court which would justify it in concluding that the charges of failure to comply were in fact true. It follows that without such proof the court could not declare appellant was justified in refusing to go forward with his bargain. On this theory, therefore, the notice could not be held effective. Finally, with respect to the claim that the law does not permit a professional boxer to receive as little as one-half of the net proceeds, it must be said that we find no such provision in the act authorizing boxing and wrestling contests. Deering's Gen. Laws, 1931, Act 6129, p. 3273. If such a regulation of the commission has been promulgated it was not made a part of the agreed statement of facts. Furthermore, the contract was so drawn as to bring it within any such limitation if such in fact exists. Hence the trial court was bound to conclude upon the record that appellant was not entitled to terminate the contract; and that he had not in fact canceled it; and that it remained in full force and effect. This is the substance of the judgment. Hence it should be, and it is, affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

219 Cal. 710

LEFFERT et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14300.

Supreme Court of California.

Jan. 23, 1934.

Hearing Denied by Supreme Court Feb. 19, 1934.

1. Master and servant ⇐375(1).

Acts necessary to comfort, convenience, and welfare of employee while in discharge of his work are within scope of employment.

2. Master and servant ⇐375(1).

Death of traveling salesman during working hours in vicinity he was required by work when struck by street car when going for overcoat in burning building occurred "in course of employment," where overcoat was useful in work as salesman, though not required by weather at time.

[Ed. Note.—For other definitions of "Course of Employment," see Words & Phrases.]

In Bank.

Proceeding under the Workmen's Compensation Law by Osa Sue Leffert and William Leffert, a minor, by his guardian ad litem Osa Sue Leffert, claimants, for the death of their husband and stepfather, opposed by Hormel & Co., employer, and the Globe Indemnity Company, a corporation, insurance carrier. From an order of the Industrial Accident Commission denying an award, claimants bring certiorari.

Order annulled.

Davis & Thorne, of Los Angeles, for petitioners.

A. I. Townsend and Everett A. Corten, both of San Francisco, for respondent Industrial Accident Commission.

J. L. Kearney, of Los Angeles, for respondents Globe Indemnity Co. and Hormel & Co.

IRA F. THOMPSON, Justice.

This is a proceeding to review the action of the Industrial Accident Commission in making its findings and award against the petitioners and discharging the defendants, Hormel & Co. and its insurance carrier, the Globe Indemnity Company, from all liability by reason of the claims asserted. Petitioners are the widow and minor stepson of Harry P. Leffert, a salesman in the employ of the defendant, who, on the morning of October 28, 1932, was struck by an automobile, receiving injuries from which he died a few hours later.

Leffert's employment on the date of his death, the amount of his earnings, and the dependency of the petitioners are undisputed, and there is no conflict in the testimony regarding the nature of Leffert's duties and the circumstances under which the injuries were received. The sole question argued is the compensability of the injuries from which he died. From the testimony given at the hearing by two of his fellow salesmen, it appears that each salesman had a definite route to cover, calling on a furnished list of customers; that they reported at the plant, which was located at 2475 Hunter street, each morning between 6:30 and 7:00 and again in the evening; that each salesman had his own car which he used in covering his route, and that the company made him a weekly allowance for its use. Roach, the senior salesman, testified that it was his duty to pass on the orders for the day, from the manager or assistant manager, to the rest of the salesmen when they reported

in the morning, and that, after receiving their instructions, it was the custom for the salesmen, before starting on their routes, to have a cup of coffee together in Mott's coffee shop, which was located on Santa Fé avenue about three doors south of its intersection with Hunter street. He further testified that on the morning in question he arrived at the plant at about 6:45 a. m. and found it in flames; that no cars could be parked on Hunter street because it was blocked off by the fire department and the police; that, on the orders of Bader, the assistant manager, he instructed the other salesmen, including the deceased, whom he found already at the plant, to go over to another office of the same company called the "Flavor Sealed Division," which was located at Ninth and Alameda streets, and to call their customers from there, explaining that the delivery of orders was delayed by the fire; that these instructions were given as all the salesmen, including Leffert, were walking down Hunter street away from the plant; that, at the suggestion of one of the men, they then went into the coffee shop following their usual custom; that, as they left the shop, he repeated the instructions to go to the other plant, which was six or seven blocks away, and that the last he saw of Leffert he had left the coffee shop and was crossing Santa Fé avenue from east to west in the company of Le Brech, another salesman.

The testimony of Le Brech is that, when he reported to the plant at twenty minutes of seven, he found the plant in flames and Leffert and the other salesmen already there; that, while waiting for instructions, he went to look for his overcoat which he had left in the office the night before; that he was informed by a fireman that a coat had been taken next door, and that he there found his coat in a water-soaked condition; that on his return he found that the other salesmen had started to go toward Santa Fé avenue, and that the assistant manager told him to "go on up with Mr. Roach"; that, when he got to the corner, they were going into the shop to get coffee; that he put his wet coat in his car, which was parked on the west side of Santa Fé avenue about opposite the shop, after which, he, too, went into the shop; that, when they emerged, Leffert announced his intention of going to look for his coat, which he also had left at the office the night before and asked Le Brech if he could leave his brief case in his car and lock it up; that he went with Leffert across Santa Fé avenue, locked the brief case in the car, and started back with him across the street; that, when they were within about 12 feet of the east side of Santa Fé avenue, he heard the scream of brakes and turned to see Leffert being struck by a north-bound car.

Le Brech testified that Leffert always carried a brief case, and that his own car was open so that he could not leave it there. Roach also testified that it was customary for Leffert to carry a brief case as part of his equipment, and, when asked whether the salesmen "ordinarily and customarily wear overcoats in the morning when they leave," he replied: "Yes, those that have them." On these facts the commission found that "the evidence does not establish that the said Harry P. Leffert was performing services arising out of and occurring in the course of his employment as aforesaid at the time of the accident herein mentioned."

[1] The question here to be determined is whether, having entered upon his employment on the morning of October 28, 1932, Leffert undertook an errand of so personal a nature as to remove himself from the protection of the act. The order of the commission denying the award is based on the case of California C. I. Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257, 258, annulling an award made to the representative of the driver of an ice truck. The driver was given a designated route by his employer, and was expected to cover it in an average working day. No specific hour was set aside for lunch which the drivers were allowed to get wherever they desired. The deceased arranged his route so as to deliver ice to a cafeteria where he got his breakfast at about 7 in the morning. He then continued on his route and returned to the same cafeteria for his lunch. It was conceded that his return to this district was not necessitated by the route assigned to him, and that he returned solely for the purpose of getting lunch. On the day of the accident he had parked his truck across the street from the cafeteria. After lunch, and before recrossing the street to the truck, he went to a cigar store to get a "smoke," and was run over while attempting to cross to the truck. In holding that his death was not compensable, this court said: "Neither his assigned route nor the requirements of his customers necessitated his return to that place. He had no business to transact for his employer in that vicinity. His movements during the time he was getting his noonday lunch were dictated wholly by his own desires and as the convenience of the route admitted. Had he gone home for lunch, and been injured while returning to the place of his employment, the situation would be plain. We see no distinction between such a case and this. When he ceased delivering ice, deviated from his route, and returned to the cafeteria for lunch, he was not doing anything required by or incidental to the employer's business. When struck down by the automobile and injured, his relation to his employment had not changed." We do not consider this case to be controlling, but prefer rather to apply the principles exemplified by Western Pacific

R. Co. v. Industrial Accident Commission, 193 Cal. 413, 224 P. 754. In that case compensation was allowed for the death of a messenger who was struck by an automobile while returning on his bicycle to his place of employment from his home, where he had gone to get a raincoat. It was held that it was a reasonable act for the employee to go out of his way to obtain his raincoat; a storm having come up and his duties requiring him to be outside no matter what the weather. These facts are more closely analogous to the present case than are the facts in California C. I. Exchange v. Industrial Accident Commission, supra. It is urged by the commission that there is no showing here that the weather on the morning of the accident required the wearing of an overcoat, but that, on the contrary, there is evidence to sustain the inference that Leffert only went after the coat because he desired to retrieve it and save it. This does not, in our opinion, prevent the case from coming within the rule that acts necessary to the comfort, convenience, and welfare of the employee while in the discharge of his work do not take him outside the course of his employment.

[2] As we look at these facts, Leffert was, when injured, engaged in doing something he might reasonably have been expected to do while in the performance of his duty. Unlike the driver of the ice truck in California C. I. Exchange v. Industrial Accident Commission, discussed above, he was in the general vicinity where his work compelled him to be, and the accident occurred during the hours of work, not during a period which was allowed him as his own time. The custom of going to the coffee shop after receiving the orders for the day and before starting on the day's rounds was acquiesced in by the employer, probably because the salesmen were required to report at a very early hour in the morning. It seems to be conceded that Leffert had not stepped outside the course of his employment up to the point where, having announced his intention of recovering his overcoat if he could, and, having placed his brief case in the car of Le Brech, which was parked close by, he started back across the street with the purpose of looking for his coat. Had he been going to look for his brief case or customer list, it could not seriously be contended that the errand was personal. The saving of his overcoat was also reasonably incidental to the performance of his duties as a salesman. Roach testified that the salesmen who had overcoats customarily wore them when starting on their rounds in the morning, and Le Brech testified that he saw Leffert with his overcoat when he reported in to the office the evening before, and, when asked whether he had seen him many times carrying an overcoat, he replied in the affirmative. In view of the fact that Leffert drove an open car and that the salesmen started on their rounds at an early hour in the morning, the carrying of an overcoat seems an ordinary and necessary precaution. The absence of a showing that Leffert needed the coat on that particular day is immaterial. He was allowed to leave it at the office, and the conditions of his work required its use from time to time. That he sought to recover it for future use did not take him out of the course of his employment.

The order of the commission denying compensation to petitioners is annulled.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

219 Cal. 687

GIOMETTI et al. v. ETIENNE.

L. A. 13777.

Supreme Court of California.

Jan. 19, 1934.

1. Judgment ⇐9.

Judgment rendered by disqualified judge is void (Code Civ. Proc. § 170).

2. Judges ⇐51(4).

Where grounds for disqualification of judge are disputed, facts constituting disqualification must be judicially established by proper procedure (Code Civ. Proc. § 170).

3. Judges ⇐51(4).

Where grounds for disqualification of judge of Supreme Court appeared on face of record, and disqualified judge declared fact himself, order of Supreme Court granting hearing, after hearing in District Court of Appeal, *held* void.

4. Judges ⇐39.

Judges of appellate courts are subject to same rules of disqualification applicable to judges generally (Code Civ. Proc. §§ 170, 170a).

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. Giometti and others against Victor Etienne, Jr. From a judgment in favor of the plaintiffs, the defendant appeals. On motion to set aside order [25 P. (2d) 826] vacating order granting hearing in Supreme Court after decision in the District Court of Appeal.

Motion denied.

See, also, 23 P.(2d) 52.

Frank Kauke, of Fresno, and Peter tum Suden and Richard tum Suden, both of San Francisco, for appellant.

Lindsay & Gearhart and H. J. Carling, all of Fresno, for respondents.

PER CURIAM.

This is a motion to set aside an order vacating an order granting a hearing in this court, after decision in the District Court of Appeal. Plaintiffs had judgment in the lower court, and upon appeal by defendants, the judgment was reversed by the District Court of Appeal. The plaintiffs petitioned for hearing, and an order granting a hearing was made on August 14, 1933, signed by four justices of this court. Thereafter, counsel for defendant called attention to the fact that Mr. Justice Preston, one of the four justices who concurred in the order, was related to Mr. Hugh L. Preston, one of counsel for petitioners. This court was of the opinion that Mr. Justice Preston was thereby disqualified from acting in the cause, and that consequently the order granting a hearing was void because of the concurrence of but three qualified justices. Accordingly an order was made on August 30, 1933, vacating the previous order. The last order declared that the time for hearing had expired and that the petition was therefore denied by operation of law.

[1-3] Petitioners' chief point is that Mr. Justice Preston's disqualification was not urged by opposing counsel nor judicially established during the time the application for hearing was pending before this court. Under section 170 of the Code of Civil Procedure a judge may disqualify himself by declaring his disqualification in open court, or if he neglects to do so, any party to the proceeding may file a statement of the grounds. Petitioners argue that it is the judicial establishment of disqualification which is controlling, and not the fact of disqualification. But this argument finds no support in the statute, and this court has on several occasions pointed out that a judgment rendered by a disqualified judge is void. See Cadenasso v. Bank of Italy, 214 Cal. 562, 6 P.(2d) 944. It is true that where the grounds for disqualification are disputed, the facts constituting it must be judicially established by the proper procedure. Here, however, there is no dispute, and no facts to ascertain. The ground for disqualification appears on the face of the record, and the disqualified judge declares the fact himself. There would seem to be no escape from the conclusion that the order granting a hearing was void and that the order setting it aside was proper. See People v. Ruef, 14 Cal. App. 576, 114 P. 48, 54.

[4] Petitioners also suggest that section 170 of the Code of Civil Procedure does not apply to justices of appellate tribunals, and that the sole ground for this disqualification is stated in section 170a, providing that none may act in a cause which he tried in a lower court. There is nothing in the statute to indicate such a limited interpretation, and without express legislative exception appellate judges must be deemed subject to the rules applicable to judges generally.

The motion is denied.

219 Cal. 734

SULLIVAN v. SULLIVAN.

L. A. 13201.

Supreme Court of California.

Jan. 24, 1934.

Divorce ⇐320.

Marriage ⇐60(1).

Woman's marriage after receiving copy of interlocutory decree, but before final decree, was void, and she was entitled to have judgment to that effect (Civ. Code, §§ 56, 61, 80).

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Mildred M. Sullivan against Eugene Sullivan to have marriage declared void. From a judgment for defendant, plaintiff appeals.

Reversed with directions.

Carl M. Yokum, Griffin, Haughton & Dodge, and William P. Haughton, all of Los Angeles, for appellant.

Kirtland I. Perky, of Los Angeles, for respondent.

PER CURIAM.

The question here presented is: If a woman goes through a marriage ceremony with another man after interlocutory decree but before securing a final decree of divorce from her husband, is she thereafter entitled to judgment pursuant to Civil Code, § 80, declaring such attempted marriage void, notwithstanding the fact that she had received a copy of the interlocutory decree, clearly declaring it was "not a judgment of divorce," and should have known, and possibly did know, that she was still a married woman, and not legally capable of contracting a valid marriage.

Our answer is: Yes.

This is an appeal by plaintiff from judgment denying annulment of a void marriage.

Clerk's and reporter's transcripts were filed August 19, 1931, and the opening brief, with due proof of service, followed promptly thereafter. No respondent's brief was filed and no extension of time therefor given, nor did appellant request that the case be heard in chronological order notwithstanding respondent's default. In November, 1933, the appeal was included with others in an order of the court on its own motion that respondent show cause why judgment or order appealed from should not be reversed, or other appropriate order made in the cases, fixing December 5, 1933, before the court in Los Angeles as the time and place for such showing. At that time there was no appearance by either party to the appeal and it was ordered submitted for examination and order.

It is provided by rule V of this court that: "If the respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the appellant's brief, in which case the court may, in its discretion, decide the case upon the statement of facts contained in such brief."

Pursuant to that rule we quote from the appellant's brief the statement of facts, as follows:

"The pleadings and undisputed evidence disclose the following state of facts:

"Plaintiff and defendant, Eugene Sullivan, were intermarried at Tia Juana, Mexico, on the 14th day of July, 1924. At the time of this marriage plaintiff had a husband living from whom she had secured, in the Superior Court of the State of California, county of Los Angeles, an interlocutory decree of divorce, but no final decree had been entered, and her former marriage was still in effect and subsisting when she married the defendant. Plaintiff and defendant lived together until about February, 1925, when they separated and have continuously thereafter lived separate and apart from each other.

"The defendant filed an answer admitting the allegations set forth in plaintiff's complaint but did not appear either in person or by counsel when the matter came up for trial, and the cause was tried as default.

"Upon the trial of the case the court expressed himself as entertaining no doubts about the facts hereinabove stated, but on the theory that the plaintiff either knew or should have known that her marriage with the defendant was invalid refused to grant plaintiff any relief on the equitable maxim that he who comes into a court of equity must come with clean hands."

There can be no question that the attempted marriage was illegal and void under Civil Code, §§ 56 and 61. See Estate of Elliott, 165 Cal. 339, 132 P. 439.

Section 80 of the Civil Code provides: "Either party to an incestuous or void marriage may proceed, by action in a superior court, to have the same so declared."

The trial judge should have given judgment for the plaintiff.

No decision of this state interpreting section 80, Civil Code, has been found, as counsel for appellant states, but several decisions of other states are given, declaring in effect that as a matter of public policy the court should, at the first opportunity, enter its decree annulling such a marriage, to the end that the public be protected so far as possible from the evils of such unlawful acts and to prevent the innocent from suffering therefrom. Hahn v. Hahn, 104 Wash. 227, 176 P. 3; Sylauzis v. Sylauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741, Ann. Cas. 1913D, 454; Dolan v. Wagner, 95 N. J. Eq. 1, 125 A. 2.

The judgment appealed from is reversed, with directions to the trial court to enter judgment as prayed for.

219 Cal. 696

HENDERSON v. STATE BAR OF CALIFORNIA.

S. F. 14974.

Supreme Court of California.

Jan. 22, 1934.

Attorney and client ⇐10.

Application for admission to bar without examination was denied in view of highly specialized and peculiar character of petitioner's prior practice.

Record showed that petitioner's practice had been principally carried on in and before various courts and boards established for limited jurisdiction vested in naval tribunals, and in and before consular courts of equally limited jurisdiction, so that court could not say that petitioner, within meaning and intent of rules governing admission, was member of bar of highest court of sister state, territory, district of Columbia, or foreign jurisdiction where common law of England constitutes basis of jurisprudence.

In Bank.

Application by Robert Henderson for admission on motion and without examination after refusal of the Committee of Bar Examiners of the State Bar of California to recommend the admission of petitioner to the practice of law in California.

Petition denied.

O'Melveny, Tuller & Myers, Albert Parker, and A. M. Rogers, Jr., all of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks to be admitted on motion, and without examination, to the practice of the law in all the courts of this state. The committee of bar examiners and the state bar do not presently question petitioner's moral or educational fitness to enter the profession, but have concluded that, under the rules governing admission on motion, they are without jurisdiction to move his admission without examination because of the highly specialized and peculiar character of his prior practice.

At the time petitioner filed his application for admission, it was essential, among other things, that an applicant seeking admission without examination furnish proof that he had been "admitted to practice law in the highest court of a sister state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence." (See order of this court, dated August 24, 1931, adopting provisions of repealed sections 275, 276, 276a, 277, 279, and 280 of the Code of Civil Procedure, as the rules governing the admission to practice law in this state pending the framing and adoption of definitive rules and regulations.)

The quoted portion of the above rule, effective when petitioner applied for admission in March, 1932, is, for all practical purposes, substantially identical with the rule subsequently adopted and presently effective which requires that an applicant for admission on motion, and without examination, furnish proof "that he is a member of the bar of the highest court of a sister state, territory, the District of Columbia, or of a foreign jurisdiction where the Common Law of England constitutes the basis of jurisprudence." (See Rules Regulating Admission to Practice Law, 213 Cal. cxlv, cxlviii.)

We are satisfied that the committee of bar examiners has correctly determined that petitioner has failed to satisfy the requirements of the above rule in either its original or revised form. Inspection of the record discloses that petitioner graduated from the United States Naval Academy in 1902 and has served in the navy, holding all commissions from midshipman to captain, until his retirement in 1929; that he was graduated from the George Washington University Law School on June 23, 1925, with the degree of bachelor of laws; that from time to time he has since acted as legal adviser to the Governor of the Island of Guam, has served as an associate judge in the consular court at Constantinople, and has acted in a legal capacity in the judge advocate's office at Washington, D. C., and has participated as counsel in various courtsmartial.

It is apparent from the record that petitioner's practice of the law, in the main, has been carried on in and before the various courts and boards established for the purpose of exercising the very limited jurisdiction vested in naval tribunals and in and before consular courts of equally limited jurisdiction. In view of this, we are unable to say that petitioner, within the meaning and intent of the rules governing admission, "is a member of the bar of the highest court of a sister state, territory, the District of Columbia, or of a foreign jurisdiction where the Common Law of England constitutes the basis of jurisprudence," and this without attempting in any manner to minimize or deprecate petitioner's ability or learning in the law.

The order to show cause is therefore discharged and the petition denied.

219 Cal. 690

TODHUNTER v. SMITH.

S. F. 14944.

Supreme Court of California.

Jan. 20, 1934.

1. Judgment ⇐585(4).

Counterclaim arising out of transaction set forth in complaint as foundation of plaintiff's claim must be set up, unless exceeding jurisdictional limit of court (Code Civ. Proc. §§ 438, 439).

2. Judgment ⇐585(4).

Where separate causes of action for personal injuries and damages to automobile arise from same collision, the accident is "transaction" within statute requiring setting up of counterclaim arising out of "transaction" set forth in complaint as foundation of plaintiff's claim (Code Civ. Proc. § 439).

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

3. Pleading ⇐4.

Character of pleading is determined from its allegations, regardless of designation given it by pleader.

4. Courts ⇐122.

Ad damnum clause of complaint is test in determining whether sufficient amount is involved to give superior court jurisdiction of action, if plaintiff claims amount within such jurisdiction in good faith.

5. Judgment ⇐639.

If defendant in municipal court permits action to go to judgment, the final judgment, although not complete bar to defendant's subsequent prosecution in superior court of his

cause of action arising from same accident, is conclusive as to issues determined in municipal court.

Judgment is conclusive to that extent, since, under res judicata doctrine, final determination of court of competent jurisdiction necessarily affirming existence of any facts is conclusive evidence of existence thereof when again in issue in subsequent litigation between same parties in same or any other court, and facts decided in first suit cannot be disputed or relitigated, although later suit is upon different cause of action.

6. Judgment ⇐544.

Final adjudication by inferior court, made within its jurisdiction, is binding and conclusive upon higher court in subsequent action.

7. Judgment ⇐585(4).

Determination of an issue presented in a former action by defendant by way of counterclaim or cross-complaint is res judicata as fully as if determined in separate action brought by defendant against plaintiff.

8. Judgment ⇐544.

Where truck owner, in motorist's action in municipal court for destruction of automobile, set up so-called "cross-complaint" for $100 damage to truck, arising from same collision, municipal court's judgment that motorist "recover nothing; each party pay costs," barred recovery by truck owner, in his subsequent action in superior court for personal injury sustained in the collision, brought for amount exceeding municipal court's jurisdiction (Code Civ. Proc. §§ 439, 831d; Const. art. 6, § 11).

Truck owner could not recover in superior court, since same issues of negligence and contributory negligence were involved in the municipal court action, and since truck owner was there denied a recovery on his "cross-complaint" which was, in legal effect, a counterclaim; and fact that judgment in municipal court did not expressly provide that truck owner take nothing did not mean that court failed to determine counterclaim on its merits, because truck owner's $100 claim was within jurisdiction of municipal court, which counterclaim he was required to set up under Code Civ. Proc. § 439, and, had court intended only to rule against motorist on his complaint, it would not have provided that each party pay his costs.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by George C. Todhunter against D. S. Smith. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Prior opinion, 21 P.(2d) 479.

McEnerney & Morris, of San Francisco, for appellant.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

SEAWELL, Justice.

Defendant, D. S. Smith, appeals from a judgment of the superior court of the city and county of San Francisco awarding plaintiff, George C. Todhunter, $500 as damages for personal injuries suffered by plaintiff by reason of an automobile truck which he was driving colliding with an automobile driven by defendant, Smith, at a street intersection in the city of San Francisco. The sole point urged upon this appeal is that the superior court erred in ruling that a judgment of the municipal court of San Francisco in an action between the same parties arising out of the same collision was not a bar to plaintiff Todhunter's recovery of damages for personal injuries in the action herein.

D. S. Smith, defendant in the action herein, commenced suit in the justice's court against Todhunter to recover $800 for the total destruction of his automobile. Before Todhunter filed his answer, the municipal court was established in San Francisco, and all pending justice court actions were transferred to the municipal court by constitutional provision. Article 6, § 11, Const. By his answer in the municipal court action, Todhunter prayed that plaintiff take nothing, and "by way of cross-complaint" prayed judgment against plaintiff for $100 for damages done to his autotruck. The municipal court heard the action sitting without a jury and entered judgment as follows: "It is adjudged that D. S. Smith recover from Geo. Todhunter nothing; each party pay costs." No appeal was taken from said judgment.

Smith, defendant and appellant in the superior court action herein, contends that Todhunter should have set up his claim for personal injuries in the municipal court action. Section 439, Code of Civil Procedure, provides as follows: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." See sections 855 and 856, Code of Civil Procedure, governing counterclaims in justices' court actions until their repeal in 1933. But for the fact that Todhunter in his complaint filed in the superior court prays for damages for personal injuries in the sum of $10,900, which is beyond the jurisdiction-

al limit of the municipal court, we are of the view that section 439, supra, would be a bar to prosecution of said action for personal injuries.

[1-3] Under the 1927 amendment to section 438, Code of Civil Procedure, the sole requisites of a counterclaim are that it "must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474, 477; Luse v. Peters (Cal. Sup.) 28 P.(2d) 357. Upon counterclaim a defendant may recover damages exceeding the plaintiff's demand. Sections 626, 666, 857a, Code Civ. Proc. In an action for damages to plaintiff's automobile sustained in a collision with defendant's automobile, defendant's separate causes of action for damages to his automobile and for personal injuries sustained in the collision arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, under the provisions of section 438, subdivision 1, as it read before the 1927 amendment. Under section 439, which continues in force, counterclaims of this nature must be set up unless they exceed the jurisdictional limit of the court in which the complaint is filed. Where separate causes of action for personal injuries and for damages to the automobiles involved arise from an automobile collision, such accident may be said to be the "transaction" out of which said causes arise. Engleman v. Superior Court, 105 Cal. App. 754, 288 P. 723; Morris v. Warner, 207 Cal. 498, 503, 279 P. 152; Story & Isham Commercial Co. v. Story, 100 Cal. 30, 34 P. 671. Although the allegations upon which Todhunter relied in the municipal court to recover for damage to his automobile were set forth "by way of cross-complaint," the character of a pleading is determined from its allegations regardless of the designation given it by the pleader. Terry Trading Corp. v. Barsky, supra, 210 Cal. at page 434, 292 P. 474; Luse v. Peters, supra, at page 359 of 28 P.(2d).

[4] In the action for personal injuries filed in the superior court, Todhunter prayed for damages in the sum of $10,900. The jury returned a verdict in his favor for $500. However, appellant herein raises no issue as to the good faith of Todhunter. It may well be that, although Todhunter did not reasonably believe that he was injured to the extent of $10,900, he nevertheless was of the view that he had a legitimate claim exceeding $2,000. In this situation the rule that the ad damnum clause of the complaint is the test of jurisdiction must prevail. 7 Cal. Jur. 692, and cases there cited.

[5-7] There is authority which holds that, where the defendant in a justice court action has a counterclaim arising out of the transaction upon which the complaint is founded which is beyond the jurisdictional limit of the justice court, such defendant may bring an action in the superior court and compel the plaintiff in the justice court action to litigate the entire controversy in the superior court. To this end such defendant may procure an injunction restraining further prosecution of the justice court action. Gregory v. Diggs, 113 Cal. 196, 45 P. 261; Engleman v. Superior Court, supra. No reason exists why the same rule should not apply where the original action is in the municipal court. But it is not necessary that the defendant should resort to this procedure and apply for the extraordinary remedy of injunction. He may permit the action in the inferior court to go to judgment. If he adopts this course, the final judgment of the inferior court, although not a complete bar to subsequent prosecution in the superior court of this cause of action arising from the same accident is nevertheless conclusive and binding upon him in so far as the subsequent action involves issues adjudged and determined in the prior action. By virtue of the doctrine of res judicata, the final determination of a court of competent jurisdiction necessarily affirming the existence of any fact is conclusive evidence of the existence of that fact when it is again in issue in subsequent litigation between the same parties in the same or any other court. The facts decided in the first suit cannot be disputed or relitigated, although the later suit is upon a different cause of action. Estate of Clark, 190 Cal. 354, at page 360, 212 P. 622; Horton v. Goodenough, 184 Cal. 451, at page 461, 194 P. 34; Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Martin v. Holm, 197 Cal. 733, 242 P. 718; 15 Cal. Jur. 134, 136; 2 Freeman on Judgments (5th Ed.) 1425. The doctrine of res judicata has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. See authorities cited, supra, this paragraph. The final adjudication of an inferior court made within its jurisdiction is binding and conclusive upon a higher court in a subsequent action. 2 Freeman on Judgments (5th Ed.) 1336; 15 Cal. Jur. 107; Wiese v. San Francisco Mus. Soc., 82 Cal. 645, 23 P. 212, 7 L. R. A. 577. The determination of an issue presented in a former action by the defendant by way of counterclaim or cross-complaint against the plaintiff is res judicata as fully as if determined in a separate action brought by defendant against plaintiff. Lamb v. Wahlenmaier, 144 Cal. 91, 94, 77 P. 765, 103 Am. St. Rep. 66; 15 Cal. Jur. 157.

[8] In the superior court action herein, the

right of plaintiff, Todhunter, to recover for personal injuries sustained by him in the automobile collision depended upon his establishing the negligence of appellant, Smith, and his own freedom from contributory negligence. These are the identical issues which were involved in the municipal court action, wherein Todhunter sought damages for injury to his automobile truck sustained in the same collision upon allegations set forth by him "by way of cross-complaint," which in legal effect constituted a counterclaim. By the judgment of the municipal court he was denied recovery. Smith having advanced the plea of res judicata by his answer in the superior court action herein, Todhunter cannot relitigate these issues. See Allamong v. Falkenhof, 39 Ohio App. 515, 177 N. E. 789, 791.

It cannot be held that, because the judgment in the municipal court did not expressly provide that Todhunter take nothing upon his counterclaim, said court failed to determine the claim on its merits. Todhunter's claim for $100 for injuries to his automobile truck was a counterclaim within the jurisdiction of the municipal court, which he was required to set up under section 439, Code of Civil Procedure. By its silence the court decided said claim against him. Ernsting v. United Stages, Inc., 206 Cal. 733, 737, 276 P. 103. Had the court intended only to rule against Smith on his complaint, it would not have provided that each party pay his costs. The prevailing party in the municipal court is allowed his costs. Section 831d, Code Civ. Proc.

The judgment that plaintiff, Todhunter, recover damages in the sum of $500 is reversed, with directions to the court below to enter judgment for defendant that plaintiff take nothing.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; IRA F. THOMPSON, J.

219 Cal. 699

ETHEL D. COMPANY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 14308.

Supreme Court of California.

Jan. 23, 1934.

1. Master and servant ⇐387.

"Serious misconduct" of employer warranting additional compensation for injury means conduct which employer knew or should have known to be likely to jeopardize employee's safety (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

[Ed. Note.—For other definitions of "Serious Misconduct," see Words and Phrases.]

2. Master and servant ⇐414.

Whether employer was guilty of serious misconduct in not providing handholds required by Industrial Commission's safety order on ladder for ascending to roof of belthouse of oil derrick so as to warrant additional compensation for employee's injury *held* fact question for referee (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

3. Master and servant ⇐414.

What referee observed on visit to place of employee's accident was evidence in compensation case.

4. Master and servant ⇐405(6).

Evidence warranted Industrial Commission's finding of employer's serious and willful misconduct in not providing handholds, required by commission's safety order, on ladder to roof of belthouse of oil derrick, warranting additional compensation to injured employee (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

5. Master and servant ⇐417(7).

Annulment of award of Industrial Accident Commission is authorized only when commission acts beyond powers or when award is procured by fraud or is unreasonable, or fact findings do not support it.

6. Master and servant ⇐417(7).

Court, determining whether award of Industrial Commission should be annulled, cannot review findings except to determine whether there is any supporting evidence.

7. Negligence ⇐136(25).

Question of proximate cause of injury is one to be determined by trier of facts from facts developed by evidence.

8. Master and servant ⇐405(4).

Industrial Commission's finding that employer's failure to provide handholds required by commission's safety order was proximate cause of injury sustained by employee falling off ladder *held* warranted by evidence (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

9. Master and servant ⇐352.

Employer's duty to comply with Industrial Commission's safety order was owed directly to employee.

10. Master and servant ⇐352.

Industrial Commission, in administrative capacity, cannot waive violation of duty owing directly to employee from employer.

11. Master and servant ⇐416.

Findings required in workmen's compensation cases are findings of ultimate facts.

12. Master and servant ⇐416.

Industrial Commission's finding that employee's injury was caused by serious and willful misconduct of employer was not defective because not specifying particular act or omission of employer (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

Finding was not defective, because it could be made certain by reference to record, since only dereliction of employer for which it was claimed injured employee was entitled to additional compensation under St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430, was failure of employer to have provided secure safety handholds for ladder to roof of belthouse of oil derrick, and, in all other respects, record showed that construction of ladder complied fully with safety order of commission.

13. Master and servant ⇐416.

Findings in workmen's compensation case are sufficient if they can be made certain by reference to record.

14. Master and servant ⇐416.

Industrial Commission's finding that injuries were caused by serious and willful misconduct of employer, a corporation, *held* not fatally defective because not stating it was misconduct of executive or managing officer, or general superintendent (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

"Corporation" is a purely legal fiction possessing neither physical nor mental attributes of a human being. Finding was not defective because record showed that certain person was general manager of employer at time accident occurred, and that he was also superintendent, and it did not appear that any person other than he exercised any control or supervision over oil well where accident occurred, so that only individual who could be charged with serious and willful misconduct was man who had entire supervision and control of oil well.

[Ed. Note.—For other definitions of "Corporation," see Words and Phrases.]

In Bank.

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Law by J. L. Johnston, claimant, for injuries, opposed by Ethel D. Company, employer. The Industrial Accident Commission awarded a certain sum to be paid by the insurance carrier, and an additional amount against the employer based on a finding of serious and willful misconduct, and employer brings certiorari to have the order awarding compensation annulled.

Award affirmed.

For prior opinion, see 21 P.(2d) 601.

Everts, Ewing, Wild & Everts and L. N. Barber, all of Fresno, for petitioner.

A. I. Townsend and Everett A. Corten, Asst. Atty., both of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM.

On application to the District Court of Appeal, the award of the Industrial Accident Commission involved herein was affirmed, but by a divided court. We granted a petition to have the cause transferred to this court, that we might give the majority and minority opinions rendered in the District Court of Appeal further consideration and study. Upon re-examination of the case, we are of the opinion that the majority opinion correctly states and applies the law applicable to the facts here. We, therefore, approve the same and adopt it as the opinion of this court. It was prepared by Mr. Justice Jennings and is as follows:

This is a proceeding in certiorari to review an order of the Industrial Accident Commission awarding compensation to J. L. Johnston for injuries sustained by him during the course of his employment with the petitioner. The order of the commission awarded to the injured employee the sum of $1,324.70 to be paid by the insurance carrier and an additional amount of $662.35 against petitioner based on a finding of serious and willful misconduct on the part of petitioner. That part of the order awarding additional compensation against petitioner is sought to be annulled by this proceeding.

Respondent J. L. Johnston was employed as a pumper by petitioner, a corporation, which is engaged in the business of producing oil in Kern county, Cal. On December 5, 1929, Johnston ascended to the roof of the belthouse of an oil derrick on a well owned and operated by petitioner for the purpose of oiling the walking beam which was above the belthouse roof. The ascent was made by means of a ladder which extended from the floor of the derrick to the roof of the belthouse. In constructing this ladder, one of the braces of the Sampson post was utilized as the right-hand stringer, and the ladder rungs were fastened to this brace and to a left-hand stringer composed of 2-inch by 6-inch timber. The brace of the Sampson post was composed of 6-inch by 6-inch timber. The ladder rungs were of 2-inch by 6-inch timber and were uniformly spaced at a vertical distance of 11 inches. The width of the ladder was

16½ inches in the clear between the stringers. The ladder was not equipped with a railing nor with handholds. There was, however, a 2-inch by 4-inch post supporting the railing of the runway which extended along the side of the belthouse, and a bolt which extended through the Sampson post 29 inches above the level of the top rung of the ladder projected from the Sampson post on the side nearest to the belthouse for a distance of 2 or 3 inches. After Johnston had completed the task of oiling the walking beam he prepared to descend the ladder with his back thereto. He placed his right foot on the top rung of the ladder, the left foot being on the belthouse roof. When he placed his weight on the right foot preparatory to lifting the left foot from the roof to the ladder, the right foot slipped and he was precipitated a distance of approximately 18 feet to the derrick floor, sustaining thereby the injuries for which he was awarded compensation.

The Industrial Accident Commission made the following finding: "Said injury was caused by the serious and wilful misconduct of the employer, a corporation." The statute (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430) which authorizes the allowance of an additional award against an employer amounting to 50 per cent. of the disability compensation contains the following language: "Provided, that where the employee is injured by reason of the serious and wilful misconduct of the employer * * * or if a corporation, on the part of an executive or managing officer or general superintendent thereof, the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half." It is undisputed that the only dereliction on the part of the employer, petitioner herein, which, under the circumstances shown by the record, could justify the award of additional compensation against petitioner amounting to 50 per cent. of the disability compensation, consists of the failure of petitioner to provide secure handholds at the top of the ladder, heretofore described. Subdivision (f) of General Petroleum Industry Safety Order 1618, effective March 1, 1924, provides: "Secure handholds shall be provided at the top of the ladder."

[1, 2] Petitioner's chief contention is that the commission's finding that the injuries of respondent Johnston were caused by the serious and willful misconduct of petitioner is lacking in evidentiary support. In this connection, it is urged that at most there was a purely technical violation of subdivision (f) of Safety Order 1618, whose language requiring that secure handholds shall be provided is obviously vague and indefinite, and, further, that there was substantial compliance with the subdivision in that the post supporting the railing of the runway, which extended along the side of the belthouse and the projecting end of the bolt which passed through the Sampson post, were readily accessible to any one on the top rungs of the ladder and furnished convenient and adequate handholds.

"Serious misconduct" of an employer, within the meaning of the statute permitting the allowance of compensation amounting to 50 per cent. of the compensation for disability, was defined in E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 188, 193 P. 105, 108, 16 A. L. R. 611, to be "conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." In the same case it was said that, in order that serious misconduct should also be willful misconduct within the meaning of the statute, the appearance of circumstances surrounding the act of commission or omission which "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of," would amount to sufficient proof of knowledge by the employer of the unsafe condition of the premises to fulfill the requirement that the employer charged with willful misconduct shall have knowledge that the act of commission or omission is wrongful. It may be conceded that, generally speaking, the mere failure of an employer to comply literally with the requirement of a safety order of the Industrial Accident Commission does not of itself justify a finding that the employer is guilty of serious and willful misconduct. In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act may properly be characterized as "serious and willful misconduct." What would amount to no more than simple negligence in one situation may well be denominated serious and willful misconduct in another. Hoffman v. Dept. of Indus. Relations, 209 Cal. 383, 390, 287 P. 974, 68 A. L. R. 294. In the instant case the continued presence upon and about the derrick of so slippery a substance as crude oil would seem to point unmistakably to the necessity of strict compliance with the provisions of the commission's Safety Order 1618 and to suggest to the person in charge of the oil well that a ladder utilized by workmen should be provided with secure handholds rather than with such makeshift supports as the end of a bolt or an upright post supporting a railing. At all events, the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to whom the evidence in the case was submitted.

[3, 4] During the course of the hearing, it

was suggested by petitioner's counsel that the referee visit the scene of the accident and make an inspection of the premises. This was accordingly done. What the referee observed on this visit was evidence in the case. People v. Milner, 122 Cal. 171, 54 P. 833; Hatton v. Gregg, 4 Cal. App. 537, 540, 88 P. 592; Wright v. Locomobile Co. of America, 33 Cal. App. 694, 167 P. 407; Vaughan v. County of Tulare, 56 Cal. App. 261, 265, 205 P. 21; MacPherson v. West Coast Transit Co., 94 Cal. App. 463, 466, 271 P. 509. Undoubtedly, the knowledge gained by this visit had much to do with the conclusions embodied in the referee's report to the commission which forms the basis for the findings and award of the commission. The knowledge thus acquired may in and of itself amply justify the finding of serious and willful misconduct on the part of petitioner. It is not available to us other than it is to some extent reflected in that portion of the referee's official report to the commission which is included in the answer of respondent Industrial Accident Commission to the petition. Therein is set forth in the language of the referee a description of the visit made by him to the scene of the accident, the pertinent observation that he descended the ladder in the same manner in which respondent Johnston testified that he descended "because I should have certainly been afraid to do so in any other manner," together with the referee's observations respecting the nonaccessibility of the post of the railing and the projecting end of the bolt which petitioner contends furnished convenient handholds and amounted to substantial and sufficient compliance with the commission's safety order. To sustain petitioner's contention in this regard would mean that we should have to reject the referee's expressed conclusion respecting the nonaccessibility of those parts of the derrick relied upon by petitioner as affording secure and convenient handholds. This we are not justified in doing unless the other evidence which is presented by the record produces settled conviction that the referee's conclusion respecting the nonaccessibility of the claimed handholds was incorrect. Careful examination of the record has failed to produce such conviction, and we therefore conclude that the finding of serious and willful misconduct is not so entirely lacking in evidentiary support as to require annulment of the award.

[5, 6] Furthermore, in this connection, it is to be borne in mind that, in a proceeding of this character, where this court is asked to review an award of the Industrial Accident Commission, annulment of the award is authorized only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings themselves are not subject to review except in so far as they may have been made without any evidence whatever in their support. Even then a review of the findings is based upon the theory that the commission had no jurisdiction to make a finding entirely unsupported by evidence rather than upon the theory usually presented upon appeals that findings of a trial court are lacking in sufficient evidentiary support which imposes upon the reviewing tribunal the duty of weighing evidence to arrive at a determination of that proposition. Dearborn v. Industrial Acc. Com., 187 Cal. 591, 594, 203 P. 112; Hartford A. & I. Co. v. Industrial Acc. Com., 202 Cal. 688, 692, 262 P. 309, 58 A. L. R. 1392; Independence Indem. Co. v. Industrial Acc. Com., 203 Cal. 51, 56, 262 P. 757; Newton v. Indust. Acc. Com., 204 Cal. 185, 189, 267 P. 542, 60 A. L. R. 1279.

[7, 8] It is further objected that the finding of the commission that the failure of petitioner to have provided secure handholds was the proximate cause of the injuries sustained by respondent Johnston is not warranted by the evidence. In support of the objection thus presented it is argued that the sole proximate cause of the injuries sustained was the negligence of the employee in attempting to descend the ladder in the manner in which he did as though he were descending a flight of stairs rather than by using both hands and feet in the manner which a person usually does in descending a ladder. It is pointed out that Johnston could have rendered the beginning of his descent more steady by grasping either the supporting post of the railing of the runway or the portion of the bolt projecting from the Sampson post and that by failing to do so and by stepping on the ladder facing out from it as though he were walking down a stairway he was himself guilty of negligence, which was the sole proximate cause of the fall and the injuries resulting therefrom. Respondent Johnston was questioned at length as to these matters on cross-examination. He testified that he always descended the ladder in the manner in which he began the descent on the date of the accident for the reason that the ladder was too nearly vertical to permit descent in the usual manner, and that in making the descent facing out from the ladder the upright post supporting the railing of the runway was behind him, making it impracticable for him to utilize it as a handhold. It further appears from his testimony that, as he prepared to descend the ladder on December 5, 1929, he held in one hand a quart can fastened to the end of a stick three feet in length, and that the can contained an unspecified quantity of crude oil. The general superintendent of petitioner admitted upon cross-examination that a man descending the ladder face outward would be compelled to reach behind him in order to grasp the upright post of the runway railing, but stated that he could utilize the end of the bolt protruding

from the Sampson post as a handhold if he desired.

It is the general rule that the question of the proximate cause of injury is one to be determined by the trier of facts from the facts and circumstances developed by the evidence. In the instant case, it is to be remembered that the referee visited the scene of the accident and observed the ladder, its manner of construction, and the post and protruding bolt which it is claimed furnished secure handholds. As above noted, the knowledge thus acquired by the trier of facts was evidence, and it may well be that this evidence in and of itself was sufficient to justify the finding that the failure of petitioner to provide secure handholds was the proximate cause of the fall and the ensuing injuries. At all events, it does not sufficiently appear from the record that respondent Johnston was negligent in attempting to descend the ladder in the manner above described, nor that, incumbered as he was by the oil can in his hand, he was negligent in failing to grasp the upright post some distance behind him or the protruding bolt some distance in front of him. Furthermore, if it be assumed that Johnston was negligent in attempting to descend the ladder facing outward, it does not necessarily follow that his negligence in this regard was the proximate cause of the injuries which he sustained. The fact still remains that the ladder was not equipped with secure handholds and that the post and projecting bolt were not so readily accessible to him as to afford adequate security for his descent under the circumstances narrated.

[9, 10] A further contention is presented that the evidence shows that the oil well where the accident occurred had been visited on various occasions by inspectors of the State Industrial Accident Commission and that such inspectors had recommended various unspecified changes which were always made, but that at no time was any recommendation made with respect to the ladder. From this it is argued that the Accident Commission in its administrative capacity, in effect, approved the ladder and its method of construction and that such approval is sufficient to obviate the charge of serious and willful misconduct in having failed to provide secure handholds. The contention is untenable. In the first place, the evidence with respect to the visits of inspectors is too vague to support so bold an argument. More important, the duty of petitioner to comply with the safety order of the Accident Commission was one that petitioner owed directly to its employees. It is their safety which is at stake when there is noncompliance with the orders of the commission, the very object and purpose of which is obviously to insure the maximum safety to individuals engaged in the performance of work which presents unusual hazards and dangers. The Industrial Accident Commission, in its administrative capacity, possesses no authority to waive or consent to the violation of a duty owing primarily and directly to the employee from the employer.

[11-13] It is further contended that the commission's findings are fatally defective in that they fail to specify what was the particular act or omission of petitioner which was concluded to amount to serious and willful misconduct. This contention is likewise without merit. It is well established that findings are required to be findings of ultimate facts. 24 Cal. Jur., p. 968; Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; Talbot v. Ginocchio, 18 Cal. App. 390, 123 P. 223. The ultimate fact upon which the right of respondent Johnston to receive an award of additional compensation depended was that his injuries were caused by the serious and willful misconduct of his employer. Clarke v. Industrial Acc. Com., 87 Cal. App. 766, 771, 262 P. 471. It is also the rule that findings are sufficient if they can be made certain by reference to the record. 24 Cal. Jur., p. 964; Kennedy, etc., Co. v. S. S. Const. Co., 123 Cal. 584, 56 P. 457. Application of this latter rule establishes the sufficiency of the findings. The only dereliction of petitioner for which it was claimed the injured employee was entitled to be awarded additional compensation was the failure of petitioner to have provided secure handholds for the ladder. In all other respects, it was shown that the construction of the ladder complied fully with the safety order of the commission, and there was no pretense by the injured employee that it did not, with the single exception that it was not provided with secure handholds.

[14] The final contention advanced by petitioner is that the finding of the commission that the injuries were caused by the serious and willful misconduct of the employer, a corporation, is fatally defective in that it fails to state that the injuries were caused by the serious and willful misconduct of an executive or managing officer or general superintendent of the corporation. The statute which authorizes the recovery of additional compensation provides, as heretofore noted, that, where the employee is injured by reason of the serious and willful misconduct of the employer, "or if a corporation, on the part of an executive or managing officer or general superintendent," additional compensation may be awarded. It is obvious that a corporation is incapable of willful misconduct. Willfulness presupposes mentality. A corporation is a purely legal fiction possessing neither the physical nor mental attributes of a human being. The record herein shows that H. F. Owen was general manager of the petitioner corporation at the time the accident occurred, and that from 1913 until 1929 he was superintendent of petitioner, and that

all properties of petitioner were under his supervision as superintendent. It does not appear from the record that, at any time material to the inquiry herein, any person other than Owen exercised any control or supervision over the oil well where the accident occurred. It is thus apparent that the only individual who could be charged with serious and willful misconduct was the man who had entire supervision and control of the oil well. Since the commission's finding can so readily be rendered definite and certain by reference to the record, no difficulty is encountered in declaring that the finding is not fatally defective in the respect claimed by petitioner.

For the reasons stated, the award is affirmed.

136 Cal.App. 217

CHILDS et ux. v. NEWFIELD et al.

Civ. 8973.

District Court of Appeal, First District, Division 1, California.

Jan. 11, 1934.

1. Deeds ⇐150.

Condition subsequent in deed restricting use of property conveyed and forfeiting title to grantor in case of breach is not repugnant to granting clause, since right to annex such conditions is necessary incident to right to own and convey.

2. Vendor and purchaser ⇐231(3).

Recording of agreement containing conditions restricting use of property conveyed and forfeiting title to grantor in case of breach charges future purchasers with notice of contents.

3. Deeds ⇐158.

Condition in deed restricting use of property conveyed and forfeiting title to grantor in case of breach runs with title.

4. Deeds ⇐156, 166.

Condition in deed restricting use of property conveyed and forfeiting title to grantor in case of breach is transferable and may be released or waived (Civ. Code, § 1046).

5. Deeds ⇐166.

Release of condition in deed restricting use of property conveyed and forfeiting title to grantor in case of breach can be made by transfer of grantor's interest in property (Civ. Code, § 1046).

6. Covenants ⇐77.

Where grantor imposes building restrictions on tract of land under general plan of improvement, equity will enjoin violation of restrictions by grantee, though not binding at law and party bringing suit has no privity of estate with grantee.

7. Covenants ⇐77.

Building restrictions imposed by grantor of tract of land under general improvement plan can be enforced by grantor or other owners in tract, where use of property in neighborhood has not changed from causes other than breach of restrictions.

8. Deeds ⇐156.

Where deed contains building restrictions and provides that breach by grantee shall forfeit property conveyed to grantor, such restrictions, if conditions and not covenants, run only in favor of grantor and his heirs and assigns.

9. Deeds ⇐156

Where deed conveying lot in tract subject to general improvement plan contained condition restricting building within 30 feet of property line and provided that grantor should have right of re-entry for breach, grantor who conveyed reversionary rights in tract could not enforce condition.

10. Deeds ⇐104.

Deed signed and acknowledged by persons not named therein as grantors is not deed of such persons, where identity of grantors is not certain from consideration of entire instrument.

Appeal from Superior Court, Los Angeles County; Harry B. Neville, Judge.

Action by Willard Ross Childs and Mary V. Childs, his wife, against Nicholas Newfield and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Burke, Hickson & Burke and Louis H. Burke, all of Los Angeles, for appellants.

Arch H. Vernon, Ralph H. Spotts, and Chas. H. Brock, all of Los Angeles, for respondents Max Reichardt and Security-First Nat. Bank of Los Angeles.

PER CURIAM.

An action to compel the reconveyance of a parcel of real property in Los Angeles county based upon the alleged violation of certain building restrictions.

Plaintiffs on July 26, 1923, were the owners of a tract of land described as lot 73 of Montebello according to a map thereof duly recorded. On that date they executed and recorded a "Declaration of Establishment of Restrictions and Conditions," which provided a general plan of improvement, and among other things that: "Any residence

erected upon any lot or subdivided portion of said tract shall be built so that the front wall thereof shall be not closer than thirty feet to the property line fronting on any street, avenue, drive or boulevard * * *. Further, that a breach of any of the restrictions, provisions, conditions and covenants hereinbefore referred to shall cause the real property upon which said breach occurs to revert to said owners or their successors in interest as owners of the reversionary rights herein provided for, and the owners of such reversionary rights shall have the right of immediate re-entry upon said real property in the event of any such breach, and as to each lot-owner in said tract the said provisions, conditions, restrictions and covenants shall be covenants running with the land, and the breach of any thereof and the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by said owners or their successors in interest, or by any such owner, of other lots in said tract but by no other persons. * * * Provided further that a breach of any of the foregoing conditions, restrictions and covenants, or their re-entry by reason of such breach, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value as to any lot or purchase of lots in said tract, but said provisions, conditions, restrictions and covenants shall be binding upon and effective against any owner thereof whose title thereto is acquired by foreclosure, trustee's sale or otherwise."

In December, 1923, the lot in controversy was conveyed by plaintiffs. The deed was made "subject to restrictions and reservations of record" and also "subject to all restrictions and conditions" contained in the declaration above mentioned. This lot was subsequently conveyed by mesne conveyance containing the provision "subject to restrictions and reservations of record" to James P. and Minnie N. Delyea, who were the owners thereof on March 7, 1929. On that date plaintiffs and the Delyeas joined in the execution of a "Declaration of Removal of Restrictions," wherein they declared that they canceled and released the declaration first mentioned. The last declaration was duly acknowledged and recorded. On the same date plaintiffs executed two other declarations of restrictions and conditions. One affected the west half of the tract, in which was situated the lot owned by the Delyeas, and the other affected only the east half of the tract. Each declaration contained substantially the same provisions as were contained in the first declaration. The Delyeas signed and acknowledged both of these instruments but they were not named in the body of either.

In November, 1929, plaintiffs conveyed a lot in the west half of the tract to defendants Newfield. This lot adjoined the lot owned by the Delyeas. Said defendants erected certain improvements thereon which were in compliance with the provisions of the declaration last mentioned. On February 28, 1930, the Delyeas conveyed their lot to said defendants, the deed containing the provision "subject to conditions, restrictions, reservations, rights, rights of way and easements of record." During the same month plaintiffs at the request of said defendants executed and recorded a waiver of restrictions, granting the right to erect an apartment house or flats on any portion of the tract, but providing that such building should not be "erected closer than thirty feet to the westerly property line." Thereafter said defendants constructed an apartment house on the lot acquired from the Delyeas and in such a manner that the front wall thereof was but 20.51 feet from the said property line. Following this plaintiffs served notice on the defendants that they would avail themselves of their alleged rights under said declaration of restrictions, and later the present action was commenced.

During the said month of February and before the construction of the apartment last mentioned, defendant Max Reichardt loaned defendants Newfield the sum of $21,500, which they secured by a deed of trust of the Delyea lot; the bank above named being the trustee. The court found that this sum was loaned in good faith for the purpose of erecting the apartment, and that at the time the same was advanced neither Reichardt nor the bank had knowledge or notice of the declaration filed on March 7, 1929, except such constructive notice thereof as its filing and recordation gave; further that they were without knowledge that "any improvements erected or to be erected thereon would in any way or degree violate any restrictions, conditions or reservations covering said real estate."

The trial court entered judgment for defendants. Plaintiffs have appealed therefrom, claiming that the above facts found by the court do not support the judgment.

[1-7] It is well settled that the right to annex conditions restricting the use of property conveyed is a necessary incident of the right to own and convey (18 Cor. Jur., Deeds, § 373, p. 359), and a condition subsequent forfeiting the title to the grantor in case of breach is not repugnant to the granting clause. Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann. Cas. 1912D, 1190. The recording of such an agreement charges future purchasers with notice of its contents (Wayt v. Patee, 205 Cal. 46, 269 P. 660), and the conditions run with the title. Quatman v. McCray, 128 Cal. 285, 60 P. 855. Agreements similar to the one in question have been upheld. See Wayt v. Patee, supra. Such conditions are transferable (Johnston v. Los Angeles, 176 Cal. 479, 168 P. 1047;

Civ. Code, § 1046), and they may be waived or released. Werner v. Graham, 181 Cal. 174, 183 P. 945; Los Angeles, etc., Co. v. Marr, 187 Cal. 126, 200 P. 1051. Such a release may be made by a conveyance of the grantor's interest in the property transferred by the deed carrying the condition. 3 Thompson Real Property, § 2050; Ingersoll, etc., Co. v. Crocker (C. C. A.) 228 F. 844. Where under a general plan of improvement for a particular tract building restrictions are imposed equity will in proper cases enjoin the violation of such conditions by the grantee of a lot therein. Nor is it essential in all cases in order to warrant equitable relief that the restrictions should be binding at law, or that any privity of estate should exist between the parties (Martin v. Holm, 197 Cal. 733, 242 P. 718), and such an action may be maintained by the other owners of such lots or by the grantor (Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann. Cas. 1914A, 1; Title Insurance & Trust Co. v. Fette, 90 Cal. App. 606, 266 P. 570), except in cases where, due to changes in the uses to which property in the neighborhood is put, such changes being the result of causes other than their breach, it would be unjust and oppressive to give effect to the restrictions. Downs v. Kroeger, 200 Cal. 743, 254 P. 1101; Strong v. Hancock, 201 Cal. 530, 258 P. 60.

[8] But where a deed containing building restrictions provides that the property conveyed shall revert to the grantor in case of a breach, such restrictions, if in fact conditions and not covenants, run only in favor of such grantor, his heirs or assigns, and the breach cannot be taken advantage of by a stranger. Werner v. Graham, supra; McBride v. Freeman, 191 Cal. 152, 154, 215 P. 678; 18 Cor. Jur., Deeds, § 384; pp. 364, 365.

[9] As shown above, the declaration in question provided that the owners, or their successors as owners of the reversionary rights, should have the right of immediate re-entry in case of a breach, further providing that in addition such owners or the owners of other lots in the tract should be entitled to equitable relief. It is clear that none but the owner of a reversionary right might re-enter in case of a breach committed; and that, as respects the lot upon which the alleged breach occurred, the plaintiffs were not the owners of any rights in the reversion. The title passed from them before the declaration in question was executed; and any right given by the provisions of the original declaration was released by their declaration of removal of restrictions executed on March 7, 1929. While the Delyeas could have transferred their reversionary rights to plaintiffs (Johnston v. Los Angeles, supra), nothing in the declarations which they have signed indicates an intention to do so. At most, plaintiffs were given the right with other owners of lots in the tract to enjoin a breach of the restrictive covenant.

[10] Defendants urge that the Delyeas not having been named in the body of the declaration as declaring or establishing any restrictions on their property, the instrument merely declaring that the plaintiffs as the owners of the property did so, the instrument did not have that effect as to the Delyea property.

It is the rule with respect to deeds signed and acknowledged by persons not named therein as grantors that the same are not the deeds of such persons. Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann. Cas. 1912C, 1044; Roberts v. Abbott, 48 Cal. App. 779, 785, 192 P. 345. Nevertheless, if the identity of the grantors is certain from a consideration of the entire instrument this is sufficient (18 Cor. Jur., Deeds, § 54, pp. 172, 173), and here the Delyeas signed as owners and duly acknowledged the execution of the instrument.

However, in view of our conclusion that plaintiffs had no reversionary rights in the property, a determination of the question here is unnecessary. And the same applies to the contention that the court having found that the loan by Reichardt was made and the deed of trust was executed in good faith for value and without knowledge of the declaration in question, or that the apartment was constructed in violation thereof, a breach of the restriction could not under the paragraph of the declaration referring to deeds of trust defeat such encumbrance.

For the above reason the judgment is affirmed.

136 Cal.App. 329

PEOPLE v. GROBEN.

Cr. 2444.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1934.

Criminal law ⇐1037(2).

Prosecutor's statement, in reply to witness' answer, whether that was the reason witness said defendant had been drinking, objection to which was sustained, *held* not misconduct requiring reversal, where accused made no request for instruction to disregard statement.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

H. J. Groben was convicted of involuntary manslaughter, and he appeals.

Affirmed, and purported appeals from verdict and from order denying motion in arrest of judgment dismissed.

Robert H. Wallis, of Los Angeles, William J. McNichols, of Hollywood, and Raymond G. LaNoue and Anna Zacsek, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

YORK, Justice.

Defendant appeals from the judgment of conviction of involuntary manslaughter and from the order denying his motion for a new trial.

Appellant's first point that the evidence was insufficient to justify the verdict is not well taken. There is at most only a conflict in the evidence.

The only point worthy of discussion in this appeal is the alleged misconduct of the district attorney occurring during the progress of the trial in his examination of the witness Shumacher. After the witness had been asked if he had made a certain statement and had answered "No," the following question was put to him by the district attorney: "Q. And that as a reason you said that Mr. Groben had been drinking?" This question was objected to and was assigned by defendant's attorney as misconduct on the part of the district attorney. The court in reply stated: "Yes, I think that goes beyond trying to show that the witness made a different statement at some other time and place, because the statement as to which you are now seeking to interrogate him is the statement that Mr. Groben did stop at the boulevard stop. Now, you are going further than that in attempting to show that he made some statement about whether or not Mr. Groben had been drinking. That, of course, was not a matter touched on by either side in either the direct or cross-examination. The objection is sustained, and the answer so far as given will be stricken out."

No request was made by appellant's counsel that the court give to the jury a special instruction to disregard this question asked by the district attorney. There is nothing inherent in the question that could not be wiped out by a proper instruction.

The judgment and order are affirmed. The purported appeals from the verdict of the jury and from the order denying motion in arrest of judgment are dismissed.

We concur: CONREY, P. J.; HOUSER, J.

136 Cal.App. 322

Ex parte STOVALL.

Cr. 2493.

District Court of Appeal, Second District, Division 2, California.

Jan. 22, 1934.

Habeas corpus ⇐85(1).

Writ of habeas corpus was discharged where evidence at hearing was sufficient to warrant detention of accused for trial for pandering.

Application of Dick Stovall for a writ of habeas corpus prayed to be directed to the sheriff of Los Angeles County to secure release of petitioner from custody on the ground of insufficiency of evidence to warrant detention.

Writ discharged.

Loeb L. Cossack, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Petitioner was regularly bound over to superior court for trial for pandering. He complains to this court that there was not sufficient evidence produced at the hearing to legally justify his being held for trial.

There is sufficient evidence to justify the belief that such a crime was committed in his residence. There is evidence of his implication and knowledge.

The writ is discharged.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

136 Cal.App. 333

EIGENHUIS et al. v. MORRIS et al.

Civ. 1408.

District Court of Appeal, Fourth District, California.

Jan. 22, 1934.

1. Mortgages ⇐369(7).

In action to vacate sale under trust deed, evidence sustained finding that sale price of $500 for two lots subject to prior incumbrance of $2,500 was not grossly inadequate.

2. Homestead ⇐108.

Trustee *held* entitled to sell two lots together as authorized by trust deed, notwithstanding declaration of homestead as to one lot, where grantors in trust deed had lost all interest in such lot through mechanic's lien sale and expiration of redemption period.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Abraham Eigenhuis and another against Harry J. Morris and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

W. Frank Shelley, of Los Angeles, for appellants.

Halsey W. Allen, of Redlands, for respondents.

JENNINGS, Justice.

Plaintiffs instituted this action for the purpose of vacating a sale of certain real property in the city of Redlands theretofore made by the defendant Security First National Bank of Los Angeles to the defendant Harry J. Morris. From a judgment rendered in favor of the defendants plaintiffs have appealed.

The record on appeal discloses that the following facts were established by the evidence produced during the trial of the action: Plaintiffs were the owners of lots numbered 19 and 20, Ross & Rausch addition in the city of Redlands. On May 5, 1930, they executed a promissory note in the amount of $500 payable on June 12, 1931, to James L. Worley and Bertie Worley as joint tenants. To secure payment of the note plaintiffs executed a trust deed conveying the above-described premises to the Security First National Bank of Los Angeles, as trustee for the Worleys, who were named as beneficiaries in the instrument. The trust deed contained a statement that it was "second to trust deed recorded June 28, 1928, * * * which secures a note of $2500.00." The prior trust deed was executed by plaintiffs and conveyed the same premises described in the second trust deed to the same trustee for the benefit of the same beneficiaries. The note for $500 secured by the second trust deed on the property was subsequently transferred by the Worleys to the defendant Harry J. Morris, who paid therefor the sum of $500. On April 14, 1932, the plaintiff Abraham Eigenhuis executed and recorded a declaration of homestead on lot 19. On February 17, 1931, a judgment was rendered in two actions for the foreclosure of certain mechanics' liens. The property upon which the liens were foreclosed was lot 19. The plaintiffs in the present action were named as defendants in the actions for foreclosure of the liens and defaulted. The judgments in the foreclosure actions decreed that lot No. 19 be sold to satisfy the liens of the plaintiffs in said actions, and a commissioner was designated to make a sale of the property. On April 10, 1931, the said property was duly sold for the sum of $1,900 to one C. S. Wiggins, and the commissioner issued to said purchaser a certificate of sale. On April 20, 1932, the commissioner executed a deed conveying said lot No. 19 to C. S. Wiggins, the purchaser at the foreclosure sale. In the meantime the note for $500 executed by plaintiffs as aforesaid was not paid at its maturity, and the defendant Harry J. Morris demanded that the trustee named in the deed of trust given to secure payment of the note should sell the property described in the trust deed for the purpose of satisfying the indebtedness represented by the note. Notice of sale was accordingly given. Prior to the sale plaintiffs demanded that the trustee first offer for sale lot No. 20, upon which no declaration of homestead was recorded. The demand was refused, and both parcels were sold as a whole on April 22, 1932. The defendant Harry J. Morris was the purchaser at said sale for the sum of $500. It appeared that the defendant Harry J. Morris had paid taxes assessed upon the property and interest due upon the prior note of $2,500, and that there was also interest due and unpaid on the second note. The total indebtedness due from plaintiffs to defendant Morris at the time of the sale of the property by the trustee amounted to $948.10. Application of the sum of $500, the purchase price of the property sold at the trustee's sale, left a deficiency of $448.10 due from plaintiffs to defendant Harry J. Morris.

[1] It is the contention of appellants that the trial court erred in finding that the sum of $500 paid by respondent Harry J. Morris as the purchase price for the two parcels of land was not grossly inadequate and was not an unfair price, and that, if the trustee had sold lot No. 20, the proceeds from such sale would have been insufficient to satisfy the indebtedness secured by the second trust deed. The evidence as to the value of the two pieces of property was conflicting. The evidence of

appellants indicated that the value of the two parcels on the date of sale was $8,200. The testimony of respondent Morris was that the value of the property was approximately $5,250, and that the value of lot No. 20 alone was $1,750. Another witness for respondents placed a total valuation of $4,150 on both parcels, and testified that the value of lot No. 20 was $1,650. When it is remembered that both lots were subject to a prior incumbrance of $2,500, it is apparent that the court's findings that the purchase price paid by respondent Morris was not grossly inadequate, and that, if the trustee had first sold lot No. 20, the proceeds therefrom would have been insufficient to satisfy the indebtedness secured by the second trust deed, cannot be declared to be lacking in evidentiary support.

[2] Apart from the question of inadequacy of price, however, the record shows the presence of another factor which is decisive of the contentions advanced by appellants. It is urged that, although the second trust deed vested in the trustee a discretion to sell the property either as a whole or in separate parcels, nevertheless, when it was made to appear that a declaration of homestead had been recorded as to one lot, and a demand was made that it first offer for sale the other lot, a duty was imposed upon the trustee to comply with the demand and to endeavor to satisfy the indebtedness by a sale of the lot upon which no declaration of homestead had been recorded. It is then further urged that a court of equity should set aside a sale made in violation of this duty.

The trial court found, however, that at the time of the trustee's sale the appellants had no interest of any character in lot No. 19 on which the homestead had been declared. This finding is supported by the undisputed evidence that long prior to the recordation of a homestead declaration a judgment had been rendered in actions for the foreclosure of mechanics' liens upon lot No. 19 in which appellants were named as defendants and in which they had defaulted, that the judgment decreed that lot No. 19 be sold to satisfy the liens, that a commissioner was appointed to conduct the sale, that the sale was duly made and a certificate of sale executed, that the year of redemption had expired, and that prior to the trustee's sale to respondent Morris a deed conveying lot No. 19 had been executed by the commissioner to the purchaser at the foreclosure sale. It is manifest, therefore, that the trial court's further finding that appellants "were not injured in any way by the sale of said two lots as a whole" is sustained by evidence which is undisputed and conclusive, and appellants are in no position to complain of the court's decree.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 365

ABBOTT v. FLOYD.

Civ. 1421.

District Court of Appeal, Fourth District, California.

Jan. 23, 1934.

Hearing Denied by Supreme Court March 22, 1934.

1. Brokers ⇐54.

Broker, employed to sell property, contracts to produce purchaser who is able to buy property.

2. Brokers ⇐84(2).

Burden is upon broker employed to sell property to prove that prospective purchaser is financially able to make purchase.

3. Brokers ⇐54.

Broker *held* not entitled to commissions upon landowner's refusal to sell, where prospective purchaser produced could not make down payment without loan promised by third person, but which was unenforceable.

4. Estoppel ⇐63.

In suit for broker's commission, executrix of landowner *held* not estopped to assert inability of purchasers produced by broker to buy property, because landowner in declining to sell asserted a different reason.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by H. S. Abbott against Mary Kate Watson Floyd, as executrix of the estate of J. A. Floyd, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

U. F. Lewis, of Redlands, and Fred A. Wilson, of San Bernardino, for appellant.

Halsey W. Allen, of Redlands, for respondent.

MARKS, Justice.

On September 20, 1926, J. A. Floyd executed a written authority to appellant to act as broker in the sale of a twenty-acre orange grove in San Bernardino county, upon which he and his wife lived. Appellant took several prospective purchasers to the property and on September 17, 1926, informed Mr. Floyd that he had an offer of purchase from J. D. Whitted and Ruth Esther Whitted, his wife, and tendered a certified check for $1,000 to apply on the purchase price. The written offer bore the signature "J. D. Whitted by H. S. Abbott, his attorney in fact." Some question was raised as to the authority of Abbott to sign the offer. He admitted that he had no written authority from Whitted. The certified check which he offered as a deposit on the purchase price

was his own. Mr. Floyd informed him that he could not discuss the sale with him until on or after September 19th.

On September 18, appellant went to the city of Bakersfield, where he secured a general power of attorney from Whitted and his wife and had them attach their signatures to the written offer of purchase. On September 19, he returned to the house of Mr. Floyd and tendered the offer of purchase together with the certified check. This offer was rejected by Mr. Floyd, and he informed Abbott he had decided not to sell.

During the pendency of this action, Mr. Floyd died and respondent was appointed his executrix and substituted as defendant. A claim for the commission was filed by Abbott against the estate and was rejected.

The brokerage contract executed by Mr. Floyd specified $34,000 as the selling price of the property, with $5,000, or more, payable in cash, $4,000 payable the following June, and the balance "to suit" with interest at 7 per cent. per annum, payable semiannually. The written offer to purchase provided for the total price of $34,000, $5,000 cash to be deposited in escrow, $4,000 to be paid on June 1, 1927, and $3,000 per annum thereafter, with interest at the rate of 7 per cent. per annum on the deferred payments.

Respondent urges that the written offer contained several variances from the terms specified in the written authority to the agent. From the view we take of the case, it will not be necessary to discuss these variances.

The trial court found that the prospective purchasers produced by appellant were not able to complete the purchase. Their total assets consisted of the following: $1,100 in cash which was in the possession of the agent; a used automobile upon which they owed an unpaid balance of about $750 with an equity to themselves of not more than $400; a promissory note of $400 which had not been paid on June 10, 1932; $150 bonus payable from the state of Illinois to Whitted because of his enlistment in the World War; and an adjusted compensation certificate issued to Whitted by the United States government upon which $300 was paid a considerable time after he made the offer and before the trial.

Testimony was introduced to the effect that appellant, on behalf of the purchasers, had interviewed the manager of an orange distributing corporation in the city of Redlands and had obtained a statement that that corporation would loan the proposed purchasers $4,000 upon the crop of oranges then growing upon the real property. There was no consideration given for this representation which was not reduced to writing and was admittedly not enforceable.

The sole question which needs to be determined on this appeal is whether the prospective purchasers had the ability to make the purchase and perform the conditions of their offer.

[1-3] It is part of the contract of a broker employed to sell property to produce a purchaser who is able to buy the property. Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87; Diamond v. Fay, 23 Cal. App. 566, 138 P. 933. The burden is upon the broker to prove that the prospective purchaser is financially able to make the purchase. Merzoian v. Kludjian, 183 Cal. 422, 191 P. 673; Phelan v. Hilda Gravel Mining Co., 203 Cal. 264, 263 P. 520, 56 A. L. R. 476; Alison v. Chapman, 36 Cal. App. 759, 173 P. 389. An unenforceable promise of a third person to furnish part of the money to the prospective purchaser with which to make the down payment does not establish the fact that the proposed purchaser is able to make the purchase. "If the money for the purchase or sale is to be produced by some third person other than the customer, the broker has not produced a customer able to buy, and is not entitled to commissions." 4 Cal. Jur. 592; Coger v. Wiltsey, 117 Cal. App. 652–658, 4 P.(2d) 302; Tashjian v. Krikorian, 55 Cal. App. 160, 202 P. 956; Merzoian v. Kludjian, supra. Without the loan of $4,000 the purchasers could not have made the $5,000 cash payment.

The case of Merzoian v. Kludjian, supra, is factually similar to the instant case, and is authority for our holding that the finding of the trial court, that the prospective purchasers were not able to make the purchase, is supported by ample evidence. It is also authority upon which we must affirm the judgment.

[4] Appellant seeks to avoid the effect of these decisions by contending that respondent cannot now urge the inability of the purchasers to buy the property because deceased told the broker that he had decided not to sell and did not specify the financial inability of the purchasers as a ground for rejecting their offer. This contention has been resolved against appellant in the case of McCarthy v. Grider, 72 Cal. App. 393, 237 P. 751.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 382

McBRIDE v. SOUTHERN CALIFORNIA TELEPHONE CO.

Civ. 8105.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1934.

Rehearing Denied Feb. 23, 1934.

Hearing Denied by Supreme Court March 26, 1934.

1. Automobiles ⇐244(35).

Evidence that defendant's automobile made left turn into street from alley at 20 miles per hour, and drove in front of plaintiff's automobile proceeding on right side of street, sustained verdict for plaintiff.

2. Appeal and error ⇐1056(1).

Excluding memorandum of witness' opinion of how automobile accident occurred, containing unsworn statements made year after accident, *held* not reversible error, where witness said on stand that former opinion was wrong and was cross-examined as to details of accident.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Augusta G. McBride against the Southern California Telephone Company (a corporation). Judgment for plaintiff, and defendant appeals.

Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

Olson & Olson, of Los Angeles, for respondent.

CRAIG, Justice.

The verdict of a jury and resultant judgment having been rendered in favor of the plaintiff in an action for damages alleged to have been sustained through negligence of the defendant, the latter appealed.

[1] From the evidence elicited from certain of its witnesses the appellant argues that the verdict is wholly without support as to the manner in which two automobiles of the parties collided upon a public thoroughfare in the city of Los Angeles. It is conceded that a Buick car of the respondent was being driven along a boulevard as a Ford truck of the appellant emerged from a narrow driveway, and that they met upon the main highway. Arguments are devoted largely to positions of the machines after the impact and to conjecture with respect to the possible proximate cause of the injury thereto. An eyewitness swore positively that the Ford proceeded at the rate of 20 miles per hour for a distance of 30 feet and without lessening speed entered the boulevard, turned toward the left, and came suddenly in front of the Buick. The plaintiff testified that "it just shot out of the alley and I wasn't very far from the alley and it shot out at an angle and I had no opportunity of seeing it before." From this and corroborative evidence before them the jury may well have concluded that, although there was other evidence tending to show care on the part of the driver of the Ford car, all of the evidence preponderated against the degree of ordinary care and skill required by law as given in the instructions of the court. The intendments must be resolved in favor of such conclusion.

[2] During cross-examination of one of the plaintiff's witnesses he was shown and defendant's counsel offered in evidence a memorandum of a conversation at the latter's offices about a year after the accident, wherein the witness had stated his opinion as to the occurrence. It is insisted that the trial court erred in excluding the same. However, it consisted of no more than an opinion, was an unsworn response to certain questions, and the witness swore positively, "I was all wrong, and since I have made that statement I went over the whole thing thoroughly and saw where I had been wrong." Nevertheless, the witness was cross-examined upon details of the occurrence, and it would be difficult to hold that the jury were not sufficiently conversant with the witness' views to render their verdict in disregard of his testimony if they did not believe it entitled to credit. His testimony upon the stand was more in accord with that of other witnesses whose testimony was not impeached, but it cannot be said upon appeal that their verdict was so influenced by it alone as to warrant an assumption that a different result would have been attained by consideration of his unfounded opinion at another time.

The judgment is affirmed.

ARCHBALD, Justice pro tem. (concurring).

I concur. Appellant strenuously contends that the physical evidence shows that the accident was due to the fact that plaintiff's Buick was being driven on the wrong side of the street. From the appearance of both cars as shown by the exhibits, and the fact that the accident occurred approximately 19 feet north of the north line of Edgewood place as it intersects West boulevard, on which plaintiff was traveling, the jury might well infer that defendant's driver did not enter such boulevard from Edgewood place as defendant's witnesses testified, but instead crossed the path of plaintiff's car on an angle, so that only the left front corner of the Buick struck the truck, crushing into and along the side of it, and that to get in such a position the truck must have entered West boulevard as testified by plaintiff's witnesses.

There are two dark lines shown on Exhibit B extending down toward the Buick as the car is shown at rest after the accident. The jury might also conclude that they were not made by the Buick, as they do not answer the description of the marks testified to by defendant's witnesses as leading to the wheels of that machine, as the left track was fixed as only 16½ inches past the center line; and from an examination of the exhibit the jury might easily conclude that the two marks that are plainly shown pass under the car in unbroken lines. They could also infer that, inasmuch as said marks pass the spot of the collision in unbroken lines, they could not have been made by the Buick, which was unquestionably pulled to the left at the time of the impact; and they might easily infer that in the few feet it moved after the accident it was drawn to the left from its place on the right of the center line to that where it finally came to rest as shown by the exhibit.

I concur in both of the above opinions: STEPHENS, P. J.

On Application for Rehearing.

PER CURIAM.

Petition for rehearing is denied. An error occurs in the opinion, as pointed out in the petition for rehearing, concerning a date, but, since this mistake is wholly immaterial, it need not be corrected.

136 Cal.App. 223

PONCINO v. REID-MURDOCH & CO. et al.

Civ. 8870.

District Court of Appeal, First District, Division 2, California.

Jan. 11, 1934.

1. Automobiles ⇐171(1).

Motorist who entered intersection at same time that defendant did, and who turned sharply to left without giving warning, and increased his speed and ran directly into path of defendant's automobile, *held* negligent as matter of law (St. 1923, pp. 557, 558, §§ 122, 129, and § 130 as amended by St. 1925, p. 413).

2. Negligence ⇐83.

To apply "last clear chance" doctrine relieving plaintiff of his negligence, it is insufficient that defendant may have had chance to avoid accident, but defendant must have had last and clear chance, later in point of time than plaintiff's chance, and more than bare possible chance to avoid accident by exercise of ordinary care.

The elements constituting "last clear chance" doctrine are that the plaintiff has been negligent; that as a result thereof he is in a situation of danger from which he cannot escape by the exercise of ordinary care; that the defendant is aware of plaintiff's dangerous situation under such circumstances that he realizes, or ought to realize, plaintiff's inability to escape therefrom; that defendant then has a clear chance to avoid injuring plaintiff by the exercise of ordinary care and fails to do so.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

3. Negligence ⇐83.

Basis for last clear chance doctrine is proximate cause, for whenever defendant has last clear chance to avoid injury by exercise of ordinary care, his negligence in failing to avail himself of such chance becomes proximate cause of injury, and plaintiff's negligence becomes remote, and mere condition in chain of causation.

4. Negligence ⇐83.

Last clear chance doctrine is exception to general rule that contributory negligence bars recovery, and unless all of elements calling for application of doctrine are present, negligence of injured person remains proximate cause of injury barring recovery.

5. Appeal and error ⇐1066.

Where there is no evidence from which it might be found that all of elements calling for application of last clear chance doctrine are present, it is reversible error to instruct jury with respect to doctrine.

6. Automobiles ⇐244(59).

Last clear chance doctrine *held* inapplicable under evidence in action for death of motorist in intersectional automobile collision (St. 1923, pp. 557, 558, §§ 122, 129, and § 130 as amended by St. 1925, p. 413).

Evidence disclosed that plaintiff's deceased, who was driving Ford automobile, approached intersection at same time that defendant driving Buick automobile approached intersection in opposite direction, and that the plaintiff turned left without giving any warning, that the distance from the point where the Ford automobile turned to the place of collision was 50 feet, and that the time required for such traveling was no more than 2 seconds, that the pavement at the time was wet, and that defendant applied brakes but could not avoid hitting side of Ford automobile, and that last chance which defendant had to avoid accident was not a clear chance, but a bare possible chance.

7. Negligence ⇐83.

Last clear chance doctrine should not be applied to ordinary case in which acts creating peril occurred practically simultaneously with happening of accident.

8. Automobiles ⇐246(38).

Refusing instruction that motorist had right to anticipate that defendant would re-

duce speed of his automobile to lawful and prudent rate when entering intersection *held* not error, where motorist was negligent in making left turn at intersection without giving warning (St. 1923, pp. 557, 558, §§ 122, 129, and § 130, as amended by St. 1925, p. 413).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Alinda Poncino, administratrix of the estate of Eugenio Poncino, against Reid-Murdoch & Co. and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Edwin H. Williams, of San Francisco, for appellant.

George L. Stewart and Jesse H. Miller, both of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff, as administratrix of the estate of the deceased, brought this action to recover damages for the death of the deceased. The cause was tried by the court sitting with a jury, and from a judgment on the verdict in favor of defendants, plaintiff appeals.

The accident in which deceased met his death occurred on April 16, 1928, at the intersection of Third street and Evans avenue in San Francisco. At this point Third street is 70 feet wide between curbs and Evans avenue is 50 feet wide between curbs. Third street runs in a general northerly and southerly direction, while Evans avenue runs in a general easterly and westerly direction. These thoroughfares intersect almost at right angles. The double tracks of the car line running along Third street are located in the middle of the street, one set of tracks being located on either side of and in close proximity to the center line thereof.

[1] Prior to the time of the accident, deceased was driving a Ford automobile in a southerly direction along Third street traveling in or near the south-bound tracks. At that time defendant Walker was driving a Buick automobile in the opposite direction along Third street traveling near the curb line on the east side thereof. Both cars entered the Evans avenue intersection at approximately the same time, and the accident happened when the deceased turned sharply to the left without giving any warning, increased his speed, and ran directly into the path of the oncoming Buick while "cutting the corner" to proceed in an easterly direction on Evans avenue.

The cause was tried upon the issues made by the pleadings relating to negligence on the part of the defendant Walker and contributory negligence on the part of the deceased. The jury was given the customary instructions upon said issues. The trial court refused, however, to give plaintiff's proposed instruction on the last clear chance doctrine and said refusal constitutes the main assignment of error on this appeal.

It is clear from the undisputed facts above set forth that the deceased was guilty of negligence as a matter of law. We believe this is apparent without reference to any of the provisions of the California Vehicle Act, but attention may be called to the fact that in making said turn, deceased violated many of the provisions of said act then in effect. California Vehicle Act (St. 1923, pp. 557, 558) §§ 122, 129, and section 130 (as amended by St. 1925, p. 413). Such negligence on the part of the deceased is conceded and we will not pause to discuss the subject further. The main question before us is whether there was any evidence upon which the jury could have found that defendant Walker had a last clear chance to avoid the collision by the use of ordinary care.

In support of her position appellant cites and relies upon Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915, and Center v. Yellow Cab Co., 216 Cal. 205, 13 P.(2d) 918. Appellant concludes from these authorities that, "The doctrine of 'continuous and concurrent' negligence has been exploded and rendered obsolete by the last decisions of the Supreme Court on this subject." We believe, however, that a careful analysis of said decisions demonstrates that they did not repudiate that doctrine, but expressly reaffirmed it. We need quote but a few excerpts from the decisions mentioned to show that the Supreme Court did not take the position claimed.

In Girdner v. Union Oil Co., supra, at page 201 of 216 Cal., 13 P.(2d) 915, 917, the court said: "This doctrine [referred to in the opinion as the continual negligence doctrine] is, like the doctrine of the last clear chance, based upon the particular facts of the case and is but a determination that the facts involved do not bring into operation the latter doctrine, but involve merely the ordinary and proximately contributory negligence which will bar recovery in any case. In other words, the doctrine as pronounced in the cases cited and relied upon generally, hold that the doctrine of last clear chance may not be invoked by a plaintiff to avoid his contributory negligence when the same has proximately contributed to his injury." On page 202 of 216 Cal., 13 P.(2d) 915, 917, the court said: "If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery." Again, on page 204 of 216 Cal., 13 P.(2d) 915, 918, we find the following: "If it [the doctrine of last clear chance] does not apply, his negligence remains proximate in its causation and will bar his recovery." In Center v. Yellow Cab Co., supra, the Supreme Court said, at page 207 of 216 Cal., 13 P.(2d) 918, 920: "If, on the other hand, any

of the elements of the doctrine are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery."

[2-5] What then are the elements which must be shown in order that the doctrine of the last clear chance may be relied upon? These elements have been frequently set forth in the decisions and are well settled. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36, 37; Darling v. Pacific Electric Railway Co., 197 Cal. 702, 242 P. 703; Chappell v. San Diego, etc., Railway Co., 201 Cal. 560, 258 P. 73. In Palmer v. Tschudy, supra, the court said, at page 700 of 191 Cal., 218 P. 36, 37: "The last clear chance rule presupposes: That the plaintiff has been negligent; that as a result thereof she is in a situation of danger from which she cannot escape by the exercise of ordinary care; that the defendant is aware of her dangerous situation under such circumstances that he realizes, or ought to realize, her inability to escape therefrom; that he *then* has a *clear chance* to avoid injuring her by the exercise of *ordinary* care, and fails to do so. If all of these elements are present, the rule applies and enables the plaintiff to recover, notwithstanding her own negligence. But if any of them be absent the rule does not apply, and the case is governed by the ordinary rules of negligence and contributory negligence." (Italics ours.)

Before giving further consideration to the facts in the present case, we may state that we believe that the very name of the doctrine under discussion is helpful in determining whether it may be applied to any given set of facts. It is designated as the *last clear chance* doctrine. In other words, it is not enough to relieve a plaintiff of his own negligence that the defendant may have had *a chance* to avoid the accident, but defendant must have had the *last chance* and also had a *clear chance* to do so by the exercise of *ordinary* care. That he should have had the *last chance* implies that his chance to avoid the accident must have come later in point of time than any similar chance on the part of the injured person. That he should have had a *clear chance* implies that he must have had more than a *bare possible chance* to avoid an unexpected peril created practically simultaneously with the happening of the accident by the negligence of the injured party. The doctrine had its origin in the humanitarian concept that a person should not be exonerated from liability when he has such *last clear chance* to avoid an injury, regardless of any negligence on the part of the injured person which may have brought the latter into a situation of danger from which he could not escape by the exercise of ordinary care. In many of the decisions the doctrine is based upon the theory that the acts of the defendant after observing the injured party's peril are willful or wanton. See 19 Cal. Jur. 653, and cases cited. A passing reference to this theory is found in the recent case of Girdner v. Union Oil Co., supra, on page 203 of 216 Cal., 13 P.(2d) 915, 917, where the court states that the law requires a person to respond in damages "for his willful act." We believe, however, that the true basis of the doctrine is that of proximate cause as indicated in many of the decisions for whenever a defendant has a *last clear chance* to avoid an injury by the exercise of ordinary care, his negligence in failing to avail himself of that *last clear chance* becomes, in the eyes of the law, the proximate cause of the injury and the negligence of the injured party becomes remote so as to constitute merely a condition in the chain of causation. Girdner v. Union Oil Co., supra; Center v. Yellow Cab Co., supra; 19 Cal. Jur. 653, and cases cited. As stated in the authorities cited, the last clear chance doctrine is essentially an exception to the general rule and unless all of its elements are present, the negligence of the injured person remains a proximate cause of the injury barring recovery. See, also, Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259. Furthermore, where there is no evidence from which it might be found that all of said elements are present, it is reversible error to instruct the jury with respect to said doctrine. Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. 117.

We shall now proceed to a further consideration of the evidence in the present case. The testimony relating to the speed of the two cars was conflicting. That offered by appellant tended to show that the deceased was driving about 15 miles per hour as he entered the intersection and that respondent Walker was traveling about 35 miles per hour. On the other hand, the testimony offered by respondents tended to show that deceased was traveling between 20 and 25 miles per hour and respondent Walker was traveling about 20 miles per hour. The diagram used by the witnesses in illustrating their testimony has been brought up as part of the record on this appeal. It shows that there was practically no conflict in the testimony relating to the course traveled by the Ford car or that relating to the point of collision. The diagram is drawn to scale and shows that the distance traveled by the Ford from the point where it turned sharply to the left to the point of collision was not more than 50 feet. A simple mathematical computation demonstrates that even if we take the testimony most favorable to appellant, the elapsed time between deceased's sudden turn to the left and the collision was approximately two seconds.

In an endeavor to show that respondent Walker had a last clear chance to avoid the collision after the deceased had started to turn, appellant produced an expert on the subject of the distances required to stop a car by

the application of brakes when traveling at various speeds. This expert testified that the Buick car could be stopped in 16 feet when traveling at 20 miles per hour and that it could be stopped in 45 to 50 feet when traveling at 35 miles per hour. On cross-examination he testified: "The stopping distances I have given are after the actual application of the brakes. If a driver suddenly saw an obstacle in front of him it would take him a certain length of time to take his foot off the throttle and apply the brakes. That time would vary according to the driver. It might be a split second and it might be a second or more. It probably would take a second to do that." It was stipulated that a car going 20 miles per hour travels 29 feet per second and that a car going 35 miles per hour travels 51 feet per second. One of appellant's witnesses testified "the street was a little wet at the time of the accident." Respondent Walker applied his brakes before the collision occurred, leaving skid marks on the street, but the application of the brakes did not prevent the collision. The front end of the Buick struck the side of the Ford.

[6] Under the evidence presented we are of the opinion that the trial court correctly refused appellant's proposed instruction on the last clear chance doctrine. It makes no difference for the purpose of this discussion whether the respondent Walker was driving 20 miles per hour or 35 miles per hour or whether he was at the property line or curb line of Evans avenue at the time the deceased made his sudden turn. He had but two seconds time within which to observe, think, and obtain effective action in his endeavor to escape the sudden peril created by the negligence of the deceased. Half of this brief space of time would have been consumed before the brakes could actually be applied and there was no testimony to show the distance required to stop the car after the actual application of the brakes upon a street which was "a little wet." But assuming that an expert, or even a nonexpert, could have stopped a Buick car under the existing conditions within the distances specified after the brakes were actually applied, we believe that the evidence was entirely insufficient to warrant the giving of the proposed instruction. If, as claimed by appellant, respondent Walker could have stopped or turned to avoid said collision, the deceased could likewise have stopped or turned for that purpose. In fact, the deceased, who was driving at a lower speed according to the testimony offered by appellant, had a better chance to avoid the collision by so doing than did respondent Walker, but the deceased merely speeded up his car in an endeavor to beat the Buick out of the intersection. Under any view of the evidence it certainly cannot be said that the chance, if any, which respondent Walker had to avoid the injury came later in point of time than any similar chance on the part of the deceased. In other words, respondent Walker did not have the *last chance*. Furthermore, it does not appear that respondent Walker had a *clear chance*. The negligence of the deceased which created the peril occurred almost simultaneously with the happening of the accident and the deceased was actively at fault throughout the brief interval remaining. We have already indicated that the entire time for observation, thought, and action on the part of the respondent Walker after the peril was created by the negligence of deceased was but two seconds and the chance, if any, had by respondent Walker could not be said to be anything more than a *bare possible chance* falling far short of a *clear chance* to avoid the collision. All of the evidence showed that the present case fell within the general rule rather than the exception, and we believe that the trial court would have been justified in directing a verdict in favor of respondents in view of the admitted negligence on the part of the deceased. Dealing with the general rule and the exception found in the last clear chance doctrine, the Supreme Court said in Young v. Southern Pacific Co., 189 Cal. 746, at page 755, 210 P. 259, 262: "This exception to the general rule, however, has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury."

The cases of Girdner v. Union Oil Co., supra, and Center v. Yellow Cab Co., supra, are clearly distinguishable on their facts. In each of those cases the injured person was wholly unaware of his peril while the defendant was not only aware of the peril, but knew that the injured person was unaware thereof. Therefore, the chance which the defendant had to avoid the injury was the *last chance* to the exclusion of any similar chance then had by the injured person. Whether the defendant had a *clear chance* in either of said cases to avoid the injury after knowing of the injured person's peril was held to be a question of fact under the particular circumstances involved. On the question of *clear chance* we believe that these authorities are border-line cases and should not be extended beyond the point required by the testimony before the court in those cases. We have already stated that the testimony in the present case showed that a moving vehicle travels an appreciable distance before the brakes can be applied after the danger is apprehended. No such testimony appears in the cases above mentioned. Accepting the testimony of appellant's own witness for the purpose of this discussion, it shows the probability that one second is required for the application of brakes after the danger is apprehended. If this be true (and certainly a driver cannot be said to have a *clear chance* to observe, think

and act in any shorter space of time), then a car traveling at any of the speeds found in the testimony in the present case would travel a greater distance in the brief interval from the time the danger is apprehended until the time the brakes are applied than it would travel in the brief interval from the time the brakes are applied until the time the car is stopped. It is therefore apparent that the testimony here negatived the existence of any *clear chance* on the part of respondent Walker to avoid the collision by the use of ordinary care after the peril was created.

[7] Appellant also cites Berguin v. Pacific Electric Railway Co., 203 Cal. 116, 263 P. 220; Winn v. Long, 203 Cal. 758, 265 P. 805; Chappell v. San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73; Darling v. Pacific Electric Railway Co., 197 Cal. 702, 242 P. 703; and Pair v. Hammond Lumber Co., 111 Cal. App. 426, 295 P. 581. These authorities are all distinguishable. In each of said cases there was ample testimony to show that the defendant had the *last chance* to avoid the injury to the exclusion of any similar chance on the part of the injured person. Appellant also cites Galwey v. Pacific Auto Stages, Inc., 96 Cal. App. 169, 273 P. 866, but the court points out on page 177 of 96 Cal. App., 273 P. 866, 869, that there was evidence from which it could be inferred that the driver saw the peril of the child when 150 feet distant from the point of the accident. In Howard v. Worthington, 50 Cal. App. 556, 195 P. 709, which is also cited by appellant, the facts are not set forth in detail in the opinion, but on pages 558 and 559 of 50 Cal. App., 195 P. 709, 710, the court states that there was evidence to show "that the defendant could have stopped his machine in time to avoid the accident, but *voluntarily* did not do so." (Italics ours.) We do not believe that any of said cases are similar on their facts to the case before us. Here the cars were approaching each other in broad daylight without any indication whatever of danger until the deceased suddenly turned his car to the left and into the path of the car driven by the respondent Walker. Like many other cases involving collisions between moving vehicles, the accident may be said to have happened within the twinkling of an eye after the first indication of danger. While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes contributory negligence a bar to recovery.

[8] Appellant further contends that the trial court erred in refusing an instruction to the effect that the deceased "had the right to anticipate that Walker would reduce the speed of his car to a lawful and prudent rate when he entered the intersection." We are of the opinion that said instruction was properly refused in view of the admitted negligence on the part of the deceased. Roller v. Daleys, Incorporated (Cal. Sup.) 28 P.(2d) 345; White v. Davis, 103 Cal. App. 531, 284 P. 1086; McPherson v. Walling, 58 Cal. App. 563, 209 P. 209.

The only remaining contention is that "the uncontradicted evidence showed as a matter of law that Walker was acting within the scope of his employment at the time of the accident." We need not discuss this contention, for it is conceded that the point raised could only become material in the event of a reversal on the grounds hereinbefore discussed.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

136 Cal.App. 385

PEOPLE v. KASCH.

Cr. 1315.

District Court of Appeal, Third District, California.

Jan. 25, 1934.

1. Criminal law ⇐260(11).

It is not appellate court's province to determine weight of evidence or witnesses' credibility; that responsibility resting on trial judge.

2. Criminal law ⇐260(11).

Where witness' veracity is involved, appellate court must be guided largely by trial court's findings.

3. Criminal law ⇐747, 1159(3).

Conflicting evidence as to accused's identity presents question wholly within province of jury, whose conclusion will not be disturbed on appeal.

4. False pretenses ⇐49(3).

Evidence *held* sufficient to support trial court's finding of defendant's guilt of issuing check without sufficient funds or credit at drawee bank with intent to defraud.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Benjamin Kasch was convicted of issuing a check on a bank, at which he had insufficient funds or credit, with intent to defraud, and he appeals.

Affirmed.

J. O. Stemmler, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was charged in an information of the crime of issuing a check for the payment of money on a bank without having sufficient funds or credit thereat, with intent to defraud.

A plea of not guilty was interposed, a jury waived, and the issue of the guilt or innocence of the accused was tried before the court, and the defendant found guilty as charged. A motion for a new trial was presented and denied. The defendant now prosecutes this appeal from the judgment and the order denying that motion.

The defense was an alibi, and the testimony is sharply conflicting and irreconcilable. It is the contention of appellant that the evidence adduced by the prosecution does not establish the guilt of the defendant to a moral certainty and beyond a reasonable doubt, but on the other hand establishes the innocence of the defendant.

W. H. Davis, the complaining witness, testified that on Saturday, August 12, 1933, between the hours of 8:30 and 9 o'clock in the evening, a man whom he identified as the defendant called at his house and arranged for the purchase and delivery of certain chicks. Upon that occasion they were together about fifteen minutes, part of that time being in a well-lighted brooder house. According to the arrangements, the prospective buyer returned the following morning about 6 o'clock, and the chicks were then crated and delivered. At that time the complaining witness and the man whom he identified as the defendant were together approximately an hour selecting the chicks and constructing the crates in which they were taken away. Mr. Davis identified the defendant as the man who called upon him on these two occasions, and who delivered to him a check in payment of the chicks, which upon presentation was found to be fictitious.

To prove a scheme or design, the district attorney called J. G. H. Hill, who testified that a man whom he identified as the defendant called upon him and attempted to purchase some chicks, but, when he attempted to pay for the same with a check, Mr. Hill refused to sell, and the deal was off. He fixes the hour at about 11 o'clock in the forenoon and the date either a Tuesday or a Wednesday, a few days after a certain Saturday near the middle of the month. Later in his testimony he concluded the Saturday he had in mind was the 12th day of August, and that the transaction above narrated took place probably on Tuesday, August 15th.

Another witness, L. G. Goulden was also called. He testified a man whom he identified as the defendant called at his place about 8 o'clock on the evening of August 18th, and took delivery of certain chicks and paid for them with a check, later found to be fictitious, signing the name "J. Wright" thereto. At that time the witness spent about a half hour with "J. Wright" in selecting the chicks and closing the transaction.

John Ferrell, who lived at the Goulden home, identified the defendant as the man who delivered the check to Mr. Goulden, and also as the same man who between 1 and 2 o'clock p. m. on August 18th, called and selected certain chicks and spent perhaps a half hour with the witness, and then arranged to return that evening and take them away.

Mrs. Goulden, wife of L. G. Goulden, identified the defendant as the man whom she saw at their place on August 18th.

Upon the part of the defense there was called five witnesses who were acquainted with defendant in varying degrees, who testified as positively he was at a certain garage in Modesto on the evening of August 12th, between the hours of 6 and 10 o'clock, where his car was being repaired, and in a like manner other witnesses were called who accounted for the presence of the defendant in the city jail at Stockton, and in Oakland, Vallejo, and Sacramento, upon the several dates referred to by the witnesses for the people.

[1, 2] It is not the province of this court to determine the weight of the evidence nor the credibility of the witnesses; that responsibility rests upon the trial judge who had ample opportunity to observe the witnesses upon the stand and to consider the worth of their testimony; and again, upon the motion for a new trial, he had the opportunity of again reviewing the facts and again determining where the truth lay. Where the veracity of a witness is involved, the cold record as presented to this court on appeal is of but little assistance. We must be guided largely by the findings of the trial court.

[3] As was said in the case of People v. Seawright, 72 Cal. App. 414, 237 P. 796, 797: "A conflict of evidence as to the identity of one on trial accused of having committed an offense presents a question wholly within the province of the jury, and their conclusion will not be disturbed upon appeal."

On the question of identification it was said in People v. Farrington, 213 Cal. 463, 2 P.(2d) 814, 815: "The strength or weakness of the

identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction."

[4] As the trial judge said in his summation at the conclusion of this trial:

"The question to be determined by the court is one of fact, namely, did the defendant Benjamin Kasch write and pass, People's Exhibit 1, a check payable to Davis Hatchery and signed by one J. P. Kelley. * * * The writing, of course, is not conclusive in this case. There are, however, certain characteristics to which the court will call attention. The maker of the check designated as People's Exhibit 1 apparently experienced some difficulty in his up-strokes. (Here the trial court went into an analysis of various letters and figures in the exemplars before him, then concluded that the handwriting, although indicative of guilt, was not conclusive.) * * * What seems to the court to be a singular circumstance but by no means conclusive is the various kinds of letters the defendant made in the handwriting in People's Exhibit 3 (exemplars). I can see no occasion myself when a man is called upon to furnish an example of his handwriting, why he should vary that handwriting so many times in five lines; it may be due to nervousness on his part but more likely due to a conscious effort to disguise his writing.

"The court entertains some doubt of this man's guilt and I dare say a great many juries in deliberating from time to time on criminal cases entertain some doubt, but that is not the test. The test is: Is it a reasonable doubt? All human affairs, being dependent upon moral evidence, are open to more or less doubt, but is a doubt a reasonable doubt?

"Now, some four or five witnesses in this cause all appearing to the court as being disinterested, have positively identified this defendant as being the man who mulcted various poultry raisers in this county of small sums of money. I can believe from my long experience that one man or two men might be mistaken in their identification of this defendant, but I cannot believe that four or five or six men could be mistaken about a positive identification of this defendant. Counsel will recall that the court, in a somewhat informal manner, called the attention of these identifying witnesses to the responsibility they took in going upon the stand and identifying this man with the result that he might be incarcerated in prison, both older men, and both of those witnesses after this admonition steadfastly maintained that this man was the man who had passed the checks."

Counsel for defendant urges that the people have not established the guilt of the defendant to a moral certainty and beyond a reasonable doubt. That again brings us to the weight and credibility of the witnesses. If they were entitled to full faith and credit, then the crime was amply proved, and we must accept the conclusion of the trial judge as to the degree of credibility to be attached to their testimony.

There is no issue of law involved, the entire argument of counsel going to the weight and credibility of the witnesses, and, as before stated, that is a matter within the province of the trial court. There being ample testimony to support the conclusion and finding of the court, the judgment and order must be affirmed.

It is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

136 Cal.App. 434

NORTH v. EVANS.

Civ. 1098.

District Court of Appeal, Fourth District, California.

Jan. 26, 1934.

1. Appeal and error ⇐800.

Appeal will not be dismissed for failure to duly file points and authorities, on motion presented after appellant filed brief.

2. Appeal and error ⇐554(2).

Appeal, presented on judgment roll alone, will not be dismissed for failure to file bill of exceptions (Code Civ. Proc. § 670).

3. Appeal and error ⇐903.

Rebuttable presumption exists that judgment roll consists of documents stated to be correct, but not stated to constitute judgment roll in county clerk's certificate attached to transcript containing documents necessary to comply with statute which specifies what shall constitute judgment roll (Code Civ. Proc. § 670).

4. Appeal and error ⇐786.

Appeal will not be dismissed because it is frivolous, where appellee admitted that one ground therefor was well taken.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by C. C. North against Lillian E. Evans. From the judgment, defendant appeals, and plaintiff files a motion to dismiss the appeal.

Motion denied.

Frank J. Macomber, of San Diego, for appellant.

S. G. North, of San Diego, for respondent.

JENNINGS, Justice.

Motion by respondent to dismiss appeal. On October 9, 1933, respondent gave notice that on November 13, 1933, a motion to dismiss the appeal would be presented. The grounds for the motion were stated to be, first, failure of appellant to file points and authorities within the time prescribed by the rules of this court; and, second, failure of appellant to cause a bill of exceptions to be prepared and settled. On October 31, 1933, appellant filed her opening brief. The regular calendar day of this court for the month of November, 1933, was Tuesday, November 14th, and, respondent not having noticed the motion for hearing on said date, it was not placed on the calendar, which was heard on November 14, 1933. On November 22, 1933, respondent gave notice that on December 12, 1933, a supplemental motion to dismiss the appeal would be presented. The notice stated that the motion for dismissal of the appeal would be based upon the grounds set forth in the motion which was filed in October and upon the grounds set out in the supplemental motion filed on November 22, 1933. The additional grounds stated in the supplemental motion are that appellant's opening brief shows on its face that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument, and that the appeal was taken solely for the purpose of delay. The motion was presented on December 12, 1933.

[1-3] It is our opinion that the motion may not be granted for the reasons urged. The records of this court show that appellant's opening brief was filed on October 31, 1933. At the time the motion was presented, therefore, the brief was on file, and it has generally been held that, when a motion for dismissal of an appeal is made on the ground of failure of the appellant to file points and authorities within the prescribed time, the motion will be denied if, at time of hearing, it appears that the brief is then on file. Fishman v. Silva, 108 Cal. App. 121, 291 P. 430; Tyner v. Axt, 111 Cal. App. 187, 295 P. 97; Toth v. Metropolitan Life Ins. Co., 113 Cal. App. 55, 297 P. 564. The failure to file a bill of exceptions is not a valid ground for the motion to dismiss the appeal for the reason that this appeal is not presented on a bill of exceptions. It is evidently presented on the judgment roll alone. Although the certificate of the county clerk which is attached to the transcript on appeal fails to state that copies of the pleadings, findings of the court, and judgment contained therein constitute the judgment roll, it does state that they are full, true, and correct copies of the papers on file in his office. Section 670 of the Code of Civil Procedure specifies what documents shall constitute the judgment roll, and the transcript herein appears to contain the documents necessary to comply with its requirements. In any event, in the absence of any showing to the contrary, we are entitled to presume that the documents mentioned in the clerk's certificate are those which constitute the judgment roll. O'Shea v. Wilkinson, 95 Cal. 454, 30 P. 588.

[4] The contention that the appeal should be dismissed for the reason that appellant's brief now on file shows that the questions upon which the decision of the cause depends are so unsubstantial as to require no further argument is answered by respondent's express admission, for the purposes of this motion, that the amount of recovery allowed by the judgment shall be reduced by the total amount of attorney's fees included in the judgment. This is one of the points relied upon by appellant for reversal of the judgment, and respondent's concession that, for the purposes of this motion, it is well taken, and should be sustained, carries a complete refutation of respondent's contention that the appeal is frivolous.

The motion to dismiss the appeal is therefore denied.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 411

ZUVER et al. v. GENERAL DEVELOPMENT CO. et al.

Civ. 5041.

District Court of Appeal, Third District, California.

Jan. 26, 1934.

1. Appeal and error ⇐957(1).

Exercise of discretion in overruling motion to set aside default judgment will not be disturbed, where affidavits were conflicting on essential facts (Code Civ. Proc. § 473).

2. Judgment ⇐163.

Credibility of affiants who executed affidavits supporting motion to set aside default judgment, and weight of evidence, are questions exclusively for trial judge (Code Civ. Proc. § 473).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Judgment ⇐143(10).

Overruling motion to vacate default judgment entered after defendants' attorneys, duly notified, failed to appear, *held* not abuse of discretion (Code Civ. Proc. § 473).

Appeal from Superior Court, Los Angeles County; H. D. Gregory, Judge.

Action by C. R. Zuver and wife, and another, against the General Development Company and others. From a judgment in favor of the plaintiffs, and from an order refusing to set aside a default judgment entered against it, the McCabe-Fewel & Co. appeals.

Judgment and order affirmed.

Knight & Reynolds, of Los Angeles, for appellant.

Clarence P. Wallick and John J. Selover, both of Long Beach, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a final judgment of rescission and from an order refusing to set aside a default judgment which was entered against the appellant for failure to appear at the trial of the case.

The plaintiffs executed an agreement with the General Development Company to purchase lots 1 and 2, block 5, tract 10263 in Los Angeles county. In payment for this property two promissory notes secured by trust deeds upon the lots were executed. One of these notes and trust deeds was transferred to the appellant. The plaintiffs took possession of the property and expended considerable money in making improvements. A suit was subsequently commenced against the General Development Company, the appellant and other defendants, to cancel the agreement, together with the trust deeds and notes on the ground of fraud. Damages for the cost of improvements were also sought. It was alleged the appellant claimed to be the owner and holder of one of the trust deeds and notes, but that these instruments had been transferred to it without consideration. The appellant filed an answer alleging that it was the bona fide owner and holder of that particular trust deed and note as the purchaser thereof for a valuable consideration. On information and belief the alleged fraud was also denied. Three other suits involving the same property were pending in Los Angeles county. They were consolidated with this case for trial. The consolidated cases were originally set for trial for July 7, 1931. On motion of counsel for plaintiffs the causes were continued to July 13th, at which time the trial began, but lasted for several weeks. The attorneys for the appellant were duly notified of the time and place of trial, but failed to appear or participate therein. On motion of plaintiffs the default of the appellant was duly entered in open court on July 23d. A judgment by default was accordingly rendered. The appellant subsequently moved to set aside this default judgment under the provisions of section 473 of the Code of Civil Procedure. The motion was supported by the affidavit of Robert W. Cooper, one of the attorneys for appellant. Counter affidavits were filed by the plaintiffs. On August 8, 1931, the motion to set aside the default judgment was denied. From this order and from the judgment of rescission which was subsequently rendered and entered, this appeal was perfected.

[1, 2] The affidavits which were presented for and against the motion to set aside the default judgment were conflicting with respect to the essential facts related. Since the evidence is conflicting upon which the motion to set aside the default judgment was denied, this court may not interfere with the discretion of the trial court with respect thereto. Waybright v. Anderson, 200 Cal. 374, 253 P. 148; Taranto v. Dick, 119 Cal. App. 161, 6 P.(2d) 334; Brown v. De Waard & Sons, 99 Cal. App. 222, 278 P. 257; 14 Cal. Jur., p. 1072, § 115. It was exclusively the province of the trial judge to determine the credibility of affiants and the weight of the evidence adduced. Sheehan v. Osborn, 138 Cal. 512, 515, 71 P. 622; Smith v. Pickwick Stages System, 113 Cal. App. 118, 297 P. 940. Regarding the effect of conflicting affidavits upon an order denying a motion to set aside a default judgment, it is said in Williams v. Reed, 43 Cal. App. 425, 431, 185 P. 515, 518:

"Thus, we see that a very sharp and decided conflict as to the questions presented was present. Under these conditions, we are powerless to interfere with the conclusion of the trial court herein. The rule is, as it has been so frequently stated, both by the Supreme Court, as well as by this court, that 'in the consideration of an appeal from an order made upon affidavits, etc., involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be taken as established.' Doak v. Bruson, 152 Cal. 17, 91 P. 1001; Hyde v. Boyle, 105 Cal. 102, 38 P. 643; Bernou v. Bernou, 15 Cal. App. 341, 114 P. 1000. Under these circumstances, it is immaterial whether or not there was an affidavit of merits which complied with the legal requirements."

[3] In opposition to the motion to vacate the default judgment, Mr. Selover, one of the plaintiffs' attorneys, filed an affidavit,

in which it was asserted that affiant notified one of the attorneys for the appellant on July 6, 1931, that the cases would be continued for trial to July 13th, and that the evidence in this case would not be presented until after proof affecting the other consolidated cases had been adduced; that appellant's counsel would be subsequently notified of the exact time upon which its case would be heard; that a letter was subsequently mailed to appellant's attorney specifying that particular date; that on July 14th, during the process of the trial, affiant had a conversation with Mr. Cooper, one of appellant's attorneys, "in which conversation Robert W. Cooper informed affiant that he did not believe that the McCabe-Fewel Company desired to go to any expense in reference to the trial of said action, and that if affiant would address a letter to said Robert W. Cooper informing them that the plaintiff would not take a money judgment against his client, that he would not appear at the trial and contest the action"; that a letter was promptly sent to the said Cooper assuring him that a money judgment would not be taken against the appellant. On July 23d, without further notice, on application of the plaintiffs, the default of the appellant was entered. No appearance was made in behalf of the appellant until after default had been entered. It appears without contradiction that no money judgment was rendered against the appellant. The general judgment affected the appellant only to the extent of rescinding and canceling the trust deed and note which it claimed to own. In the affidavit of Mr. Cooper, which was filed in support of the motion to vacate the default judgment, it was admitted appellant had due notice of the time and place of trial of the consolidated cases, but it was averred that plaintiffs' attorneys suggested it would be unnecessary for appellant's attorneys to be present during the entire trial of the cases and they would be notified of the particular time when the evidence in this case would be presented. Mr. Cooper also averred that he inquired of Mr. Selover on July 14th whether plaintiffs intended to ask for a money judgment against the appellant, and that he was informed they had no intention of doing so, but, upon the contrary, that they would merely ask to rescind their note and mortgage. Neither in this affidavit nor elsewhere has the appellant contradicted the positive assertion of the plaintiffs' attorney that Mr. Cooper said in the conversation which occurred between them on July 14th that, if appellant was assured in writing that no money judgment would be taken against it, "he would not appear at the trial and contest the action." The fact that the trial of the consolidated cases lasted for nine days after this conversation, during which time the appellant's attorney made no further inquiry regarding the case in which he was interested, and made no appearance in court, and that no money judgment was in fact rendered against the appellant, furnishes corroboration of the assertion that appellant's attorney did agree not to appear or contest the case if he was assured in writing that no money judgment would be taken against his client. In fact, that statement is not contradicted. This record warranted the trial court in assuming that the appellant did not intend to appear at the trial provided it was assured a money judgment was not sought against it, and that it was not in good faith in subsequently seeking to set the default judgment aside. There appears to have been no abuse of discretion on the part of the trial court in denying the motion to vacate the default judgment.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

MORTENSEN v. FAIRBANKS et al.*

Civ. 8101.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1934.

Hearing Granted by Supreme Court March 22, 1934.

1. Trial ⇐194(16).

Instruction, in substance, that automobile driver, placed in position of danger by defendant's negligent speed, would not be contributorily negligent if, in effort to extricate himself from danger, he failed to act as careful and prudent person, *held* not improper as taking question of fact from jury.

2. Trial ⇐194(16).

Instruction, in substance, that automobile driver first entering street intersection may assume that another, under duty to yield right of way, will slacken speed and permit first car to proceed, *held* not improper as taking from jury question of contributory negligence.

3. Automobiles ⇐225.

Automobile driver, suddenly confronted with unexpected danger, without fault on his part, need only use such means for avoiding danger as would be used by person of ordinary prudence.

4. Trial ⇐295(1).

Instructions must be read as a whole, and considered in connection with each other in passing on propriety thereof.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 35 P.2d 1030.

5. Trial ⇐295(1).

Where instructions, when read as whole, harmonize and fairly state law, fact that isolated phrase or separate instruction does not contain all of conditions and limitations contained in charge as whole does not warrant reversal.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Le Vaughn L. Mortensen against Cornelia Fairbanks and others. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellants.

Wheeler & Wackerbarth and Henry E. Carter, all of Los Angeles, for respondent.

CRAIG, Justice.

Upon the trial of an alleged cause for damages arising from the meeting of automobiles at an intersection of thoroughfares in the city of Los Angeles, a verdict and judgment were awarded the plaintiff, from which the defendants appealed.

[1-5] There was evidence from which the jury could have concluded that the plaintiff first entered a five-point intersection, and that the defendants drove from a distance to the rear and collided with the car of the plaintiff without lessening speed. Two instructions given by the trial court are questioned. One directed that, if the jury should find from the evidence that the plaintiff entered the intersection in a lawful manner and at a lawful speed, and after so entering he observed for the first time that he was placed in a position of apparent danger by the defendants and as a result of the latter driving in an unlawful manner at an unlawful rate of speed, and if they should find that in an effort to extricate himself from such danger the plaintiff failed to act in such a manner as a careful and prudent person would have done under the circumstances, then he was not negligent or guilty of contributory negligence in driving ahead in an effort to get out of the path of the car driven by the defendants. It is asserted that by this the jury were told that under certain circumstances the plaintiff was not required to exercise reasonable care, and that the last clause took from the jury the determination of a question of fact. It is not clear from the appellants' argument as to how by an instruction that, if the plaintiff had failed in a position of danger to act as a careful and prudent person would have done, it was error to instruct also that he would not be negligent in electing between alternatives for his safety thereafter, or that the jury would be required to conclude that he need not exercise reasonable care. The definition and application of the rule as to the care required of a reasonable and prudent person under like circumstances appeared at least nine times in the instructions. By their verdict adversely to the defendants' contentions it must be assumed that the jury determined that the plaintiff had not failed to act in such manner as a careful and prudent person would have acted under like circumstances. Since they did not find that the "plaintiff failed to act in such manner as a careful and prudent person would have done under the circumstances," the hypothesis for plaintiff's argument is absent, and the fact, if assumed in the last clause of the instruction, becomes immaterial. Carefully reviewing the facts of the case and the law applicable thereto, the jury were also instructed that one first entering an intersection may assume that another some distance away, whose duty it is to yield the right of way, will slacken his speed and permit the first car to proceed, and that they might so find if such were found to be the case. This is criticized as taking from the jury the question whether or not the plaintiff was negligent in attempting to cross in view of the facts assumed by the court. Citations of instructions ignoring the question of contributory negligence and without supporting instructions tending to cure such defect do not require the conclusion contended for. No isolated phase of the case was here left to stand alone in the full and complete instructions given upon negligence or contributory negligence, as was said of the cases cited. And the jury were plainly instructed that they were "not to single out a certain sentence, or an individual instruction, but you are to consider all of the instructions together and as a whole, and you are to harmonize them so far as it is possible for you to do." This has been held to be the rule, and the instructions cannot be said to have been insufficient in this respect. Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 P. 976. This being true, the jury cannot be assumed to have rendered a verdict in disregard of the instructions upon the question of care required of each of the parties. "A person suddenly confronted with an unexpected danger, without any fault on his part, is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence, and he is not held to that strict accountability which would require that the course chosen be the most judicious one." Carnahan v. Motor Transit Co., 65 Cal. App. 402, 224 P. 143, 146. "The plaintiff in an effort to avoid the threatened collision speeded up his machine and turned at an angle to the left. That he cannot be held as a matter of law guilty of negligence in doing this is clear from the well-established rule that one suddenly confronted with an unexpected danger may use such means for

avoiding the danger as would appeal to a person of ordinary prudence in a like situation without being held to strict accountability as to whether the course chosen is the most judicious or not. Schneider v. Market St. Ry., 134 Cal. 482, 490, 66 P. 734." McPhee v. Lavin, 183 Cal. 264, 191 P. 23, 24. Instructions must be read as a whole, and considered in connection with each other. If, when so read, they harmonize and fairly state the law, a reversal may not be had because an isolated phrase or separate instruction does not contain all of the conditions and limitations to be gathered from the whole charge. Dolan v. Sierra Ry. Co., 135 Cal. 435, 67 P. 686. The rule was recognized and applied by this court in denying a petition for a rehearing in Hellman v. Los Angeles Ry. Corp. (Cal. App.) 28 P.(2d) 384, recently decided.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

136 Cal.App. 337

PEOPLE v. BEATCHER.

Cr. 2413.

District Court of Appeal, Second District, Division 1, California.

Jan. 23, 1934.

1. Criminal law ⇐1141(2).

Defendant appealing from order denying motion for new trial must show affirmatively that trial court abused his discretion in consideration of motion and decision thereon.

2. Criminal law ⇐954(1).

Accused's statement to trial court that he moved for new trial on all statutory grounds without argument or suggestion of reason for granting motion did not justify grant of new trial.

3. Criminal law ⇐954(1).

Upon motion for new trial, trial court must be given opportunity to consider and determine definite claim on which motion depends, before court of appeal will review order denying motion.

4. Criminal law ⇐954(1).

Motion for new trial on ground that evidence was insufficient for conviction should have pointed out facts relied on and results to which they pointed.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Fred A. Beatcher was convicted of an offense and from an order denying his motion for new trial, he appeals.

Affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

YORK, Justice.

This is an appeal from the order denying defendant's motion for a new trial. As stated by appellant:

"This appeal involves the following questions of law, to-wit:

"(1) The evidence was insufficient to sustain a finding of guilty by the Court.

"(2) The finding of guilty was contrary to law and contrary to the evidence for the reason above stated.

"(3) The court erred in denying defendant's motion for a new trial."

An examination of the entire record discloses a conflict in the evidence. The defendant was found guilty by the court, sitting without a jury, as to counts 1 and 2 of the information, and not guilty as to count 3. No sentence was imposed by the court, because of an application for probation, which was granted.

An examination of the evidence discloses the fact that there was sufficient evidence to justify the finding of guilty on the two counts specified. This disposes of points one and two made by appellant. As to point three, that the court erred in denying defendant's motion for a new trial, we find no abuse of discretion in the court's order. No question is raised by appellant that is not answered by the statement that there was sufficient evidence to support a conviction.

The order is affirmed.

CONREY, Presiding Justice.

I concur in the judgment. Without duplicating the extensive examination of the record which has been made by Mr. Justice York, I think that the order should be affirmed for yet another reason.

Defendant's claim that the decision against him was contrary to the evidence was not actually and definitely presented to the trial court for decision. I will here state the entire record of the proceeding on motion for a new trial. The minutes of the court as shown in the clerk's transcript show that on May 24, 1933, "Defendant's oral motion for a new trial is denied." The report-

er's transcript of the case for the same day, on the same subject, reads as follows: "Mr. Cochran: At this time, may it please the court, I desire on behalf of the defendant, and defendant does, to make oral motion for new trial, on all the statutory grounds, and submit it without argument. The Court: Motion denied."

[1-4] I would not here contend that upon a motion for new trial thus presented, the court would have been without jurisdictional authority to grant that motion and order a new trial. But when the defendant appeals from an order denying such motion, it is incumbent upon him to show affirmatively that in the trial court's consideration of the motion and decision thereon there was some abuse of discretion. The bald statement to the trial court that the defendant made his motion for new trial "on all the statutory grounds," without argument and without suggestion of any definite reason for granting the motion, did not fairly and reasonably call for decision upon any indicated question in the case. Essentially, it failed to bring to the attention of the court any one reason why a new trial should be granted. The motion was just a general appeal to the world of legal possibilities. Although courts of appeal are created to review and correct errors of trial courts, the law intends (so I believe), that upon a motion for a new trial, the trial court shall be given an opportunity to consider and determine some definite question or claim on which the motion depends, before a court of appeal will be required to review an order denying the motion. In this case if, by critical examination of the complicated and very long record, it could be demonstrated that the evidence was not sufficient to prove that any crime was committed, the facts relied upon, and the results to which they point, should have been brought to the attention of the court below.

I concur: HOUSER, J.

136 Cal.App. 144

HILL v. PERES.

Civ. 8865.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1934.

Hearing Denied by Supreme Court March 2, 1934.

1. Automobiles ⇐245(79).

Whether motorist was negligent in turning to left side of highway when another automobile approached rapidly from opposite direction diagonally across his path, *held* for jury (St. 1931, pp. 2124, 2125, §§ 122(a), 124(a).

2. Death ⇐99(3).

$7,500 to 56 year old parent for death of 10 year old daughter who was healthy, normal, and affectionate child *held* not excessive (Code Civ. Proc. § 377).

Appeal from Superior Court, Contra Costa County; H. S. Gans, Judge.

Action by John Hill against Edward A. Peres. Judgment for plaintiff, and defendant appeals.

Affirmed.

Colding, Hale, Crawford & Myers, of San Francisco, for appellant.

Tinning & De Lap, of Martinez, for respondent.

OGDEN, Justice pro tem.

This is an appeal from a judgment awarding damages for the death of Elizabeth Hill, the minor daughter of respondent, resulting from injuries received in an automobile accident. The cause was tried with a jury, which rendered its verdict in the sum of $7,833.

Shortly after 10 o'clock p. m. of the evening of January 24, 1932, respondent, driving a Ford coach, with his wife and their three minor children as passengers, was proceeding in an easterly direction along Cutting boulevard in the city of Richmond. Cutting boulevard, at the point where the accident occurred and for a considerable distance in either direction, is a level paved highway, 61 feet in width, bounded by 14-inch curbs. It runs in a general easterly and westerly direction, being perfectly straight except at a point approximately 1,000 feet east of that of the accident, where it "jogs" slightly to the south and then continues in the same previous general direction, but deviating slightly to the north. The accident occurred, although within the city limits of Richmond, neither in a business nor residence district as defined in the California Vehicle Act (St. 1923, p. 517, as amended).

The testimony of respondent and two of his children, the only survivors of the accident who were in the Hill car, indicates that respondent first observed the headlights of the automobile driven by appellant, an Auburn sedan in which he was riding alone, when it was at a distance equal to about three ordinary city blocks away approaching from the east on the same highway; that, although when first observed it was apparently on its right (the north) side of the road, as it approached it "zig-zagged" across the highway

to the south side until directly in the path of respondent's car and between 150 and 200 feet away, when the latter turned sharply to his left in order to permit appellant to pass on his right. Unfortunately, at about the same instant, appellant also turned to his right with the result that the two cars came into violent collision on the north side of the highway, throwing respondent and his wife out of the car and inflicting upon their daughter Elizabeth the injuries from which she died the following day.

The tire marks on the pavement show that just prior to the turn to the north by both automobiles they were headed directly toward each other, respondent's car being 19 feet and appellant's car 19 feet and 2 inches north of the south curb. They also indicate that the turn to the left made by respondent was quite abrupt, being only 39 feet from the commencement of the turn to the point of impact, while that made by appellant was more gradual, being 110 feet in length. Respondent testified that he was driving at a speed of about 30 miles per hour immediately prior to turning to the left and appellant estimated his speed at about 30 to 35 miles per hour. However, the jury might reasonably have attributed a much higher rate of speed to appellant's car, not only from the length of the skid marks made by it, but from the force of the impact, which turned the Hill car completely around so that it came to rest 35 to 40 feet, and facing in the opposite direction. It is admitted that it was a clear moonlight night, the pavement being perfectly dry, and that both drivers were familiar with the highway.

Appellant suggests that the accident was unavoidable, thus preventing a recovery by either party. He fails, however, to point out why two drivers of motor vehicles approaching each other along such a broad straightaway are each unable to avoid a collision if both are exercising that degree of care and prudence which the law requires. Likewise his suggestion that his appearance of being on the wrong side of the highway was merely an optical illusion due to the "jog" in the highway is without merit in view of the evidence of his tire marks, which indisputably shows him to have been there and the testimony of respondent, which indicates that it was after his car had passed the "jog" that appellant cut across to his left side of the road. That immediately prior to the accident appellant was driving his car on his left side of the highway without any justification therefor in violation of section 122(a) of the California Vehicle Act (St. 1923, p. 557, as amended by St. 1931, p. 2124, § 41) cannot be seriously disputed.

Appellant does, however, earnestly contend that the proximate cause of the accident was not his act of driving on the wrong side of the road but was the act, which he contends was negligent, of respondent in turning to his left and attempting to pass appellant on the north side of the highway. He insists that respondent, having a space of highway 19 feet to his right, was negligent as a matter of law in turning to his left instead of to his right, in which latter event, he insists, the accident would not have occurred. In support of his position he refers to the case of Cupples Mercantile Co. v. Bow, 32 Idaho, 774, 189 P. 48, 53, 24 A. L. R. 1296, where it is held that the driver of an automobile is not justified under any circumstance in turning to the left to avoid an approaching vehicle, but must hold to his right side of the road at all hazards. Such view is not, however, in accord with the authorities of this state, nor, we think, with good reason. As expressed in the dissenting opinion in the same case: "It is not the law to say to one traveling on the right side of the highway that he must keep his course, even where it is impossible to turn to the right and permit a reckless, willful, or drunken driver, who has by his failure to obey the law in the first instance placed the former in a precarious position, to drive directly upon him to his certain injury and probable death."

This court, in Hagenah v. Bidwell, 46 Cal. App. 558, 189 P. 799, 800, and again in Anderson v. Dahl, 121 Cal. App. 198, 8 P.(2d) 883, has adopted a view contrary to that expressed in the majority opinion in the Idaho case. In the former, under a state of facts similar to the present case, it was said: "It is argued that at the moment of the collision the defendants were on their left-hand side of the road. This cannot be controverted, but it does not follow as a matter of law that the defendants were negligent in being where they were at that time. * * * There are certain circumstances under which the law permits one to use that portion of the highway. It is the duty of the driver of a vehicle who is suddenly confronted with danger, though arising from the fault of another, to seek to avoid a collision. * * * Whether he has taken the proper course depends upon all the circumstances of the case."

[1] It cannot be said as a matter of law that respondent was guilty of negligence merely by reason of the fact that he adopted a course contrary to the provisions of section 124(a) of the California Vehicle Act (St. 1923, p. 557, as amended by St. 1931, p. 2125) requiring drivers of vehicles approaching in opposite directions to pass each other to the right, nor merely because at the moment of collision his car was on his left side of the highway. Whether he was negligent in so doing or in being where he was at the time was a question for the jury to determine from all the circumstances of the occasion. Respondent was placed in a position of imminent danger by reason of the negligence of appel-

lant. Appellant's car was rapidly approaching diagonally across his path. To his right he had a clearance of only 19 feet bounded by a curb 14 inches in height with no assurance that the driver of the approaching car would not continue in that direction. In turning to his left respondent did what he testified was the best thing in his judgment to protect his family. That his choice of the hazards confronting him was compatible with the exercise of due care and that he acted as a man of ordinary prudence and caution would have acted under the same circumstances cannot be said as a matter of law to be without support in the evidence. By its verdict the jury has found that respondent was not guilty of negligence in this regard and its determination is conclusive here.

[2] Nor can the amount of the verdict be said as a matter of law to be excessive. The medical and funeral expenses amounted to $333, leaving $7,500 awarded as general damages. Respondent was fifty-six years of age at the time of trial and his deceased daughter was ten years old at the time of her death. She had been a healthy, normal, and affectionate child. In this class of cases the measure of damages is such as, under all the circumstances of the case, may be just (section 377, Code Civ. Proc.). There is no indication from the amount of the verdict that there was any abuse of good sense and sound discretion on the part of the jury in arriving at the difficult determination of the pecuniary value to respondent of the loss of the society, comfort, and protection of his daughter. See O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381, approving an award of $10,000 for the death of a son of the age of seven years.

Two other actions were separately brought against appellant arising out of the same accident, one by the administrator of the estate of respondent's wife for her death, and the other by respondent for his injuries. These actions were separately tried before a jury and in the latter case a verdict was rendered in favor of the defendant and appellant here, the jury appending to its verdict the words, "John Hill guilty of negligence." Appellant contends that, no appeal having been taken from the judgment entered thereon and it now having become final, it is res judicata as to the question of respondent's negligence. Without inquiring into what merit this contention might otherwise have, it is completely answered by the fact that the verdict and judgment in the companion case is subsequent in point of time to the verdict and entry of judgment here. The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

HILL v. PERES et al.

Civ. 8809.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1934.

Hearing Denied by Supreme Court March 2, 1934.

1. Automobiles ⇐244(36).

Evidence sustained finding that motorist driving on left side of road until automobile approaching from opposite direction turned to left to avoid collision, was guilty of negligence proximately causing collision.

2. Automobiles ⇐245(40).

Whether motorist colliding with wrecked automobile and killing one injured in former collision, should have seen wrecked cars and crowd of people, and, in exercise of reasonable caution, decreased speed and stopped if necessary, *held* for jury.

3. Automobiles ⇐146.

Motorist must use reasonable care to anticipate presence on highway of others having equal rights to be there, notwithstanding temporary interference with vision either by glaring sun or headlights.

4. Automobiles ⇐244(36).

In action for death of passenger in automobile collision, evidence sustained finding that deceased was alive after collision with first defendant's automobile and that death resulted from second defendant's collision with wrecked automobile.

5. Negligence ⇐61(1).

Plaintiff may recover if negligence in question is proximate cause of injury though not sole cause.

6. Negligence ⇐61(1).

Primary causation may be so continuous that concurrent wrongful act precipitating disaster will in law be regarded not as independent, but as conjoining with original act to create disastrous result.

7. Negligence ⇐62(1).

Where original negligence of defendant is followed by independent act of third person resulting in direct injury to plaintiff, negligence of such defendant may constitute proximate cause of injury, if in ordinary and natural course of events defendant should have known intervening act was likely to happen; but not if act was one defendant should not have reasonably anticipated.

8. Automobiles ⇐245(64).

Whether negligence of motorist causing collision by driving on wrong side of road and that of another motorist subsequently colliding with wrecked automobile killing party in-

jured in first collision was independent or concurrent *held* for jury.

9. Automobiles ⇐244(21).

Evidence justified jury's determination that motorist causing collision by driving on wrong side of road, failed to render injured passenger in other automobile such assistance and protection from further injuries as he could, as required by law (St. 1929, p. 544, § 141).

10. Jury ⇐26.

Though deposit of jury fees only 9 days prior to trial date was waiver of right to jury trial, trial judge in exercise of discretion could relieve respondent therefrom and permit issues to be tried by jury (Code Civ. Proc. § 631, subd. 5).

11. Jury ⇐26.

Granting of plaintiff's oral motion for jury trial, waived by failure to deposit fees in statutory time *held* not abuse of discretion or prejudicial to defendant; jury being present and available, delay of one day in depositing fees being obviously inadvertent, and causing no inconvenience (Code Civ. Proc. §§ 473, 631, subd. 5).

12. Jury ⇐26.

That defendants in action for death of intestate in automobile collision had judgment in another action by injured bystander tried without jury, *held* immaterial as respects prejudice to defendants from granting of plaintiff's motion for jury trial in present action notwithstanding failure to deposit fees in time (Code Civ. Proc. §§ 473, 631, subd. 5).

13. Appeal and error ⇐1033(5).

Defendant causing collision by driving on wrong side of road, and who was sued with codefendant who subsequently collided with wrecked automobile, killing injured party, could not object to instruction on concurrent negligence as applying only when negligent acts occurred simultaneously, since instruction was favorable to defendant.

14. Trial ⇐194(16).

In action against motorist who collided with wrecked cars killing injured party, instruction concerning duty of drivers whose vision is obscured by bright lights to reduce speed *held* not error as invading province of jury since ordinary reasonable care by defendant required him to reduce speed if vision was obscured.

15. Evidence ⇐553(4).

Hypothetical question to expert witness assuming that deceased did not breathe between time of succeeding automobile collisions *held* inadmissible as misleading in absence of direct testimony to that effect.

16. Appeal and error ⇐1047(3).

Failure to strike out testimony that defendant's automobile was traveling "very fast" and "plenty fast" *held* not prejudicial error where witnesses later defined in terms of miles per hour meaning of their expression and other evidence as to defendant's speed was abundant.

17. Trial ⇐2.

Refusing to consolidate for trial, action by administrator for death of intestate, in automobile collision with action by husband of intestate for his injuries, *held* within trial court's discretion.

18. Death ⇐99(4).

$15,000 for death of woman 40 years old, leaving as heirs husband, two sons, and daughter who lived together up to the time of accident at family home where deceased performed all duties of wife and mother, *held* not excessive.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by J. E. Hill, as administrator of the estate of Johanna Hill, deceased, against Edward A. Peres and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Colding, Hale, Crawford & Myers, of San Francisco, for appellant Peres.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant Brooder.

Tinning & De Lap, of Martinez, for respondent.

OGDEN, Justice pro tem.

This is an action for damages brought by the administrator of her estate for the death of Johanna Hill, which is claimed to have resulted from the negligence of both appellants. The cause was tried with a jury, which returned its verdict against both appellants in the sum of $15,000. Both appellants have separately appealed from the judgment entered thereon, each contending that he was not negligent and that even though negligent his negligence was not a proximate cause of the death.

About 10 o'clock p. m. on the evening of January 24, 1932, the deceased was riding in the front seat of a Ford coach automobile with her husband, who was driving, her three children riding in the rear seat. As they were proceeding in an easterly direction along Cutting boulevard, in the city of Richmond, a collision occurred between the automobile in which they were riding and an Auburn sedan automobile proceeding in the opposite (westerly) direction operated by ap-

pellant Peres. At the point where the accident occurred, and for a considerable distance in both directions, Cutting boulevard is a level, broad highway, being 61 feet from curb to curb and paved for the entire width. It runs in a general easterly and westerly direction, being perfectly straight, except at a point approximately 1,000 feet easterly of the scene of the accident, where it "jogs" slightly to the south and then continues in the same general direction, but deviating slightly to the north. Although within the city limits, the accident occurred neither in a business nor residence district as defined in the California Vehicle Act (St. 1923, p. 517, as amended). It was a clear moonlight night, the pavement being dry. Prior to the accident the Hill automobile had been traveling about 19 feet from the south curb at a speed of about 30 miles per hour. Mr. Hill testified that as the Peres automobile approached it "zigzagged" from the north side of the highway to the south side. When the two cars were about a hundred and fifty to two hundred feet apart, Mr. Hill turned his car to the left to avoid the other and permit it to pass on his right. At about the same time the appellant Peres also turned to the north, both cars coming into violent collision on that side of the highway. Both Mr. and Mrs. Hill were thrown to the pavement, where they lay unconscious and one of the children, Elizabeth, was so severely injured that she died the following morning. A more detailed statement of the circumstances surrounding this accident appears in the opinion of this court in the action based on the death of Elizabeth Hill, see John Hill v. Edward A. Peres, 28 P.(2d) 944, action No. 8865, this date decided.

The Peres automobile came to a stop with its front wheels against the north curb and its rear extending into the highway at almost a right angle. Mrs. Hill was thrown so that she lay about 4 feet west of the Peres car, her head resting upon the north curb and her body extending to the west and south about 2 feet from the curb. About fifteen minutes later and while Mrs. Hill lay in the same approximate position pending the arrival of an ambulance, a Buick sedan automobile, operated by the appellant Brooder and traveling in a westerly direction, crashed into the Peres automobile, swinging the rear end of the latter around so that its right rear wheel pinned the body of Mrs. Hill between it and the curb, crushing her chest.

[1] The contentions of the appellant Peres that he was not negligent in the operation of his automobile; that, even though negligent, his negligence was not the proximate cause of the first accident; and that the driver of the Hill automobile was at fault in turning to his left are fully discussed and answered in our opinion in Hill v. Peres, No. 8865, supra, which, so far as these questions are concerned, is based upon the same evidence. Under authority of that decision and without here repeating our reasons therefor, we therefore hold that the implied finding of the jury in this action, that the collision between the Hill and Peres automobiles proximately resulted from the sole negligence of the appellant Peres, is amply supported by the evidence.

At the time of the second collision a crowd of at least seventeen persons had gathered about the scene and four other automobiles were parked nearby with their lights lit, three of them east of the wrecked cars and on the south side of the highway with their lights burning and facing in the direction of the appellant Brooder's approach. Several persons who passed during the interval between the two accidents testified that they observed the wrecked cars at distances ranging from one to three blocks away. The speed of the Brooder car was estimated by witnesses as over 40 miles per hour and was not slackened until the collision occurred. The appellant admitted that he noticed three or four cars parked on the south side of the highway and that, although their lights interfered with his vision, he could not say whether he decreased his speed as he assumed that the highway was unobstructed.

[2, 3] Whether, under the circumstances, the appellant Brooder saw, or should have seen, the wrecked cars and the crowd of people gathered around them and whether the parked cars which he admittedly saw were sufficient warning of danger to require him, as a prudent driver in the exercise of reasonable caution, to decrease his speed and stop if necessary, were questions solely within the province of the jury to determine. Its finding that he was negligent must be held to be conclusive on this appeal. The driver of an automobile is bound to use reasonable care to anticipate the presence on the highway of others who have equal right to be there and the fact that his vision is temporarily interfered with, either by the glaring sun or headlights, does not relieve him from that duty. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027; Havens v. Loebel, 103 Cal. App. 210, 284 P. 676.

[4] Each appellant seriously contends that, assuming his negligence, such negligence was not a proximate cause of the death of Mrs. Hill. In response to a question submitted by the court, the jury returned a special finding that the deceased was alive after the first collision. The appellant Peres relies upon this finding as relieving him from liability as a matter of law and the appellant Brooder attacks it as being unsupported by the evidence.

Although Mrs. Hill lay unconscious after

the first accident, there arises no presumption therefrom that she was not alive. Her husband, who was also thrown to the highway beside her unconscious, recovered from his injuries. One witness testified that during the interval between the two collisions she observed the upper part of Mrs. Hill's body move. Another testified that several times during this interval, the last time at the very moment of the second collision, he felt Mrs. Hill's pulse and that her heart was still beating. The autopsy surgeon testified that the immediate cause of her death was a lacerated heart due to a crushed chest. The special finding that Mrs. Hill was alive after the first accident and the implied finding that her death resulted from injuries received in the second collision were amply supported by the evidence.

[5-7] It does not necessarily follow, however, that the appellant Peres is thereby relieved of liability for her death. The law does not require that the negligence of a defendant must be the sole cause of the injury in order to entitle the plaintiff to recover therefor. All that is required is that the negligence in question shall be a proximate cause of the injury. Griffith v. Oak Ridge Oil Company, 190 Cal. 389, 212 P. 913; Dewees v. Kuntz, 130 Cal. App. 620, 20 P.(2d) 733. The primary causation may be so continuous that a concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result. Merrill v. L. A. Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Rauch v. So. Cal. Gas Co., 96 Cal. App. 250, 273 P. 1111; Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53; Marton v. Jones, 44 Cal. App. 299, 186 P. 410; Sawyer v. Hooper, 79 Cal. App. 395, 249 P. 530. The rule is stated in Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280, 281, and approved in Sawyer v. So. Cal. Gas Co., 206 Cal. 366, 274 P. 544, that "where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury."

[8] Whether the negligence of the two appellants here was independent or concurrent was largely a question for the jury whose finding is conclusive on appeal if there be evidence to support it. Jordan v. Great Western Motorways, 213 Cal. 606, 2 P.(2d) 786.

The case of Sawdey v. Producers' Milk Co., 107 Cal. App. 467, 290 P. 684, 689, because of the similarity of facts, is particularly helpful in determining whether in the case at bar the implied finding, that the negligence of appellant Peres was concurrent with that of appellant Brooder, is sustained by the evidence. In the case cited, the car in which the deceased was riding collided with a truck and trailer which had been left stalled on the highway at night without a tail-light. A few minutes later, while deceased lay in her car shocked and stunned, another truck approaching from the rear at a high rate of speed, crashed into her car. The injuries received as a result of the second collision were the immediate cause of death. The driver of the truck involved in the first collision contended, as does the appellant Peres here, that the effect of his negligence had exhausted itself before the second impact and that the second collision was a thing not to be anticipated and introduced a completely new element into the case. The drivers of both trucks were held liable, the court saying: "As we view the facts the decedent, solely through the negligence of Rasmussen Company (employer of the driver of the first truck) and without fault on her part, was placed in a position of great danger, from which she was not able to rescue herself. That the dangers of her position were obviously dangers that might be expected to happen to any person in a similar position, namely, danger of traffic in a place devoted exclusively to traffic." That in the cited case the interval between the two collisions was only approximately three minutes, instead of approximately fifteen minutes, does not materially distinguish the two cases.

[9] The appellant Peres relies upon the case of Christensen v. Los Angeles Elec. Sup. Co., 112 Cal. App. 629, 297 P. 614, where it was held that there was no legal connection between the negligence of the driver of a truck which knocked the deceased to the street and the negligence of the driver of another car which almost immediately thereafter ran over her unconscious body despite the efforts of the former and his companion to warn the second driver. We are of the opinion, however, that in Sawdey v. Producers' Milk Co., supra, the true rule is more correctly stated and applied. A material point of distinction between the Christensen Case and the present one is that in the former the defendant did all in his power to protect the victim of his negligence from subsequent and further injury while here the appellant Peres did not. He testified that after the accident he knew nothing until he regained conscious-

ness on a street car en route to his wife's home in Oakland. Aside from its inherent improbability, his testimony in this regard was directly contradicted by that of a witness that, at the scene of the accident and shortly after it happened, the appellant spoke to him. The jury here was justified in determining that the appellant Peres failed to render deceased such assistance and protection from further injury as lay within his ability to do as the law required of him (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544).

[10-12] Both appellants complain of the ruling of the trial court permitting a trial by jury after the same had been waived by the failure to deposit the fees therefor within the time required by the statute. Upon the calling of the case for trial on the day regularly set therefor, counsel for both appellants called the trial court's attention to the fact, which is admitted, that the jury fees had not been deposited by the plaintiff until only nine days prior thereto. Over objection the court granted the oral motion of counsel for respondent, under the provisions of section 473, Code of Civil Procedure, for relief from his default and waiver.

It must be conceded that the deposit of jury fees having been made only nine days prior to the trial date, there was a waiver by the respondent of his right to a trial by jury under the provisions of section 631, subdivision 5, Code of Civil Procedure. Harmon v. Hopkins, 116 Cal. App. 184, 2 P.(2d) 540; Dunham v. Reichlin (Cal. Sup.) 18 P.(2d) 664; Deberry v. Cavalier, 113 Cal. App. 30, 297 P. 611; Gray v. Craig, 127 Cal. App. 374, 15 P. (2d) 762, 16 P.(2d) 798; Stern v. Hillman, 115 Cal. App. 156, 300 P. 972. However, the trial judge had in the exercise of his discretionary powers, the right, notwithstanding such waiver, to relieve respondent therefrom and permit the issues of fact to be tried before a jury. Stern v. Hillman, supra; Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 610, 31 P. 367; Doll v. Anderson, 27 Cal. 248; Harmon v. Hopkins, supra; Dickey v. Kuhn, 125 Cal. App. 68, 13 P.(2d) 834; Davis v. Falconer, 159 Wash. 230, 292 P. 424; 2 Bancroft's Code Pleading and Remedies, 1580; 35 C. J. 219 and 222.

Although the motion for relief was informally made, it was sufficiently before the court. No objection was made to the form of the motion, it being contested solely upon the ground that the trial court was without jurisdiction to grant it. The jury was present and available, and the delay of one day in the deposit of jury fees was obviously inadvertent, no delay or inconvenience to either of the litigants resulted therefrom, in the face of which it cannot be said that the permitting of the case to be tried before a jury was an abuse of discretion. Nor can it be said that any prejudice to appellants resulted therefrom. The fact relied upon by appellants that an action against them brought by a bystander injured in the same accident resulted in a judgment in their favor upon a trial by the court sitting without a jury has no bearing upon the question of prejudice here.

[13] The appellant Peres complains of the following instruction given the jury: "Where an injury results from two separate and distinct acts of negligence by different persons operating and concurring simultaneously and concurrently, both are proximate causes and recovery may be had against either or both responsible persons." It is conceded that this is a proper statement of the law, but contended that it is not applicable to the facts of this case. What we have heretofore said with reference to the subject of concurrent negligence completely answers this contention. If, as counsel contends, the instruction may be subject to the interpretation of applying only to situations where the overt acts of negligence simultaneously happen, such interpretation would have been more favorable to appellant than harmful.

[14] The appellant Brooder complains of the following instruction: "Where the vision of the driver of an automobile is obstructed or obscured by the bright lights of other automobiles on the road ahead of him, it is the duty of the driver whose vision is so obscured to reduce the speed of his car and to exercise all ordinary and reasonable care and diligence to avoid injury to anyone who might rightfully be on the road in front of him." Under the circumstances of this case, where ordinary reasonable care on the part of the appellant required him as a matter of law to reduce his speed if his vision was obscured, it cannot be said that this instruction invaded the province of the jury.

The instructions of the court fully and fairly stated the principles of law applicable to the case and the liability of the respective appellants and we find no error in them.

[15] The sustaining of an objection to a hypothetical question put to an expert witness, which question contained the assumption that Mrs. Hill did not breathe during the interval between the two collisions, is cited as error. Although it is true that counsel has the privilege of placing in a hypothetical question an assumption of any fact favorable to him which might be reasonably inferred from the testimony, this rule is subject to the limitation that the question shall not be misleading. Hutter v. Hommel, 213 Cal. 677, 3 P.(2d) 554. Although there was testimony that her breathing was not observed, there was no direct testimony that Mrs. Hill did not breathe during this interval. The same expert had previously testified that a person who had not breathed for a period of fifteen minutes would be dead. The only effect of incorporating in the question the

assumption that Mrs. Hill did not breathe would be to mislead the jury and was therefore properly not permitted by the court.

[16] Prejudicial error cannot be said to have resulted from the failure of the trial court to strike out the statements of two witnesses with reference to the speed of the Brooder car to the effect that it was traveling "very fast" and "plenty fast." Such expressions are, it is true, too uncertain and dependent upon the unknown factor of the witness' personal views regarding standards of speed to be proper. Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38. However, in view of the fact that both of the witnesses later defined in terms of miles per hour what they intended by their expressions and in view of the abundance of other evidence as to the speed of the Brooder car, we cannot say that prejudice resulted from this testimony.

[17] Complaint is further made by the appellant Peres of the trial court's refusal to consolidate for trial the present action with another arising out of the same accident brought by the husband of the deceased on account of injuries received by him. Although counsel apparently concedes that this was a matter solely within the sound discretion of the trial court, he makes no showing of either the abuse of that discretion or of prejudice resulting therefrom.

[18] The verdict of $15,000 cannot be said to be excessive. Mrs. Hill was at the time of her death forty years of age and left as heirs her husband aged fifty-six years, two sons aged twenty and eight years respectively, and a daughter, subsequently married, aged eighteen years. Up to the time of the accident they had all been living together at the family home, where deceased performed all the duties of a good and faithful wife and mother, including the housework. It cannot be said that the verdict suggests at first blush, or at all, passion or prejudice on the part of the jury.

Judgment is affirmed as to both appellants.

We concur: NOURSE, P. J.; STURTEVANT, J.

136 Cal.App. 301

PEOPLE v. TINNIN.

Cr. 1695.

District Court of Appeal, First District, Division 1, California.

Jan. 19, 1934.

Rehearing Denied Feb. 8, 1934.

Hearing Denied by Supreme Court Feb. 15, 1934.

1. Criminal law ⇐511(1).

Evidence necessary to corroborate testimony of accomplice must do more than create suspicion of guilt, but it is sufficient, even though slight, and though, when standing alone, it would be entitled to but little consideration (Pen. Code, § 1111).

2. Criminal law ⇐511(1).

Evidence necessary to corroborate testimony of accomplice need not tend to establish precise facts testified to by accomplice (Pen. Code, § 1111).

3. Criminal law ⇐511(2).

Strong corroborative testimony is not necessary to support conviction based on accomplice's testimony, and evidence is sufficient if it tends to connect accused with crime (Pen. Code, § 1111).

4. Criminal law ⇐511(7).

Defendant's own statements and admissions in connection with other testimony may afford corroboratory proof sufficient to sustain conviction (Pen. Code, § 1111).

5. Criminal law ⇐511(1).

It is unnecessary that corroborating evidence establish without aid of testimony of accomplice that accused committed offense (Pen. Code, § 1111).

6. Criminal law ⇐511(1).

Corroboration of accomplice testimony is sufficient if defendant's connection with crime may fairly be inferred from entire conduct of defendant (Pen. Code, § 1111).

7. Criminal law ⇐423(1).

Acts and declarations of each member of conspiracy in pursuance of original concerted plan with reference to common object are admissible against all coconspirators.

8. Criminal law ⇐423(9).

Common design of criminal enterprise may extend beyond point of commission of act constituting crime for which alleged conspirators are on trial.

9. Criminal law ⇐736(1).

Question when design is accomplished and abandoned depends on circumstances of case, and nature and purposes of conspiracy, and is for determination of jury.

10. Homicide ⇐234(3).

Evidence independent of that of accomplice *held* sufficient to connect accused with commission of murder, and to warrant his conviction of first degree murder (Pen. Code, § 1111).

11. Criminal law ⇐622(1).

Defendants jointly charged with offense are not entitled to separate trials as matter of right, but question is within trial court's sound discretion (Pen. Code, § 1098).

12. Criminal law ⇐1148.

Trial court's refusal of separate trials to defendants jointly charged is reviewable only

for clear abuse of sound discretion (Pen. Code, § 1098).

13. Criminal law ⇐1134(2).

Question on appeal whether there has been abuse of discretion in refusing separate trial to accused must be determined from circumstances as presented to trial court when order was made, not from what subsequently transpired at trial (Pen. Code, § 1098).

14. Criminal law ⇐622(2).

Accused is not entitled to separate trial merely because damaging testimony is admissible against codefendant and not against accused, and because, despite limitation placed on application thereof to accused, such testimony may carry with it unfavorable effect equal to confession (Pen. Code, § 1098).

15. Jury ⇐149.

Statute authorizing discharge of juror during trial because of illness contemplates summary hearing, and it is not necessary to take testimony in manner required judicially to establish controverted proposition (Pen. Code, §§ 1089, 1123).

16. Jury ⇐149.

Juror's appearance before court, without aid of other testimony, may itself be sufficient proof of juror's illness and inability to further discharge duties as juror so as to authorize his discharge (Pen. Code, §§ 1089, 1123).

17. Jury ⇐149.

Testimony that during adjournments of court woman juror was afflicted with severe attacks of hysteria *held* to authorize her discharge on account of illness and substitution of alternate juror (Pen. Code, §§ 1089, 1123).

18. Homicide ⇐162.

In prosecution for first degree murder, evidence showing that codefendant acted as accused's attorney in robbery case, as alibi witness in another case, and other similar evidence, *held* admissible to show relationship between parties and existence of conspiracy.

19. Criminal law ⇐1169(3).

That evidence tending to show commission of other crimes by accused, admitted for purpose of showing conspiracy to commit homicide, might have permitted inference that accused had previously been convicted of felony, *held* not to prejudice accused, where he subsequently voluntarily became witness in own behalf, and was subjected to cross-examination respecting prior conviction.

20. Criminal law ⇐1136.

General rule is that appealing defendant cannot complain of alleged errors affecting codefendant who is not appealing.

21. Criminal law ⇐655(5).

Adjudging accused's counsel in contempt of court for persistent, unnecessary, and vexatious interruptions during closing argument of assistant district attorney *held* not error nor misconduct on part of trial court.

22. Criminal law ⇐1144(15).

Appellate court will presume that jury obeyed trial court's instructions to disregard remarks of counsel and decide case on evidence only.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Albert Tinnin and another were convicted of murder in the first degree, and named defendant appeals.

Affirmed.

Nathan C. Coghlan, Vincent W. Hallinan, and Walter C. Frame, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton and William F. Cleary, Deputy Attys. Gen., for the People.

KNIGHT, Justice.

While walking home from a theater in the Ingleside district, San Francisco, about 10 o'clock at night, a Mr. and Mrs. Louw found the lifeless body of an elderly woman lying in the street close to the curb on Kenwood way, near the junction of Fairfield way. Just before finding the body, their attention was attracted by the erratic manner in which a big automobile was being driven in the vicinity, and it was believed at first that the woman had been struck and killed by the automobile while she was attempting to cross the street; but subsequent investigation by the police proved her identity to be Mrs. Jessie Scott Hughes, and that she had been murdered in the garage of her home about a block distant from the junction of said streets and her body then placed in said automobile, driven to the location where it was found, and cast into the street in a position to simulate a traffic accident. Approximately five weeks later Albert Tinnin, Frank J. Egan, and Verne Doran were charged jointly by indictment with having committed the crime. They demanded separate trials, and a severance was granted as to Doran, but denied as to Tinnin and Egan; and upon trial the latter two were found guilty of murder in the first degree. The jury fixed the penalty at life imprisonment, and sentence was imposed accordingly, following which they were committed to the state prison, and have been since confined there in execution of said sentence. At the trial they were represented by separate counsel, and they took

separate appeals from the judgments of conviction and the orders denying their motions for new trial. Egan, however, did not perfect his appeal, and on November 28, 1933, after several continuances granted pursuant to stipulation of the Attorney General, Egan's appeal was dismissed. People v. Egan (Cal. App.) 27 P.(2d) 412. We have before us for determination, therefore, only the appeal of Tinnin, the record of which includes more than 2,300 pages of reporter's transcript, and approximately 360 pages of printed briefs.

The evidence presented by the prosecution shows that the murder was instigated and planned by Egan, and that under his direction those plans were carried out by Tinnin and Doran, Egan assisting therein, although not present at the time the acts of violence were committed. Testimony to that effect was given at the trial by Doran, who was called as a witness for the people. Admittedly, Doran was an accomplice; and it is now contended as a ground for reversal that his testimony connecting appellant with the commission of the crime was not corroborated in the manner required by law.

[1-9] Section 1111 of the Penal Code, upon which the foregoing contention is based, provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. The provisions of said Code section have been under review many times, and consequently the law has become well settled as to the extent and character of proof necessary to satisfy the legal requirements of said Code section. The recent case of People v. Negra, 208 Cal. 64, 280 P. 354, 356, cites many of the earlier decisions, and in restating the rules established thereby the court points out that, while the corroborating evidence must do more than create a suspicion of guilt, it is nevertheless sufficient, even though it "be slight, and, when standing by itself, entitled to but little consideration. People v. McLean, 84 Cal. 480, 24 P. 32." And, continuing, the court says: "The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. People v. Martin, 19 Cal. App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged. People v. Solomon, 6 Cal. Unrep. 305, 58 P. 55." The more recent case of People v. Davis, 210 Cal. 540, holds substantially to the same effect. Furthermore, it has been held that such independent evidence may consist of contradictory statements made by the accused, or his silence in the face of accusatory statements, or of false statements made with respect to matters connected with the commission of the crime (People v. Taylor, 70 Cal. App. 239, 232 P. 998); that it may consist also of evidence of flight (People v. Armstrong, supra), or of circumstances showing that immediately after the commission of the crime the accused assumed a false name (People v. Cleveland, 49 Cal. 577). In fact, says the court in People v. Nikolich, 93 Cal. App. 356, 269 P. 721, the entire conduct of the accused may be looked to for corroborative circumstances, and if therefrom his connection with the commission of the crime may be fairly inferred, the corroboration is legally sufficient. It is also well settled that, where the commission of a crime grows out of a conspiracy, and the unlawful enterprise is established either by direct or circumstantial evidence, every act or declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them, it being deemed in law that one who thus enters into a common purpose or design is a party to everything which may be done or said by the others in furtherance of the conspiracy (People v. Sampsell, 104 Cal. App. 431, 286 P. 434; People v. Lorraine, 90 Cal. App. 317, 265 P. 893); furthermore, that the common design of the criminal enterprise may extend beyond the point of the commission of the act constituting the crime for which the alleged conspirators are on trial (People v. Opie, 123 Cal. 294, 55 P. 989; People v. Mazzurco, 49 Cal. App. 275, 193 P. 164; People v. Holmes, 118 Cal. 444, 50 P. 675; People v. Rodley, 131 Cal. 240, 63 P. 351), and that the question as to when the design is accomplished and abandoned depends on the facts and circumstances of each case and the nature and purposes of the conspiracy, and is one for the determination of the jury (5 Cal. Jur. 523).

[10] In the present case the prosecution claimed and introduced evidence to prove that the purpose of the criminal enterprise extended beyond the act of killing Mrs. Hughes and included a plot also to escape punishment

therefor by inducing the authorities to believe that Mrs. Hughes had been the unfortunate victim of a traffic accident. It will be seen, therefore, that the field of evidence over which the jury had the right to look for corroborative circumstances tending to connect the appellant with the commission of the crime was unusually broad; and, after examining the record of such evidence, we are convinced that the affirmative conclusion reached by the jury upon this issue of fact is not lacking in evidentiary support.

At the time the crime was committed, and for many years prior thereto, Egan held the office of public defender of the city and county of San Francisco. Tinnin and Doran were young men with criminal records with whom Egan became acquainted through the discharge of the duties of his office and afterwards maintained a friendly relationship. In 1916 he successfully defended Tinnin on a charge of robbery; afterwards Tinnin was convicted elsewhere on two felony charges, first in 1920, under another name, in Tehama county for an assault to murder a woman named Cockroft, and again in 1923, in the federal court, for illegally harboring aliens. Egan was a witness for him at the trial in Tehama county. In September, 1923, Tinnin commenced serving the penitentiary sentence for the crime there committed, and on February 1, 1932, mainly through Egan's efforts, he was released on parole from Folsom Prison, following which Egan treated him as a companion, aiding and assisting him in various ways. One of the conditions of his parole was that he reside in Oakland, but two months later, and on March 27, 1932, after consulting Egan, he took up his abode in San Francisco at the Blackstone Hotel on O'Farrell street; and a month thereafter he was arrested in connection with the Hughes murder. In 1924 Egan successfully defended Doran on a "gun" charge, and five years later defended him again on a charge of burglary. The trial resulted in a conviction, but Egan obtained a suspension of the five-year penitentiary sentence, and Doran was released on probation on condition that he serve one year in the county jail. When Doran was released from jail, Egan continued a friendly association with him; Doran having served on a number of occasions as the chauffeur for Egan and his wife and children.

Egan's motive for the crime, upon which the case against Tinnin also centers, was, so the evidence shows, to obtain money to relieve himself from financial difficulties in which he had become involved and to prevent exposure of certain unprofessional and unlawful acts committed by him in the course of his private professional practice. The facts relating thereto were established by testimony independent from that given by Doran. It appears therefrom that Mrs. Hughes was an old-time friend of Egan's. For several years he had been her legal adviser. She lived alone in a dwelling on Lakewood avenue, a short distance from where her body was found. Egan visited her home on numerous occasions, and she reposed in him the utmost confidence and trust. She carried life insurance aggregating $2,400, made payable to her estate, and in 1927 Egan induced her to substitute his name as beneficiary. He also had her convey without consideration to one Kazaka a piece of property which, under Egan's direction, Kazaka immediately mortgaged to a bank for $1,750. Out of that sum Kazaka paid Egan $500 and kept the rest in satisfaction of a loan previously made to Egan. Later, under Egan's direction, the property was sold subject to the bank mortgage to one Sweeney. The purchase price consisted of a down payment of $200 in cash and a second incumbrance of $1,550, both of which were given directly to Egan. About the same time also Egan was being constantly pressed for the payment of a promissory note for some $8,000 which he had given to cover a sum illegally withdrawn by him for his own use by means of a series of unlawful transactions from the funds of an estate, in the administration of which he was interested in a professional capacity, the holder of said note eventually obtaining as security an assignment of the Sweeney deed of trust covering the Hughes property and a policy of insurance on Egan's life. Furthermore, a bank foreclosed on Egan's home to satisfy a loan of $9,000; and another bank was demanding payment of a $1,500 note given for money borrowed. In February, 1931, Egan made application to a different life insurance company for a $10,000 policy on the life of Mrs. Hughes, payable to him, which the company refused to issue. However, it did issue one for $5,000 payable to the estate of Mrs. Hughes, and subsequently Egan induced the company to issue a second policy for the remaining $5,000. The premiums were paid by Egan; and a month after the issuance of the second policy he caused his name to be substituted as beneficiary in both policies. Meanwhile Mrs. Hughes had grown suspicious about the handling of her property affairs, and began to lose confidence in and distrust Egan. She called at his office frequently to see him, but he evaded her. Egan's office stenographer testified that Egan had thus tried to avoid seeing Mrs. Hughes for two or three years prior to her death; that, upon learning she was waiting in his office, he would remain absent until she had gone. Continuing, the witness testified that Mrs. Hughes' efforts to see Egan grew more persistent during the few months preceding her death; that she would wait in vain for hours in his office to see him; that only a few days prior to her death she called at the office, and, when told

that Egan was not in, she became hysterical, exclaiming that she had more right than any one else to come to his office—"that she wanted her money"; that as soon as she left the office on this occasion Egan returned, and excitedly wanted to know what Mrs. Hughes had said. The witness further testified that on the day preceding Mrs. Hughes' death the holder of Egan's $8,000 note visited Egan's office demanding payment.

On that same day, Thursday, April 28, 1932, so the evidence shows, Egan revealed to Tinnin and Doran his determination to put Mrs. Hughes out of the way, and the plans he had laid to accomplish this purpose. In this regard Doran testified that Egan in expressing such determination complained of the constant visits of Mrs. Hughes to his office, stating she would arrive there in the morning, stay until lunch, return, and remain until the office closed; that the only time he could visit his office was when she went out to lunch; that Egan also related how her presence there "upset" him, stating she had threatened to expose him before the bar association, and at times he had been "tempted to kill her." Continuing, Egan told them, according to Doran's testimony, that he had previously planned "to knock Mrs. Hughes unconscious and run over her," but was fearful of doing so himself because suspicion would be directed toward him. For that reason, so Doran testified, he and Tinnin agreed to carry out Egan's plan for him. Continuing, Doran stated that Egan went on to explain that it would be easy for them, Tinnin and Doran, to get into Mrs. Hughes' house; that it was his custom to phone her whenever he was going out there, and she always had the garage doors in the basement of her home open so that he could drive in without alighting outside; that by so phoning he could obtain entrance for them, and that they could then "knock her unconscious and run over her and make it appear as though it was a hit and run case," stating that he "was experienced in handling cases of that kind and knew all about them." Tinnin suggested, so Doran testified, that Egan ask Mrs. Hughes to meet him on a corner, and that, while she was crossing the street, he (Tinnin) could run over her; but Egan rejected the proposition with the statement that he had "planned this out before"; also that something was said about renting a car for the purposes of carrying out the plans, but Egan said such cars were "too light"—that he wanted a heavy car; that Egan then directed him to borrow a car from a man named Postel, a friend of Egan's, reminding Doran at the time that he (Egan) was the one that got him, Doran, out of jail and was the one that could keep him out of jail. Accordingly, the next morning Doran borrowed Postel's car, telling Postel that Egan wanted it. He drove it to his sister's home, where he lived, and parked it in the street in front of the house. Soon afterwards Tinnin and Egan drove up, and talked with Doran about the car; and later during the day, so Doran testified, two more conferences were held to complete the plans for the crime, one on the street, near the Blackstone Hotel while sitting in Egan's car, and the other late in the afternoon when Tinnin and Doran drove out to Mrs. Hughes' home, accompanied most of the way by Egan; and pursuant to final arrangements they all met that night in Egan's office at 8 o'clock, Doran driving there in Postel's car. Their activities thereafter, as shown by Doran's testimony, were as follows: Egan phoned Mrs. Hughes he was going out to see her and bring with him a couple of friends, and that they would leave very soon. It was understood between the three men, however, that Egan would not go along, but, instead, would attend a public boxing entertainment at Dreamland Rink in company with a Dr. Houseman; and he instructed Tinnin and Doran to tell Mrs. Hughes, when she inquired as to his absence, that on the way out there he stopped at the theater to reprimand his boy and send him home, and he would be there later. Egan then instructed them to phone him just before they reached Mrs. Hughes' home, and stated he would thereupon again phone Mrs. Hughes he would be there in a few minutes. Tinnin and Doran followed these instructions, and accordingly upon their arrival at the Hughes home the garage doors were open and they drove in. Mrs. Hughes closed the doors and turned on the lights. Tinnin, being acquainted with Mrs. Hughes, as will hereinafter appear, introduced Doran. Mrs. Hughes asked where "Frank" was, and they told her as instructed that he got out at the theater and would be there soon. While waiting supposedly for the arrival of Egan, Mrs. Hughes showed them around the basement, talking about different matters, and at the opportune time Doran seized her by the arms from behind and Tinnin struck her violently with his fists, rendering her unconscious. Her body was then laid on the floor in front of the car, and while Tinnin held it in position by placing his foot against it and bracing his back against the garage wall, Doran drove the car upon her body, killing her. Thereupon they put the body in the tonneau of the car, Doran washed the garage floor with the basement hose, and backed the car out of the garage. Tinnin closed the garage doors, got in the front seat with Doran, and they drove away. Soon after leaving the garage, Tinnin crawled over into the tonneau and hurled the body into the street. Thereupon they drove the car back to Postel's garage, left it there, and went to Tinnin's hotel. Later they were joined by Egan, and, after visiting a restaurant and driving around town, they obtained a morning paper and Doran was driven home. Egan lived with his family in a dwelling not far distant from Mrs. Hughes' home, but on the

night of the murder he slept with Tinnin in the latter's room at the Blackstone Hotel; Tinnin having borrowed some night clothes for Egan from a guest at the hotel named Miss Sills. Tinnin and Egan so admitted at the trial.

The police investigation under the direction of Capt. Dullea began within a few hours after the finding of Mrs. Hughes' body; and Egan, through his friendly offices with the department, sought, as originally planned, to keep in close touch therewith; but, as the investigation progressed, the three men became greatly alarmed, and in a few days Egan and Doran disappeared completely under suspicious circumstances; and Tinnin admitted at the trial that he too tried to conceal his whereabouts and was about to leave for the country and go into hiding when apprehended by the police. As to these subsequent events the evidence shows that early Saturday morning, the day following the murder, the police discovered the imprints of the automobile tire treads on the dampened floor of the Hughes garage. That same morning, according to Doran, the three men met by appointment in a park near Egan's office, and, when Egan observed Tinnin was wearing the same cap and Doran the same hat each had worn the night before, he purchased new hats for them. The fact that Tinnin discarded his cap and was wearing a new hat on the day following the murder was established also by Miss Sills, who testified that at the same time she noticed Tinnin's thumb was badly swollen and inflamed; and, when she called his attention to it, he stated he had been in a fight. No testimony was introduced at the trial, however, to show he had been engaged in any conflict. That same Saturday morning also, about 9 o'clock, Egan called at Capt. Dullea's office under the pretense of responding to a phone message from that office; but there had been no such message, and he was so informed. The conversation then turned to the death of Mrs. Hughes, and Egan accompanied Capt. Dullea to the coroner's office, explaining he had acted as Mrs. Hughes' legal advisor a number of years, that she was estranged from her family, and he had often cautioned her about going out at night on account of the danger of being the victim of a "hit and run" accident. He also stated Mrs. Hughes carried about $2,000 life insurance and left a will naming him as executor and beneficiary, and that he would take care of all funeral arrangements. Later during the day he phoned Capt. Dullea requesting further information as to the developments in the case, and was informed there were none. He then spent the afternoon and that evening with Tinnin. Both so admitted at the trial; the explanation given therefor being that Egan desired to entertain Tinnin, and had done so by driving him around town, dining him, and showing him different places of interest and amusement. About 12 o'clock that night Egan parked his car for the night in a garage near Tinnin's hotel, and, as he claimed, rode home in a jitney bus. Tinnin spent most of Sunday afternoon and evening with Doran, so Tinnin admitted at the trial. On Monday morning Doran met Egan on the street in company with Dr. Houseman in response to a phone message from Egan, at which time Egan informed him, so Doran testified, about the activities of the police, stating that detectives had taken imprints of the tire treads of Postel's car. Egan then suggested giving Postel $50 and have him replace the tires with new ones, or that they purchase the car from him and have Doran drive it into the country and conceal it. As soon as the conference ended, Doran walked down the street, so he testified, and in talking with a friend about the death of Mrs. Hughes was told that the police had seized Postel's car and arrested Postel; whereupon Doran went into hiding in the home of a friend named Mrs. Snyder. That same afternoon Egan again phoned Capt. Dullea, asking "what all the investigation was about"; and Dullea countered by asking Egan what he meant. Egan then explained that newspaper reporters had attempted to interview him about the case; and he closed the conversation by asking Capt. Dullea if he "was wanted for anything," and was informed that he was not. About 7 o'clock that night Tinnin and Egan were seen together talking in front of the Flood building at Powell and Market streets, and at 7:55 Tinnin registered at the National Hotel on Market street under the fictitious name "T. Cole." He took none of his belongings from the Blackstone Hotel except a music case containing a saxophone which he left at the Strand Hotel in the room of a friend named Yellavich, who was employed as a street car conductor; and at 9 o'clock Egan again phoned Capt. Dullea at his office, saying, under great stress of excitement, that he was "being held" by two strange men. Capt. Dullea asked where he was phoning from, and he replied, after some hesitation, "from the phone booth in the Ferry Building," explaining that he had freed himself temporarily under the pretense that he wanted to phone to his wife. He then exclaimed excitedly: "You know I had nothing to do with the Hughes case. I was at the fights that night," and abruptly ended the conversation in the middle of a sentence by hanging up the phone. Immediately following the phone message he disappeared; and subsequent investigation proved that his assertion of the circumstances under which he pretended to phone and his restraint by two men were based on pure fabrication.

Tuesday night Tinnin remained with Doran at Mrs. Snyder's, and he admitted at the trial that the next morning he made an effort to obtain his belongings from the Blackstone Hotel without disclosing his whereabouts. In this regard Miss Sills testified that Tinnin asked

her to meet him on the street, stating he had something important to tell her; that he refrained from giving his name over the phone, saying: "Don't ask who I am, you recognize my voice, don't you?"; and, after making the appointment, he failed to keep it; that same day he boarded Yellavich's street car and asked Yellavich to bring his saxophone case to the car barns about 4 o'clock, explaining that he did not want to call at Yellavich's room for it himself because he was afraid of being arrested in connection with the Hughes case. He also told Yellavich he left the Blackstone Hotel for the same reason. Yellavich arrived at his room at noon to get the saxophone case, but before he left the police called, and, upon learning of the appointment with Tinnin at the car barns about 4 o'clock, the police went there and arrested Tinnin. At the trial Tinnin admitted that he intended, after obtaining his saxophone, to leave at once for some place in the country where he could not be found. Following his arrest, he was questioned by Capt. Dullea and he denied having any acquaintanceship whatever with Doran. This statement was admittedly false; and, being asked why he left the Blackstone Hotel, said: "Well, I will tell you; when I read the paper on Monday night and read about the disappearance of Frank Egan, I became alarmed. I had been friendly with him, and on account of having a record I was afraid I would be mixed up in connection with it, so I thought the best thing I could do was to check out of the hotel." Capt. Dullea then asked him how that could be true when he registered at the National Hotel at 7:55 that night and as a matter of fact Egan did not disappear until after his phone message to the detective bureau at 9 o'clock, and the newspapers announcing his disappearance were not on the street until about 11 o'clock; and Tinnin replied: "Well, I am not going to talk any more, I do not want to say anything. I was told enough not to talk. * * * It is my experience to always keep your mouth shut;" and, although several accusatory statements were made thereafter by the officers in his presence implicating him in the Hughes murder, he remained silent. On Thursday morning, the day following Tinnin's arrest, Doran left the city and went into hiding in the country. On May 7th, five days after Egan mysteriously disappeared, he was found in a San Francisco sanatorium; and ten days later Doran returned to the city, surrendered to the police, requested that his probation on the burglary conviction be revoked, and was sent to the state prison; and on June 4th he made the confession which two days later brought about the finding of the indictment. Tinnin's defense was an alibi, whereby he sought to establish that he spent the entire evening, on the night of the murder, in the apartment of a woman trying to interest her in financing a contrivance invented by Yellavich, later meeting Egan at the Blackstone Hotel, where admittedly they spent the night together.

The record also shows that Doran's story of the circumstances under which he obtained the use of the Postel car was fully supported by Postel. It was a large, heavy, old model Lincoln touring car with curtains inclosing the tonneau, but leaving the driver's seat open to view, and was equipped with a large trunk and two spare tires in the rear and a spotlight in front; consequently it was easily described and identified; and Tinnin's connection therewith was established by the testimony of Doran's brother-in-law. He testified he was at the home of Doran's sister when Tinnin and Egan drove up in the latter's car shortly after Doran obtained possession of the Postel car; that Tinnin came across the street to talk with Doran, and pointing at the Postel car, said to Doran: "Is that it?" and Doran replied in the affirmative; that Doran and Tinnin then went over and talked with Egan, who remained seated in his own car, and soon afterwards Tinnin and Egan drove away. Doran's testimony was further substantiated by the testimony of a Mrs. Jacks, who lived neighbor to Mrs. Hughes and saw the Postel car as it was backed out of the Hughes garage and driven away by two men on the night of the murder. In so testifying she stated that about 9:30, while standing on the front sidewalk near the Hughes home, she heard a noise inside the Hughes garage, and, believing Mrs. Hughes was about to come out and water the lawn as was her custom, she walked toward the garage to greet Mrs. Hughes, but upon observing a man standing inside with his back toward the doorway she withdrew; that immediately afterwards she heard the garage doors slam and saw the big touring car with curtains drawn as far as the driver's seat back into the street, and, as it was driven away rapidly, she observed that the man she had seen standing in the doorway was occupying the front seat with the driver. The Louws also identified the Postel car as the one they had seen just before they found the body. It passed and repassed them several times in such a manner as to arouse their curiosity and apprehension. The last time it was traveling without lights and at a speed of about sixty miles an hour. Furthermore, the treads of the tires of Postel's car fitted the imprints made on the floor of the Hughes garage; and strands of Mrs. Hughes' hair and other evidences of crime were found in the tonneau of the car when it was seized by the police following the murder.

At the trial Tinnin and Egan admitted having visited Doran at his sister's home on the morning of the day of the crime, but denied positively having seen him thereafter at any time that afternoon or night, as claimed by Doran. The stories told by Tinnin and

Egan as to their movements that afternoon, however, were proved false by disinterested witnesses whose testimony fully corroborated Doran's testimony that he was in their company twice that afternoon, first on the street in Egan's car near the Blackstone Hotel and again toward evening when they made a preliminary visit to Mrs. Hughes' home in the Postel car. As to the meeting near the Blackstone Hotel, an acquaintance of Doran's named Whissel testified he saw Doran sitting in an automobile with another man at the place mentioned; that he stopped and conversed with Doran, who introduced his companion as Tinnin; and that in response to an inquiry Doran told him the automobile they were occupying belonged to Egan, who at the time was temporarily absent phoning in a nearby store. As to the preliminary visit to Mrs. Hughes' home, Doran testified the ostensible purpose thereof was to have them deliver to Mrs. Hughes an envelope containing $5 which Egan was sending her to pay for some flowers she had purchased, Egan accompanying them most of the way; whereas evidently the real purpose was to acquaint Tinnin and Doran with the interior of her home and its surroundings so that they could better carry out the plans for the murder that night. Continuing, Doran testified that, when they reached the block where Mrs. Hughes lived, Egan got out of the car and awaited their return; that, when they reached Mrs. Hughes' home, Tinnin went inside to deliver the money, remaining there about twenty minutes; that, while he waited for Tinnin in the Postel car in front of the Hughes home two women walked by, from whom he tried to conceal his features with his hands; that, after Tinnin came out of the house, they drove back and picked up Egan. These women positively identified Doran at the trial as the man they had seen sitting in the automobile. And another woman witness living close by was produced who positively identified Egan as the man she had seen standing on the sidewalk awaiting their return. She also described the Postel automobile as the one which was used on that occasion. In this regard she stated that her attention had been attracted to Egan by his strange actions; that he paced up and down the sidewalk, stopping now and then to peer down Lakewood avenue toward Mrs. Hughes' home; that on account of his suspicious movements she became alarmed and took particular note of his clothing and personal features; that, when the automobile drove up, he seemed somewhat confused about entering the back seat, but just then two other machines approached, and Egan and the automobile he was about to enter hurriedly disappeared.

There are numerous other corroborative circumstances disclosed by the mass of evidence adduced at the trial which might be added to the above in further support of the jury's conclusion that Doran's testimony was corroborated by independent facts and circumstances which tended to connect Tinnin with the commission of the crime; but it would seem unnecessary to continue on, in view of the fact that the circumstances already set forth appear to be amply sufficient to bring the case within the legal requirements of the statute.

[11-14] The trial court's ruling denying appellant's motion for a separate trial is assigned as error. The Code section bearing upon this subject provides that, when two or more defendants are jointly charged with a public offense, whether felony or misdemeanor, "they must be tried jointly, unless the court order separate trials" (Pen. Code, § 1098); and it has been held repeatedly that a defendant so charged is not entitled to a separate trial as a matter of right (People v. Rocco, 209 Cal. 68, 285 P. 704); that the question of severance is one which must be left necessarily to the determination of the trial court, and that its ruling becomes the proper subject of review only when it appears that there has been a clear abuse in the exercise of sound discretion (People v. Perry, 195 Cal. 623, 234 P. 890; People v. Erno, 195 Cal. 272, 232 P. 710; People v. Nelson, 90 Cal. App. 27, 265 P. 366; People v. Swoape, 75 Cal. App. 404, 242 P. 1067; People v. Anderson, 75 Cal. App. 365, 242 P. 906). Furthermore, the law is well settled that on appeal the question of whether there has been an abuse in the exercise of discretion must be determined from the facts and circumstances as they were presented to the trial court at the time its order was made, and not from what afterwards transpired at the trial. People v. Erno, supra; People v. Wilson, 76 Cal. App. 688, 245 P. 781. No circumstances were presented here from which it could be reasonably concluded that the denial of appellant's motion amounted to an abuse of discretion. It is true that in cases of this kind, where two or more persons are charged jointly with the commission of a crime, it frequently happens that damaging testimony, admissible against one defendant and not admissible against the others, is received in the case; and that, despite the limitation placed upon the application thereof to the one to which it is referable, such testimony may carry with it an unfavorable effect equal to a confession. But, as pointed out in the following cases, even though it appears that such situation may arise, a defendant is not entitled for that reason alone to a separate trial. People v. Perry, supra; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Erno, supra, and see, also, cases above cited.

[15-17] The jury was kept together in charge of court officers, and before the evidence closed a woman juror became ill. A hearing to ascertain her condition was con-

ducted by the court in the absence of the other jurors, as a result of which the court found said juror was unable to continue serving as such; and, pursuant to the authority granted by sections 1089 and 1123 of the Penal Code, she was discharged and an alternate juror substituted. Appellant contends that the court's finding is unsupported, that in conducting the hearing the court violated certain rules of evidence, and that it was without authority to discharge said juror because she did not ask to be relieved, nor testify at said hearing. There is no merit in any of these contentions. The statute doubtless contemplates a summary hearing, it being held in this regard that, in order to determine whether a juror, by reason of some illness, is unable to further discharge his duties as such, it is not necessary to take testimony in the manner required judicially to establish a controverted proposition; that the juror's appearance before the court, without the aid of such testimony, may itself be sufficient proof thereof. Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272, 8 Cal. Jur. 395. In the present case the officers in charge of the jury testified that during court adjournments the juror was afflicted on several occasions with severe attacks of hysteria, during which she waved her arms wildly, screamed, and conducted herself generally in an uncontrollable manner; and it was shown by the testimony of her husband and her attending physician that on account of certain major operations she had undergone she was subject to such spells during which she lost self-control, at times threatening self-destruction. And evidently the reason the juror was not called upon to testify was because of her then nervous condition. Under the circumstances stated, to allow or compel her to continue as a juror in the case would have been not only grossly unjust to the juror and to the people and the defendants, but doubtless would have imperiled the verdict. Therefore the court's action in excusing the juror was manifestly proper.

[18, 19] Over appellant's objections, and for the purpose of showing a close relationship between Tinnin and Egan, the prosecution introduced in evidence a portion of the transcript of Tinnin's preliminary examination on the robbery charge, from which it appeared that Egan acted as his attorney; also a portion of the transcript of testimony taken at the Tehama trial, from which it appeared that Egan appeared there as an alibi witness for Tinnin; also the "ticket of leave" granted Tinnin when he was released on parole from Folsom Prison, which specified the condition that he should reside in Alameda county. In view of the prosecution's claim of conspiracy, upon the existence of which the case against Tinnin depends, we are of the opinion that for the purposes intended the court did not err in admitting the evidence. No allusion in connection therewith was made to any prior conviction of felony, and, even though such inference were drawn by the jury from the transcript in the Tehama county case, it cannot be said that such inference operated to appellant's prejudice because afterwards he voluntarily became a witness in his own behalf, and thereby allowed the prosecution on cross-examination to go into the matter of said prior conviction. Nor does it appear that the cross-examination with reference thereto extended beyond the limitation of the rule governing matters of that kind (People v. La Verne, 212 Cal. 29, 297 P. 561; People v. Chin Hane, 108 Cal. 597, 41 P. 697; People v. Oliver, 7 Cal. App. 601, 95 P. 172), for, having voluntarily offered himself as a witness, appellant's credibility as such was subject to impeachment the same as any other witness (People v. La Verne, supra). It follows that, since the evidence complained of was admissible for the purpose mentioned, the assistant district attorney was within his rights in referring to the same in his argument in the light of such purpose.

[20-22] Appellant assigns as error also numerous rulings of the trial court on the admissibility of evidence, and instances of alleged misconduct on the part of the assistant district attorney during the presentation of evidence and in his argument to the jury. After having given full consideration to all of the points urged under this assignment, and the portions of the record upon which they are based, we are of the opinion that neither collectively nor separately do they furnish grounds for reversal. The distinctive nature of the points urged and the different subjects to which they relate make it impossible to deal with them collectively; and to discuss them singly, there being some thirty in all, would carry this opinion to an interminable and unnecessary length; consequently no attempt will be made to pass upon them separately. It may be that on technical analysis a few of the trial court's rulings on matters of evidence are subject to some criticism, but no one of them reaches the point of prejudicial error. And, with respect to the charges of misconduct, it may be stated generally that, although the attitude of the assistant district attorney during the course of the trial was at times aggressive and persistent, none of the specific acts complained of can be said to fall within the classification of prejudicial misconduct; nor do any of the remarks made by him during the presentation of evidence or in his arguments to the jury call for reversal. In this latter regard, the record shows that throughout the trial the assistant district attorney was made the subject of a bitter, personal attack on the part of counsel for the defendants. His motives, integrity and honesty of purpose were constantly assailed; also such extraneous personal matters as racial affiliations and religious beliefs were time and again injected into the

case by counsel for defendants. In fact the record shows an obvious attempt on their part to vex, aggravate, and humiliate him. It is not surprising, therefore, that under the stress of such provocation he felt called upon at times, as a matter of self-respect, to reply to some of the assaults upon his character. But the record shows that in doing so he confined his remarks to his own defense, and carefully refrained from making any attack upon the defendants on trial. Eventually, during his closing argument the interruptions by counsel for defendants became so vexatious, persistent, and unnecessary that the trial court, after repeated warning, and so that the trial might proceed in an orderly and respectful fashion, was obliged to adjudge counsel for Egan guilty of contempt of court; and the court's action in doing so is assigned as error and misconduct on the part of the trial court. Aside from the general rule which precludes one codefendant who is appealing from complaining of any alleged errors which affect another defendant who is not appealing (17 Cor. Jur. 208), the question of the propriety of the trial court's action in adjudging counsel guilty of contempt, and in keeping the interruptions within legitimate bounds, has been definitely disposed of adversely to appellant's contention in In re Hallinan, 126 Cal. App. 121, 14 P.(2d) 797. And, in any event, at the conclusion of the arguments, the court instructed the jury to the effect that it should disregard remarks of respective counsel and decide the case "upon the evidence which was presented in court, and upon nothing else." It will be presumed that the jury obeyed such instruction. People v. Cordero, 72 Cal. App. 526, 237 P. 786.

After reviewing the entire case, including the evidence, it is our conclusion that appellant received a fair trial and was justly convicted. The judgment of conviction and order denying the motion for new trial are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

219 Cal. 685

NORTH AMERICAN BUILDING-LOAN ASS'N v. RICHARDSON, State Building and Loan Com'r et al.

L. A. 14173.

Supreme Court of California.

Jan. 18, 1934.

Costs ⇐264.

On appeal from adverse judgment in action to enjoin commissioner from proceeding further in handling of loan association's business, allowance of costs on appeal were permitted to await determination of cause on merits, where transcript for which allowance was sought was already filed, cost of clerk's transcript was advanced by counsel, and reporter's claim for transcript rested upon private contract (St. 1931, p. 540, § 13.12; Code Civ. Proc. § 953b).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by the North American Building-Loan Association against Friend W. Richardson, State Building and Loan Commissioner, and another. From the judgment, plaintiff appeals. On plaintiff's motion for allowance of costs on appeal.

Motion denied.

David R. Faries and Joseph Scott, both of Los Angeles, for appellant.

Roland Tognazzini, of San Mateo, Roscoe C. Andrews, of Los Angeles, and Thomas M. Gannon, of San Francisco, for respondents.

WASTE, Chief Justice.

Acting under the provisions of the Building and Loan Association Act (St. 1931, p. 483), the respondent building and loan commissioner of this state assumed possession and control of the property, business, and assets of the appellant North American Building-Loan Association. Thereafter, and pursuant to section 13.12 of the act, the appellant instituted the present action in the superior court to enjoin the respondent commissioner from proceeding further in the handling of its business. Obviously, the appellant did not prevail in the court below, the court finding, among other things, that the value of its assets after deducting its liabilities, including its outstanding investment certificates and shares, was at least $150,000 less than the aggregate par value of its outstanding stock, and that the continued possession and control of appellant's property, business, and assets by the respondent commissioner is for its best interests and for the best interests of its creditors. The appellant appeals from the judgment based on these findings. The transcript to be used on the appeal is now on file, but the briefs, as yet, have not been filed.

In this state of the record, the appellant presents this motion for an allowance of costs on appeal in the amount of $486.80, representing the cost of the preparation of the transcript already on file. It is requested that this sum be allowed as a charge against the funds of the appellant now in the hands of the respondent commissioner.

In opposition to the motion, there has been filed herein an affidavit by the custodian of the appellant association, duly appointed by the respondent commissioner, wherein it is averred that the respondent commissioner is proceeding with the liquidation of the appellant association; that the association has been for more than a year "hopelessly insolvent and unable to make good its obligations"; that the appeal herein is "frivolous and without merit"; that continued resistance in this manner is materially harming the creditors of the association; that the appeal is being perfected "for the sole purpose of annoying respondent commissioner * * * with the idea in mind of harassing and annoying him, and delaying and hindering the liquidation of said insolvent and defunct association"; that the directors of the appellant association "represent the guaranty stockholder group, upon which the law places a stockholders' liability"; that said "group have not the best interests of the twenty-two thousand creditors at heart"; and that the appeal already has resulted in an additional drain upon the assets of the association and has caused the trustees under certain deeds of trust, constituting a part of the assets of the association, to refuse to proceed with sales under said deeds of trust. The affidavit concludes with the request that the decision on the motion be deferred to await the determination of the appeal on its merits.

Without passing upon the verity of the averments contained in the affidavit, we are of the opinion that this cause should follow the usual and customary course by which the allowance of costs on appeal is made dependent upon the determination of the cause on its merits. As indicated above, the transcript, for the cost of which the present allowance is sought, is now on file, and a denial of the motion at this time will not therefore delay the prosecution of the appeal. It appears from the papers herein that the cost of the clerk's transcript has been advanced by counsel for the appellant. The reporter's claim for the preparation of his transcript rests upon private contract. Section 953b, Code Civ. Proc. In the event of a breach thereof, he has his remedy. He has made no effort to join in the present motion. The

Building and Loan Association Act, supra, makes no provision for the advancement or prepayment of costs in a case of this kind. Such costs should abide the determination of the appeal.

The motion is therefore denied without prejudice to the consideration of the matter of costs on appeal on the disposition of the cause on its merits.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

219 Cal. 723

COOKINHAM v. COOKINHAM.

S. F. 14542.

Supreme Court of California.

Jan. 24, 1934.

1. Husband and wife ⇐278(2).

Contract settling property rights of separated husband and wife without any inducement to divorce and divorce decrees in conformity therewith could not be set aside by divorced husband as contrary to good morals.

2. Divorce ⇐286.

In action to set aside property settlement agreement and modify decrees of divorce relating thereto, reviewing court must assume, in absence of contrary showing, that circumstances were such as to justify court in approving and ratifying settlement agreement.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Franklin H. Cookinham against Marguerite B. Cookinham. From a judgment for defendant, plaintiff appeals.

Affirmed.

Gottesfeld, Mann & Carmody, Harry Gottesfeld, and George C. Carmody, all of San Francisco, for appellant.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune and George B. Harris, all of San Francisco, for respondent.

IRA F. THOMPSON, Justice.

This is an appeal from a judgment in favor of defendant following an order sustaining defendant's demurrer to plaintiff's amended complaint without leave to amend.

It is alleged in the amended complaint that on January 7, 1924, while the parties were husband and wife, but living separate and apart, they entered into an agreement settling their property rights, and that subsequently, on November 24, 1924, an interlocutory decree of divorce was granted to plaintiff, which decree approved and incorporated the provisions of the agreement. It is alleged that the final decree in the action was entered on July 25, 1926, which decree also adopted and ratified the provisions mentioned. It is then set forth that the agreement is and was void and against public policy, that it is executory in that it provides for payments to be made from month to month, and that so long as the agreement remains uncanceled plaintiff cannot move for an order modifying either the interlocutory or the final decree. Plaintiff then prays that the agreement be declared void and the provision for the payment of $150 per month for the support of the defendant be stricken out of both the interlocutory and final decrees.

The agreement, the interlocutory decree and the final decree are attached to the complaint and by reference incorporated therein.

The first sets forth that the parties are living separate and apart, that the wife is about to commence an action for divorce, and that they are desirous of settling their property rights. It is then agreed that the husband shall pay to the wife, the defendant in this action, the sum of $200 per month during the pendency of that action for the support of herself and their minor child, and, if the court determines that she is entitled to a divorce, the sum of $150 per month during her life or until she remarries, and the sum of $50 per month for the support of the minor daughter until the latter attains her majority. Provision is then made for the custody of the child, for her medical care, and for life insurance upon the father's life in favor of the child in the sum of $5,000. Next it recites the agreement of the husband to transfer to the wife the proceeds from the sale of certain real property, the amount of which is not set forth, their furniture, and to arrange another insurance policy in the sum of $5,000 so that she should be the beneficiary not subject to change without her consent. There is also a general provision, and one which says that, in the event a divorce is granted, the provisions of the contract may be incorporated, with the consent of the court, into the interlocutory and final decrees.

The interlocutory decree ratified and approved the agreement as a whole, and then by further decree ordered the defendant to do specifically the things which he had agreed to do; i. e., without reference to the agreement, lifted the pertinent provisions of the contract from their context and made them paragraphs a to k, both inclusive, of the judgment.

[1, 2] Appellant's contention is, as is apparent from our recital of the allegations of the complaint, that the agreement was contra bonos mores, and therefore null and void, and may be so declared in this action. With this assertion we cannot agree. First, it is to be observed that the parties were living separate and apart, and the agreement conclusively establishes their intent to amicably settle and adjust all of their property rights. This they were competent to do and were authorized by law to do. Ex parte Weiler, 106 Cal. App. 485, 289 P. 645. Second, the agreement did not hold out to the wife an inducement for her to secure a divorce by providing that she should receive $150 per month in the case a decree were granted, for the reason that, in the event of such a decree, it was to the advantage of the appellant that the lump sum of $200 payable to her for the support of herself and daughter should be segregated and made to depend for their continuance upon different contingencies. Third, the court had the authority to and presumably did examine the contract and inquired into all the facts surrounding its execution before approving and ratifying its provisions. We must assume in this action that those circumstances were such as to establish the validity of the agreement.

Finally, virtually the same contentions advanced here with reference to the agreement were put forward in the case of Brown v. Brown, 83 Cal. App. 74, 256 P. 595, and in an exhaustive opinion in which many of the authorities relied upon by appellant were reviewed, the court declared them to be without merit. No good purpose would be served in repeating what was there said.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

219 Cal. 715

BRAGG v. BRAGG.

S. F. 14802.

Supreme Court of California.

Jan. 23, 1934.

Hearing Denied by Supreme Court Feb. 19, 1934.

1. Deeds ⇐211(3).

Evidence in husband's action to cancel for fraud deeds conveying to wife joint tenancy in home and to quiet title thereto *held* insufficient to show that wife entered into marriage with fraudulent intent (Civ. Code, § 82, subd. 4, and § 1572, subd. 4).

2. Marriage ⇐34.

To annul marriage for fraud, it must appear that defendant made false statements upon matters which state deems vital, or entered into marriage with no intent to perform marital duties and with intention of fraudulently obtaining property or gaining some other advantage inherent in matrimonial state (Civ. Code, § 82, subd. 4, and § 1572, subd. 4).

3. Deeds ⇐70(6).

It is not policy of law to set aside transfers of property because of broken antenuptial promises as to love and affection (Civ. Code, § 82, subd. 4, and § 1572, subd. 4).

4. Deeds ⇐190.

Allegations that spouse had no intention of performing marital obligations at time marriage was solemnized or thereafter, when conveyance was made, must be supported by unequivocal evidence that spouse was moved by fraudulent intent (Civ. Code, § 82, subd. 4, and § 1572, subd. 4).

5. Deeds ⇐70(6).

Spouse's subsequent failure to fulfill antenuptial or postnuptial promises made in good faith does not, of itself, constitute actionable "fraud" for which cancellation of deed may be had (Civ. Code, § 82, subd. 4, and § 1572, subd. 4).

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

6. Cancellation of instruments ⇐34(1). Marriage ⇐60(2).

General rule that party who would rescind transaction for fraud must act promptly on discovery thereof applies to annulment of marriage and to cancellation of transfers between husband and wife, allegedly procured through fraud (Civ. Code, § 82, subd. 4, and § 1572, subd. 4).

7. Appeal and error ⇐110.

Order denying new trial is nonappealable.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by George H. Bragg, Sr., against Katherine Bragg to cancel certain deeds and to quiet title, which was consolidated for trial with a divorce action by plaintiff against defendant. From a judgment for plaintiff in the action to cancel certain deeds and to quiet title, and from an order denying a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment canceling deeds and quieting title reversed.

J. E. McCurdy, of San Mateo, for appellant.

Kirkbride, Wilson & Brooks, of San Mateo (John D. Willard, of San Francisco, of counsel), for respondent.

SEAWELL, Justice.

Defendant Katherine Bragg appeals from a judgment of the superior court of San Mateo county, which decreed the cancellation of certain deeds conveying to her a joint tenancy interest in described real property in the county of San Mateo, and quieted title thereto in plaintiff George H. Bragg, Sr. The action for cancellation of said deeds was consolidated for trial with a divorce action filed against defendant Katherine Bragg by plaintiff George Bragg, Sr. The court granted a nonsuit in the divorce action on the ground that the testimony of plaintiff George Bragg was not sufficiently corroborated (section 130, Civ. Code), and he has not taken an appeal from said judgment of nonsuit.

The parties intermarried on December 2, 1926. On September 14, 1930, during the temporary absence of his wife, plaintiff George Bragg left their domicile, which constitutes the property involved in this action, and thereafter filed suit for divorce. At the date of the marriage plaintiff was seventy-five years of age and defendant was fifty-five. Plaintiff was a widower with four adult children, all of whom maintained their own homes. Defendant was a widow and had a married daughter. Plaintiff and defendant had known each other for more than thirty years, and at intervals during that period they had been neighbors in five different cities. Plaintiff and his first wife had been married approximately fifty years, and at the time of the death of the wife were residing in the property involved in this action. Upon the death of his first wife, plaintiff moved to San Francisco to live in a hotel, and within a few months sought the companionship of defendant, who resided in a hotel nearby. Some time thereafter they discussed marriage. Both desired a home and companionship. Letters written by Mr. Bragg indicate that it was first planned that he should build a new home and dispose of his house in San Mateo. Apparently this plan was abandoned and after their marriage they went to live in the San Mateo home.

On December 11, 1926, nine days after marriage, plaintiff George H. Bragg executed a gift deed conveying an undivided one-half interest in the home place to Katherine Bragg, and said deed was recorded on December 16, 1926. The property consisted of a four-room cottage on a lot 50 by 128 feet. At the time of trial it was valued at $3,950 by a bank appraiser. On January 31, 1927, husband and wife joined in execution of a deed conveying said property to Emma W. Crawford, who immediately reconveyed to them as joint tenants, and these two deeds were recorded on February 1, 1927. The circumstances concerning the execution of said deeds will be set forth more fully hereinafter.

In his complaint for cancellation plaintiff alleged that said conveyances were executed at the insistent request and persuasion of defendant, and upon her express promise to be a true and faithful wife, and to render his declining years happy, peaceful and contented; that defendant married him for the express purpose of obtaining title to his property, or as much thereof as possible, and obtaining title to the balance thereof upon his death; and that she entered into the marriage and made said promises without any intention of being a true and faithful wife and did not attempt to fulfill her promises and agreements in this regard.

[1] The court found all allegations in the complaint for cancellation of said deeds to be true. The gravamen of the charge of fraud against defendant is that she entered into her marriage with plaintiff, and procured said conveyances to be executed, expressly promising to be a true and faithful wife to him and to make his declining years happy, peaceful, and contented, and that she had no intention of performing and did not in fact perform, said promises. A promise made without any intention of performing it constitutes fraud. Section 1572, subd. 4, Civ. Code. In support of these charges plaintiff testified that his wife treated him more like a stranger than a husband; that she was never sympathetic with him, and showed him very little affection; that she did not cook his breakfast after the first few months; that she scolded and nagged him and found fault with everything he tried to do in the interest of conjugal felicity and comfort; that on one occasion when he came home with a cold she told him that she would not take care of him and that he would have to get a nurse or go to the hospital; that on another occasion she accused him of taking a nickel watch, which she later found she had misplaced. We are of the view that the evidence will not sustain the charge of fraud.

At the date of the marriage, December 2, 1926, plaintiff owned an unimproved lot in San Mateo in addition to the property involved in this action, and had some cash in the bank, which, it would seem, was largely expended in buying new furniture for the home where they resided. He was employed as secretary of the Heavy Hardware and Shop Supply Association at a salary of $180 a month, which was later cut to $170 and then to $160. In March, 1930, upon the merger of this association with another organization, he was retired and was paid $100 per month for six months. In 1929, plaintiff built a house upon the unimproved lot with funds derived from a loan of $3,800 on the property, which he subsequently sold for $5,025. He realized about $700 in cash and a note for $275 from the sale, the balance going to discharge the loan and expenses. He lost the $700 in the stock market, and at the time of the trial was dependent on his children. Defendant

testified that at the date of the marriage she had about $1,000 in the bank, and that she had invested $3,000 in stocks. She had sold the stocks and spent the proceeds.

The papers executed in connection with the loan which plaintiff procured in 1929 upon the property upon which the new house was built described him as a widower. He testified that he had taken a copy of the judgment decreeing the property to be community upon the death of his first wife to the loan company for reference, and that by reason thereof the loan company described him as a widower, and that he did not read the papers over carefully before he signed them. Defendant refused to accept this reasonable explanation and charged plaintiff with misrepresenting his status. She also told him that he could not sell the property without her signature. Two unexecuted quitclaim deeds, dated August 28, 1929, were introduced in evidence. By one Mrs. Bragg conveyed all her interest in the property on which the new house was situate to plaintiff, and by the other, plaintiff quitclaimed to her his interest in the home place. Thereafter he consulted a title company and learned that as the property was his separate property, acquired before marriage, defendant's joinder was not necessary. Nothing further was said or done with reference to these unexecuted quitclaim deeds. It was not shown that defendant had requested that said quitclaim deeds be executed, or that she had ever requested plaintiff to convey to her an interest in the property upon which the new house was built. Said property was not covered by the deed of gift and the joint tenancy deed sought to be canceled in the action herein.

Regarding the circumstances connected with the execution of the deeds sought to be canceled, plaintiff testified a few days after their marriage his wife said to him that she would like to have an interest in the property to assure her a home if anything should happen to him. He told her he would provide for that in his will, but that did not satisfy her and therefore he consulted an attorney who had represented him upon his first wife's death. The deed of gift conveying to her an undivided interest in the home property was executed on December 11, 1926, and recorded on December 16, 1926. According to plaintiff, defendant thereafter asked for a joint tenancy deed. On January 31, 1927, at the office of plaintiff's attorney, they joined in executing a deed to a stenographer in said attorney's office, who conveyed back to them as joint tenants. These two deeds were recorded on the following day. On February 24, 1927, defendant filed a declaration of homestead on said property, but at no time during the marriage did she inform plaintiff thereof. Defendant denied that she had brought up the subject of the execution of the deed of gift, or thereafter suggested the change to a joint tenancy deed, but the trial court accepted the testimony of the plaintiff on this point.

[2-5] We are of the view that the judgment canceling said deeds and decreeing that defendant has no interest in the property described therein must be reversed. The general rule is that before one of the spouses is entitled to an annulment of the marriage contract on the ground that the marriage was induced by fraud, it must appear that the defendant has made false statements upon matters which the state deems vital to the marriage relationship, or the evidence must be clear to the effect that the spouse against whom the annulment is sought at the time the marriage was contracted did not intend to perform marital duties, but on the contrary assumed the relation with the sole intent of obtaining fraudulently the property of the other, or with the intent of gaining thereby some advantage which inheres in the matrimonial state. Mayer v. Mayer, 207 Cal. 685, 279 P. 783; Millar v. Millar, 175 Cal. 797, 167 P. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184. By reason of the importance that the marriage status bears to our social structure, and the obvious difficulty of determining the character of the motives and reasons which lead persons into the matrimonial state, the acts and grounds which the law recognizes as sufficient to justify an annulment of marriage for fraud (section 82, Civ. Code) are few indeed. We need not discuss this specific subject of annulment of marriage further than to say that the strict rule applicable to annulment of marriages on the ground of fraud is somewhat relaxed when the action is to cancel a deed or deeds executed as an incident to the marriage on the ground of fraudulent representations inducing the marriage and conveyances. Nevertheless, it is not the policy of the law to set aside transfers of property because of broken prenuptial promises or agreements made by the parties to the marriage as to love, affection and high regard each will bear for the other. Every marriage contract impliedly imposes such duties upon both spouses. Allegations that a spouse had no intention of performing his or her marital obligations at the time the marriage was solemnized, or thereafter when a conveyance to such spouse was executed, must be supported by unequivocal evidence that such spouse was moved by a fraudulent intent. Subsequent failure to fulfill prenuptial or postnuptial promises made in good faith does not of itself constitute actionable fraud for which cancellation of deeds between husband and wife may be had.

As illustrative of the policy of the law, we cite: Tillaux v. Tillaux, 115 Cal. 663, 47 P. 691; Hendrickson v. Hendrickson, 95 Cal. App. 487, 272 P. 1079; Murdock v. Murdock, 49 Cal. App. 775, 194 P. 762; Donze v. Donze,

88 Cal. App. 769, 775, 264 P. 294; Dale v. Dale, 87 Cal. App. 359, 262 P. 339, 342. In Dale v. Dale, the husband and wife had become estranged and the husband conveyed certain community property to the wife as her separate property as an inducement for reconciliation and renewal of marital relations. They were unable to live in harmony and the husband brought suit for divorce. In the divorce action the trial court decreed that said property was community property, rather than separate property of the wife. In reversing that portion of the decree the court said concerning the instruments of transfer: "They were voluntarily made by the grantor at his own suggestion, for the purpose of reconciling their differences. Evidently this effort was a failure. Respondent then brought this suit for divorce, and sought to set aside these conveyances. This, then, was nothing more than a failure of purpose, or of consideration. Neither the complaint, the findings, nor the evidence warrants a charge of a lack of good faith on the part of appellant. It was not alleged, and is not contended, that she deceived respondent in making this agreement to avoid trouble, or that she procured the conveyances by this means with a previous intention not to fulfill her promise. * * * So far as the record is concerned, both parties entered upon the negotiations in perfect good faith with a view of securing a reconciliation. All that is charged is that she afterwards failed to fulfill her agreement. This is an insufficient showing upon which to set aside a deed upon the ground of fraud or mistake."

[6] In the case now before us the plaintiff alleged that when defendant entered into the marriage and soon thereafter induced him to convey a joint tenancy interest to her she had no intention to perform her marriage vows, or to be a true and faithful wife and make plaintiff's declining years happy, peaceful and contented. By finding all allegations of the complaint to be true, the court impliedly held that defendant married plaintiff with the fraudulent intent alleged. But in our view, on no reasonable construction will the evidence sustain said finding of fraudulent intent. On the contrary, the evidence impels the conclusion as a matter of law that defendant married plaintiff in good faith, and that she, as well as plaintiff, was actuated by the belief that they could live together harmoniously and comfortably. In fact, they did live together for almost four years, and plaintiff himself admitted that there were times when "things would go along in pretty good shape." It is the general rule that a party who would rescind a transaction for fraud must act promptly on discovery of the fraud, and not thereafter ratify the transaction. Section 82, Civil Code, providing for annulment of marriages, expressly provides that a marriage may be annulled where the consent of either party was obtained by fraud, "unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife." Subdivision 4, § 82.

Plaintiff testified that the conduct of defendant upon which he relied to establish that she entered into the marriage with fraudulent intent commenced almost immediately after the marriage. If said conduct in fact indicated to plaintiff that defendant had entered into the marriage and induced the conveyances with fraudulent intent, he should have acted sooner to separate from her, rather than to confirm the marriage and conveyances by continued cohabitation.

That plaintiff held out to defendant the offer of a home as an inducement to the marriage is apparent from two letters he wrote to her before marriage which were introduced in evidence. There is no showing that defendant was the aggressor in urging the marriage. That defendant may have wished plaintiff to convey to her an interest in the home property, rather than to rely on plaintiff protecting her by a will, which would be ambulatory in nature, does not, taken alone, or with the other circumstances detailed, establish that she married him from purely mercenary motives, and without an intent to perform her wifely duties. The change from tenancy in common to joint tenancy would result in protection of both parties. If they held as tenants in common, upon the death of either spouse the children of the other might claim an interest under the laws of succession. In our view it appears from the evidence as a matter of law that both parties entered into the marriage in good faith, and that subsequent inharmony, bitterness and distrust developed between them. The record fails to show fraud in the inception of the conveyances.

[7] The judgment appealed from is reversed. The order denying a new trial is nonappealable, and the appeal therefrom is dismissed.

We concur: WASTE, C. J.; THOMPSON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

219 Cal. 759

NOLAN v. STATE BAR OF CALIFORNIA.

S. F. 14960.

Supreme Court of California.

Jan. 29, 1934.

Rehearing Denied Feb. 27, 1934.

Attorney and client ⇐53(2).

Evidence *held* to sustain finding that attorney was guilty of reprehensible conduct in appropriating moneys received in settlement of personal injury case and moneys received from client for costs in instituting bankruptcy proceedings, justifying suspension for three months.

In Bank.

Application by Stanley F. Nolan to review an order of the Board of Governors of the State Bar of California recommending that petitioner be suspended from practice of the law for three months.

Petitioner ordered suspended from the practice of the law for three months.

Robert H. Morrow and Stanley F. Nolan, both of San Francisco, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

On August 8, 1932, Stanley F. Nolan, a member of the State Bar of California, was, after preliminary investigation, notified by local administrative committee No. 3, for the city and county of San Francisco, State Bar of California, to appear before that body on August 18, 1932, to then and there show cause why he should not be disciplined for professional misconduct and for violation of his oath and duty as an attorney and counselor at law in the following respects, to wit:

That at the city and county of San Francisco, state of California, within approximately one year prior to proceedings taken, he did receive and retain from Bertha Mae Hedges a credit for $98.91 on account of board and room and $35 on account of costs, under the pretext and representation that he would pay said $35 on account of costs for filing and conducting bankruptcy proceedings on behalf of said Bertha Mae Hedges, which she claims petitioner had advised her to commence. Said notice further informed him that he was charged with having failed and refused to account for said moneys so received or to render any services or take any steps whatever in the fulfillment of his obligations, and that he had received said credit and retained said moneys without the intention of rendering any part of the legal services which he had contracted to perform. Petitioner by way of answer denied that he was guilty of any of the acts set forth in said notice. Hearings were held on said notice to show cause on September 20 and October 6, 1932. The local administrative committee made findings of fact and prepared conclusions of law as to which all members agreed. As to the recommendation, one member of the committee recommended a suspension of petitioner from the practice of the law for a period of three months and the other two recommended a public reprimand. The committeeman who recommended a three months' suspension was of the view that the degree of moral turpitude which would justify disbarment was not shown at the hearing, but that it was fully shown that petitioner lacked the consciousness of the duties and responsibilities of an attorney, and exhibited an extreme disregard of the devotion and fidelity to his client which the relation of attorney and client should demand. The other two committeemen adopted the findings and conclusions of their associate, but recommended a public reprimand, believing that the ends of justice would be subserved thereby. After a number of continuances, the matter came before the board of governors of the State Bar for final action. Petitioner and his counsel appeared, and both addressed the board in petitioner's behalf. The findings of the local administrative committee were adopted and approved as the findings of the board. Eight members of the board voted to suspend the petitioner for a period of three months, and four, placing their dissent upon the ground that three months' suspension was an insufficient penalty for the offenses disclosed by the record, voted in the negative. Petitioner has brought the record to us on a petition for a writ of review.

The record discloses several transactions had with Mrs. Hedges and her husband as parties on the one hand and petitioner as a party on the other. From the confusing and somewhat incoherent defense of the petitioner, it has been difficult for us, as it must have been for the local administrative committee, judged from the many questions it propounded to him, to reconcile his unusual course of transacting business with the well-recognized standards which should guide an attorney in dealing with his client. We have carefully read the transcript of the evidence taken at the hearing, and, while we are not willing to state that it discloses a definite case of moral turpitude on the part of petitioner, we are convinced that it convicts him of employing unlawyerlike and dissembling methods which properly call for disciplinary action. It would not serve any useful or beneficial purpose for this court to engage in an extensive analysis of all the evidence. It will be sufficient to refer to so much of it as tends to justify the recommendation of the board of governors of the State Bar.

It appears that Mrs. Hedges was conducting a hotel under lease at 863 Bush street in

San Francisco during the summer and fall of 1931 and for a period thereafter. She was a stranger to petitioner until on or about April 21, 1931, when she and her husband became involved in an automobile accident. The testimony of Mrs. Hedges was to the effect that a man came to her after the accident and said to her he would be glad to act as a witness for her if she would employ an attorney friend of his. When she arrived home on the same day, a call came from Mr. Nolan, who said to her that a friend of his had given her name to him as a person who had had an automobile accident, and he requested her to call at his office with respect to the matter. She and her husband subsequently called, and Mr. Nolan told her that she had a good case for damages and he would have the money compensating her for the damages suffered by her on the next day, as he was acquainted with the adjuster of the insurance carrier. Mr. Nolan had a prepared contract for her to sign with him, which in effect authorized him to represent the Hedges as their attorney in collecting, by settlement or suit, whatever damages he might recover from one Scafidi, the party to be charged with negligence. Mr. Nolan was to retain one-third of said sum. This contract was signed by the Hedges. The action is referred to as Re Hedges v. Scafidi. Two days thereafter he informed Mrs. Hedges that he was short of money and requested enough money to file the papers, but said it would be returned to the Hedges out of the moneys he would recover for them. It was her understanding that the costs would be paid by Nolan. Mr. Hedges advanced $10 on account of costs, and was given a receipt in words and figures as follows:

"April 23, 1931.

"Rec'd this day $10.00 on acct. re Hedges v. Scafidi.

"[Signed] S. Nolan."

Mrs. Hedges was in financial difficulties at the time of the transaction. She had been cited several times by the commissioner of labor for having failed to pay certain of her employees. She was also otherwise involved in the affairs of the hotel. Mr. and Mrs. Hedges' testimony, which in the main is corroborated by other witnesses, and in some respects by Nolan himself, is to the effect that Nolan, immediately after he solicited said automobile accident case, proposed that he board at Mrs. Hedges' hotel, Hotel Eugene by name, and he did become a boarder on or about June 14, 1931, and continued to board at said hotel to the time she sold it in July, 1931. The hotel changed hands, but it was again rerented to Mrs. Hedges. Nolan owed her, when he left the hotel, $98.91. Mrs. Hedges had been pressing him for payment of the board bill, but he had no money. He promised her that as soon as he was able he would pay the bill, and also said to her that he would be pleased to render her legal services in payment of the bill. He paid nothing, however, and, as Mrs. Hedges was subsequently summoned to appear at the labor commissioner's office on account of complaints made by laborers against her because of nonpayment of labor claims, she went to his office and requested him to accompany her to the commissioner's office. He advised her to file a petition in bankruptcy, as that would probably eliminate the laborers' claims. He told her the costs would amount to $35 or $40, and asked her for that amount, admitting his indebtedness to her, but saying that he would be glad to pay her, but he did not have the money. Mrs. Hedges told him she had very little money, but she gave him a check on May 4, 1932, for the sum of $10, upon the back of which she wrote "For filing papers in Bankruptcy." It was understood that this money was to be applied on account of costs. On May 6, 1932, she gave him another check for $20, and on May 13 she gave him a third check for $5. No proceedings in bankruptcy were ever commenced. This subject will be presently adverted to. In the meantime, we will consider his handling of the automobile accident case.

Petitioner's method of practicing law as related by himself was to give over the trial of each case to a specialist in the particular branch of the law to which said case belonged. He did no trial work himself. If unable to effectuate a settlement, his plan was to associate a trial lawyer. In the instant case, it appearing that the insurance company would pay nothing by way of settlement without a contest, he passed the case over to Attorney C. D. Dethlefsen, a specialist in the trial of negligence cases, and who, according to his testimony, has handled 3,000 of such cases. Nolan did not appear upon the record as an attorney, or in the case. Finally the insurance company paid $100 by way of settlement rather than to go to trial. Mr. Dethlefsen had tried other cases for Mr. Nolan. The latter was indebted to him in some amount. Nolan and the insurance adjuster had agreed upon a settlement upon the payment of $100, but Mrs. Hedges refused it as not being sufficient. Dethlefsen later accepted the offer without the approval of Nolan. Dethlefsen had advanced all costs. The $10 which Nolan had received was not paid to Dethlefsen but retained by him. It seems, according to Dethlefsen, Nolan was agreeable to the settlement as Dethlefsen credited him on account of his portion of the $33.33 fee. Nolan claims that the $10 which he received was on account of his fee. The Hedges testified that it was advanced as costs to be accounted for if and when a judgment was obtained or settlement made. The fee was on a contingency basis, and it is not at all likely that $10 was paid on account of a contingent fee. The receipt was prepared by Nolan. Throughout his testimony and his participa-

tion in the conduct of these proceedings we find him excoriating Mrs. Hedges, his former client, and denouncing her as an impostor, maintaining a cause wholly without merit. He early became satisfied in the damage suit, he says, that she was in fault as to the accident, and, further, that she received no injuries therein. Nevertheless he continued to press her claim for damages. While his name was not upon the complaint, he asserted that he was in control of the case. His claim seems to be that he was entitled to the one-third part of the $100 which was retained by Dethlefsen, and therefore he was entitled to retain the $35 paid to him by Mrs. Hedges as costs in the bankruptcy matter. According to both Dethlefsen and Nolan, the latter was agreeable to Dethlefsen crediting him with whatever was due him on said previous indebtedness. In any event, Dethlefsen was the agent of Nolan, and Mrs. Hedges was in no way a party to their private professional enterprises.

The bankruptcy project unquestionably discloses reprehensible conduct on the part of Nolan in his treatment of his client. He offers as a justification of his failure to commence the bankruptcy proceeding the refusal of Mrs. Hedges to verify the oath in forma pauperis and make affidavit to the several sets of schedules which were a necessary part of the petition. The bankruptcy proceeding was, according to Mrs. Hedges, born in the mind of Attorney Nolan, and was intended to be used by him as a sort of back fire against the prosecution of the labor claims which had been filed against her. In other words, the papers in bankruptcy were to be flourished in the presence of the commissioner as a bar to further proceedings on the labor claims. Mrs. Hedges said she was acting in good faith, and supposed the papers in bankruptcy had been filed when, as a matter of fact, they had not been sufficiently prepared to give them any value whatever. She said she signed her name wherever Nolan told her to sign it. Out of more than a dozen sets of schedules, each of which should have been signed, not one was signed. The pauper's oath was signed but not verified, and the only other papers signed were the two last pages of the petition. None is verified. It seems incredible that Mrs. Hedges, acting under the advice of her attorney, should have refused to obey his instructions in a matter in which she was unskilled. The logic and reasonableness of the proposition and the relationship of attorney and client add convincing force to the testimony of Mrs. Hedges as to whether petitioner demeaned himself as an attorney should in the performance of his duty to his client and to the law itself.

Petitioner would give us the impression that his former client was engaged in what he terms the apartment house racketeering. That term, as we understand it, is sometimes applied to an unconscionable person who is engaged in buying and selling apartment house leases and who is a swindler and a cheat. We do not so stigmatize his client. But, if he be right in his estimate of her, he knew, or should have known, very early in his business dealings with the Hedges all that he charges her to be at the time the charges against him came on for hearing, and her fraudulent purpose to recover on an unfounded claim, if such be true, should have caused him to take steps to thwart her in her iniquitous purpose, rather than assist her in wringing from the insurer of her adversary a claim which he says his clients were not entitled to receive. A similar breach of duty is seen in the insolvency transaction. It was a bald subterfuge, adopted to gain an advantage in one of the departments of government. In the light of what has been said, it is not necessary to discuss further the failure of petitioner to pay the certain amounts paid to him by Mrs. Hedges on account of court costs. It was conclusively established by the indorsement made by Mrs. Hedges on the first check she drew and delivered to him in the insolvency matter, to wit: "For filing papers in bankruptcy" that the money was to be so applied. As to the other transaction, there is sufficient evidence to sustain the finding of both the local administrative committee and the board of bar governors in the finding that petitioner failed to comply with his trust by applying said moneys to his own uses.

If petitioner has, as he claims to have, any charges against Mrs. Hedges for services rendered, he has, and at all times has had, a remedy. That question is not before us. The real question is whether he used moneys furnished to him for the specific purpose for which they were furnished, and whether his conduct throughout the transaction was fairly open to the construction placed upon it by the two law bodies which passed upon it. Both bodies were unanimous in their conclusion. They differed only as to the degree of discipline that should be imposed. We find nothing in the record that would warrant us in disregarding the recommendation. It is therefore adopted.

Mr. Nolan calls our attention to a receipt and paper presented by him to the secretary of the State Bar some four days after the final hearing of this matter. The letter, apparently bearing Mrs. Hedges' signature, acknowledges the return of $45 covering the costs in the proposed bankruptcy proceeding and the $10 paid on account of the personal injury case. The claim of Mrs. Hedges on account of board furnished Mr. Nolan in the sum of $98.91 had been by her assigned to the labor commissioner for the benefit of the laborers who had filed demands against her. In reverting to this matter, it is provided in said

receipt that it "does not in any way operate as a release of any amounts assigned by Mrs. Bertha Hedges to the labor commissioner of the State of California." It closes with the following statement: "I have no objections to proceedings that are now before the Bar Association to be dismissed." This letter was placed in the files, and was considered by the local administrative committee and the board of bar governors.

The petitioner has insistently contended throughout that he has not committed any act or acts which should subject him to censure or justify a finding that he should be brought within the disciplinary jurisdiction of the law. While it may be said that we would be unwilling to stigmatize him with the commission of acts amounting to moral turpitude, we are forced to find that he has unquestionably far overstepped the rules which should be observed by all who are authorized to hold themselves out as counselors of those who come to them seeking legal advice.

It is ordered that petitioner be, and he is hereby, suspended from the practice of the law in all the courts of this state for a period of three months, said suspension to become effective thirty days from the service of notice of the within order made upon him by the clerk of this court in the usual form.

219 Cal. 612

BALAAM v. PACIFIC STATES SAVINGS & LOAN CO.

S. F. 14187.

Supreme Court of California.

Dec. 29, 1933.

Rehearing Denied Jan. 26, 1934.

1. Municipal corporations ⇐519(6).

Statutory provision that lien to secure improvement assessment shall have priority over all special assessment liens, which may thereafter be created *held* inapplicable to lien given by section providing that, when bond is issued to pay for improvements, assessment shall be first lien upon property until bond issued for payment thereof and accrued interest thereon shall be fully paid (St. 1911, p. 744, § 23, as amended by St. 1921, p. 292; p. 760, § 66).

2. Municipal corporations ⇐950.

When cost of street improvement is to be paid by issuance of a serial bond, issuance and delivery of legal bond supersedes assessment and rights of parties are fixed and determined by terms of bond (St. 1911, p. 744, § 23, as amended by St. 1921, p. 292; p. 759, § 63, as amended by St. 1923, p. 278, § 4; pp. 758, 760, §§ 59, 64, 66; p. 758, § 61, as amended by St. 1923, p. 277, § 2).

3. Municipal corporations ⇐950.

Street improvement serial bond issued over one year subsequent to prior improvement bond upon same lot *held* superior to prior bond (St. 1911, p. 744, § 23, as amended by St. 1921, p. 292; pp. 758, 760, §§ 59, 64, 66; p. 759, § 63, as amended by St. 1923, p. 278, § 4; p. 758, § 61, as amended by St. 1923, p. 277, § 2).

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Le Roy Balaam against the Pacific States Savings & Loan Company, in which the defendant filed cross-complaint. From an adverse judgment, defendant appeals.

Reversed.

Prior opinion, 15 P.(2d) 186.

Rehearing denied; SHENK and THOMPSON, JJ., dissenting.

Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for appellant.

Jones, Balaam & Hardin, W. Reginald Jones, and John F. Balaam, all of Oakland, for respondent.

Arthur M. Ellis, O'Melveny, Tuller & Myers, and James L. Beebe, all of Los Angeles, amici curiæ.

CURTIS, Justice.

Plaintiff and defendant each own a serial bond issued under and by virtue of the Street Improvement Act of 1911 (Stats. 1911, p. 730), both bonds being liens upon the same lot or piece of real property. The bond owned by the plaintiff was issued on the 3d day of October, 1925. The bond owned by the defendant was issued on the 29th day of October, 1926. The point in issue is whether the priority of the lien under which each of the parties hereto claim is fixed by the provisions of section 23 of the Improvement Act of 1911, or by section 66 of said act as originally enacted. Section 23 of the Improvement Act

of 1911 (St. 1911, p. 744), provided in part as follows: "Said warrant, and assessment, together with the certificate, if any, of the city engineer of the quantity and character of the work done, shall be recorded in the office of said superintendent of streets, the diagram shall there be filed. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged."

Section 66 of the act (page 760), provided that, when bonds are issued to pay for any improvement under said act: "The city treasurer shall, in addition to his other duties in the premises, report all coupon payments of principal upon said bonds to the street superintendent, who shall forthwith indorse the same upon the margin of the record of the assessment to the credit of which the same is paid, and said assessment shall be a first lien upon the property affected thereby until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid. * * *"

This court, in construing the act of 1911, held in the case of Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A. L. R. 1296, that the lien imposed under this act which was last in time was first in priority. This decision was rendered in 1919 and prior to the amendments of section 23 of the act in 1921 and 1923 (St. 1921, p. 292; St. 1923, p. 115, § 2). By the amendment in 1921 (Stats. 1921, pp. 291, 292), the following new provision was incorporated in section 23: "Such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property." The amendment of this section in 1923 did not in any way change or affect this new provision added to the section in 1921. Section 66, in so far as it relates to the nature of the lien therein provided for, has not been amended since the decision of Woodill & Hulse Elec. Co. v. Young, supra. The Legislature did in that year, 1923, amend section 63 of said act (Stats. 1923, pp. 276, 278, § 4). This section prescribes the form of the bond issued in such proceedings. Prior to said amendment the bond recited that the amount of the bond "is a first lien upon the property affected." By said amendment the word "first" in said recital was stricken out.

The bonds involved herein were both issued under said act after its amendment in 1923. Respondent contends that, as the bonds were issued subsequent to 1923, the rule of priority announced in Woodill & Hulse Elec. Co. v. Young, supra, has been reversed, and that the rule in force after the adoption of said amendments is that a lien for street improvements under said act which is first in time is first in priority. If section 23 of said act controls the priority of the respective liens under the two issues of bonds involved herein, then it is conceded that respondent's position must be sustained. But the appellant contends that the priority of these respective liens is determined by section 66 of said act, which, as we have seen, provides that "said assessment shall be a first lien upon the property affected thereby." It is likewise conceded that, if the priority of the liens is to be determined by the provisions of section 66 of said act, the lien of the appellant must be given priority over that of the respondent.

[1] Section 23 is found in part 1 of the Improvement Act of 1911. Part 1 of said act deals entirely with assessments for street improvements where the work is to be paid for in cash. No mention is made of assessments that are to be met by the issuance of bonds. The lien provided for in section 23 is given only for two years. It is enforceable by an action in court which may be commenced at any time after the final delivery of the warrant to the contractor and within two years thereafter. It does not run in favor of the holder of any bond, but is evidenced by the assessment on file in the office of the superintendent of streets. On the other hand, section 66 is contained in part 3 of said act. This part deals primarily with proceedings in which the assessments are payable not in cash but by serial bonds issued against the property affected. Under this section, bonds may be issued in payment of assessments amounting to $25 or more. All assessments under $25 are payable in cash, and it is expressly provided in section 64 of the act (Stats. 1911, pp. 730, 760) that such assessments shall be collected as provided in part 1 of said act. By said act, bonds issued thereunder may run for a period of not to exceed nine years, in which event the assessment "shall be a first lien upon the property affected thereby until the bond issued for the payment thereof * * * shall be fully paid." This is an entirely different and distinct lien from that created by section 23 of the act. It is evidenced by a written instrument, the bond. It extends for a possible period of nine years. It is enforceable by a summary sale of the property affected, conducted by the treasurer of the city. A cumulative remedy is also given by permitting the bondholder to foreclose his lien by an action in court. The provisions of section 23 are not expressly made applicable to the lien given under section 66 of the act, and we find nothing in the whole act, or in any part thereof, which by implication can be construed as applying the provisions of section 23 to the lien created by section 66 of the act. Therefore it seems clear to us that the provision in section 23 that the lien to secure the assessment shall have pri-

ority over all special assessment liens which may thereafter be created has no application to, and in no way governs, the lien given by section 66 of the act.

Respondent contends that there was but one type of lien contemplated by the act of 1911 and that section 23 applies with equal force to all liens created thereunder. We cannot agree with this contention. It is based upon the assertion that there is but one assessment whether the work is to be paid for in cash or by an issue of bonds, and that that assessment is the one provided for in section 23 of the act. But the proceedings preceding the making of this assessment are entirely different when the cost of the improvement is a cash transaction than when bonds are to be issued in payment of said improvement. At the very inception of proceedings involving a bond issue, by section 59 of the act (Stats. 1911, pp. 730, 758), the city council must determine whether "serial bonds shall be issued * * * to represent assessments of twenty-five dollars or over for the cost of any work or improvement." Section 61 (as amended by St. 1923, p. 277, § 2) provides that "when said city council shall determine that serial bonds shall be issued to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention." From then on until the bond is finally issued the proceedings are based solely upon the determination of the city council that the work or improvement is to be paid by an issue of serial bonds. The only liability created against the property owner whose assessment is $25 or over is to pay the bond according to its terms when it is issued. The filing of the assessment and the issuance of the warrant creates no liability against him to pay his assessment in cash, and therefore there can be no lien against his property for the period of two years or for any other period of time to secure the payment of said assessment. The lien contemplated by the act when the improvement is to be paid by the issuance of bonds is that which arises and is created by the issuance of the bond itself, and then, according to section 66 of the act, "said assessment shall be a first lien upon the property affected thereby until the bond * * * shall be fully paid." This lien is entirely different and distinct from the lien given to the contractor under section 23 of the act when the assessment is payable in cash.

[2] Amici curiæ make the further contention that the Improvement Act of 1911 relating to bonds merely provides a convenient device to permit payment of the assessment in installments, and to that end continues the lien provided in section 23 and provides necessary methods of enforcing said lien. We may agree with this statement in so far as it declares that the provisions of the act of 1911 relating to the issuance of serial bonds provides a convenient device or plan to permit the payment of the assessment in installments rather than in one cash payment, but we find nothing in the act to justify the contention that the period of two years, provided by section 23, the life of the lien in case the assessment is payable in cash, has been extended to cover the life of the bond. There is not one word to be found in the whole act which supports such a statement. The act clearly creates two different distinct liens as we have, we think, clearly shown. By section 23, the precise words used are, "the several amounts assessed *shall be a lien upon the lands*," which words, the respondent concedes to be sufficient to create a lien. Under part 3 of the act, after providing that the city treasurer shall issue to the contractor a bond representing each assessment over $25 in amount, section 66 expressly states that the assessment for which said bond was issued "*shall be a first lien* upon the property affected thereby until the bond issued for the payment thereof * * * shall be fully paid." It will be noted that the same expression "shall be a lien" is used in each of the two sections. If by the use of these words in section 23 a lien is created, it would seem to follow without question that the same words in section 66 produce a like result. Amici curiæ in this connection contend that the lien given is to secure the assessment in each instance and not the bond. We question whether this statement is strictly correct. There is language in the act strongly intimating that the bond is issued in payment of the assessment. In fact, the very language of section 66 so states where it provides that the "assessment shall be a first lien upon the property affected thereby until the bond issued for the *payment thereof* * * * shall be fully paid." The words "payment thereof" which we have italicized refer to and mean payment of the assessment. The language just quoted we admit is not entirely clear. To state that the assessment shall be a lien on the property until the bond given in payment of the assessment is paid is the statement of a paradox. If the assessment is paid by the bond, then it is extinguished as a liability against the property owner and has no further life or vitality for that purpose. But the money due under the assessment is still unpaid. This liability after issuance of the bond is represented by the bond and is payable in accordance with the terms of the bond as prescribed by the act. That the bond supplants the assessment and represents the cost of the improvement is at least intimated by the recitals in the bond itself. It is stated therein that "This bond is issued to represent the cost of certain street work, * * * as the same is more fully described in assess-

ment number ——, issued by the street superintendent. * * * Its amount is the amount assessed in said assessment against the lot or parcel of land numbered therein, and * * * is a first lien upon the property affected thereby, as the same is described herein; and in said recorded assessment with its diagram." Section 63. Here is a direct and express declaration that the bond is issued to represent the cost of the street work, and that its amount is a lien upon the lot or parcel of land improved. If the bond represents the cost of the improvement, how can it be said that the assessment is still in force and represents this same cost of improvement? We think it is clear from the terms of the act that, when the cost of the street improvement work is to be paid by the issuance of a serial bond, the issuance and delivery of a legal bond supersede the assessment and the rights of the parties are fixed and determined by the terms of the bond. But whether it is the bond or the assessment which represents the liability after the bond is issued is, we think, of slight moment. Where the assessment is the result of proceedings carried forward under part 1 of the act, it is secured by a lien in accordance with the terms of section 23 of the act. But when the assessment results from proceedings carried forward under part 3 of the act, the lien securing the same is that given by section 66 of the act. Where the assessments are less than $25 in amount, these assessments are governed by section 64 of the act (St. 1911, p. 760), which expressly provides that they "shall be collected as is hereinbefore provided in part one of this act."

Amici curiæ have set forth in their briefs excerpts from decisions of this court in which they claim that this court has held that no lien is created by the issuance of the bond and that the only lien provided for by the act is that given to secure payment of the assessment. Under the view we take of the case, as just stated, we think it is a matter of no consequence so far as the question herein is concerned whether the lien given secures the bond or the assessment. In either case, the character of the lien is fixed by section 66 of the act. The cases from which the above-mentioned excerpts are taken are Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057; Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 P. 414; German Savings & Loan Society v. Ramish, 138 Cal. 120, 69 P. 89, 70 P. 1067; and Cohn v. Federal Construction Co., 171 Cal. 547, 153 P. 916. Hellman v. Shoulters, supra, sustains the constitutionality of the Act of March 17, 1891 (St. 1891, p. 116), relative to a system of street improvement bonds. Chase v. City Treasurer, supra, holds that an injunction will lie to restrain the threatened sale of real property to pay an amount claimed to be due on a void bond. German Savings & Loan Society v. Ramish, supra, holds that a bond issued under the Street Bond Act of February 27, 1893 (St. 1893, p. 33), has priority over a prior mortgage upon the same property. In Cohn v. Federal Construction Co., supra, the court held that the warrant provided for under the Improvement Act of 1911 was prematurely issued, and for that reason restrained the issuance of the bonds and the collection of the assessment until the council should declare the terms of the bond and cause a new warrant to issue. In none of these cases was the point raised or considered as to whether the lien, which was given to the owner of a bond issued under the Improvement Act of 1911, secured this bond, or merely the assessment.

Considerable has been said in the briefs presented by respondent as to the reasons why the act of 1911 was amended in 1921. It may possibly be that the Legislature was prompted to amend section 23 of the act in 1921 by reason of the decision of this court in the case of Woodill & Hulse Elec. Co. v. Young, supra. Although this section of the act is barely mentioned in the decision along with sections 63 and 66 (page 672, of 180 Cal., 182 P. 422, 424), on page 674 of the decision in 180 Cal., 182 P. 422, 425, the exact language of section 66, which creates the lien in favor of the owner of the bond, is quoted and commented on by the court, and is made the real basis of its decision. It would seem, therefore, that, had the Legislature intended to reverse the rule announced in this decision, it would have amended section 66 as well as section 23 of the act in 1921. The fact that it did not make any change in section 66 regarding the nature of the lien therein provided for after this court, in the Woodill & Hulse Elec. Co. v. Young Case stressed the provisions of that section as it did in that decision, shows conclusively that its omission to do so was designedly done. Just why the Legislature did not extend its efforts and amend section 66 of the act in 1921 at the time it amended section 23 we are not advised. It is apparent that the rule making liens for street improvements superior to any subsequent liens of the same character would have a tendency to interfere with future public improvements, and might result in the cessation of all further improvements of the street thereby affected until the improvements already made were fully paid. The Legislature might have considered that a cessation of public improvement for a period of two years, the life of the lien under section 23, would not seriously hamper a community in its efforts to promote public improvements. On the other hand, the lien given under section 66 as we have seen, is made to continue for a possible term of nine years. If this lien is

made prior and superior to all other liens of the same character subsequently imposed upon the same property, then we have a situation which practically puts a stop to public improvements for a long period of years. For few contractors would want to bid upon the work of an improvement when the property sought to be improved was already incumbered by prior liens. They would either refuse outright, or, if they submitted a bid, it would be in many cases at so high a figure as to make the improvement too costly and burdensome for the property owner to bear. Whatever reason may have prompted the Legislature to amend section 23 and to leave section 66 intact, the fact remains that that is just what the Legislature did. We are satisfied that this was designedly done. To hold now with respondent and decree his lien superior to that of appellant would virtually be an act of legislation on the part of this court, a course which we have neither the power nor the inclination to pursue.

[3] As the bonds held by the parties hereto are each secured by the lien created and defined by section 66 of said act, their priority must be determined by the provisions of said section. This section, as hereinbefore stated, provides that the lien shall be a first lien upon the property affected until the bond is paid. This court, in construing this very section, held in the case of Woodill & Hulse Elec. Co. v. Young, supra, that the lien subsequent in time was first in priority. As the bond owned by the appellant was issued over a year subsequent to the issuance of the bond of respondent, it must be given priority over the bond of the respondent.

Judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.

220 Cal. 3

PEOPLE v. TALBOT et al.

Cr. 3668.

Supreme Court of California.

Jan. 31, 1934.

Rehearing Denied March 1, 1934.

1. Embezzlement ⇐5.

Fraudulent intent is essential element of embezzlement (Pen. Code, §§ 484, 503, 504).

2. Embezzlement ⇐44(2).

Secrecy or concealment is evidence of criminal intent, but there may be embezzlement where appropriation is openly made (Pen. Code, §§ 484, 503, 504).

3. Criminal law ⇐568.

Felonious intent must be determined from facts and circumstances of case.

4. Embezzlement ⇐23.

Officer or agent taking corporation's money intrusted to him, and using it even temporarily for his personal benefit, cannot avoid criminal responsibility by calling it loan (Pen. Code, §§ 484, 503, 504).

5. Embezzlement ⇐1.

Embezzlement is purely statutory crime (Pen. Code, §§ 484, 503, 504).

6. Embezzlement ⇐4.

Statutory definition of embezzlement as "fraudulent appropriation" shows that gist of offense is immediate breach of trust in fiduciary's appropriation for personal uses of money intrusted him for trust uses, rather than permanent deprivation of owner of his property (Pen. Code, §§ 484, 503, 504, 512, 513).

"Fraudulent," in the phrase "fraudulent appropriation," is intended to distinguish an "appropriation" by an agent under circumstances that might be merely tinged with suspicion as to the agent's intent, from an appropriation for purely personal uses of the agent, as contrasted with the purpose for which the money or property appropriated was intrusted to him; thus where officers of the corporation, who are necessarily intrusted with the money and property of the concern, use it, knowingly and intentionally, for their own purposes there is a "fraudulent appropriation" thereof, which is termed "embezzlement." "Fraud" is defined as any act that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another, and an act is "fraudulent" that is characterized by "fraud."

[Ed. Note.—For other definitions of "Embezzle; Embezzlement," "Fraud," "Fraudulent; Fraudulently" and "Fraudulent Appropriation," see Words and Phrases.]

7. Embezzlement ⇐44(2).

Evidence sustained finding that officer appropriated corporation's money with fraudulent intent, though officer intended or was able to repay money taken or had been accustomed to using corporate funds for personal needs, eventually returning money, with directors' knowledge (Pen. Code, §§ 484, 503, 504, 512, 513).

8. Embezzlement ⇐47.

Whether officer used corporation's money which he appropriated to stabilize price of corporation's stock for benefit of corporation and stockholders, and not to make his own holdings more valuable, *held* for trier of facts (Pen. Code, §§ 484, 503, 504).

9. Criminal law ⇐877.

Where evidence affects both defendants jointly charged alike, conviction of one cannot be sustained, where other is acquitted.

10. Criminal law ⇐877.

Slightest difference in effect of testimony on defendants jointly charged obviates rule precluding conviction of one and acquittal of other on evidence affecting both alike.

11. Criminal law ⇐877.

Evidence in prosecution of joint defendants for grand theft by embezzlement *held* to affect defendants with sufficient difference to authorize conviction of one, despite acquittal of other (Pen. Code, §§ 484, 503, 504).

12. Criminal law ⇐371(2).

In prosecution of chairman of corporation's directors for grand theft by embezzlement, evidence of acts showing chairman's continuous practice of using corporation's funds for personal purposes *held* competent to prove felonious intent, although some of acts were before and some after acts on which conviction resulted (Pen. Code, §§ 484, 503, 504).

13. Criminal law ⇐673(4).

In prosecution of joint defendants for conspiracy to commit grand theft and for grand theft by embezzlement, denial of motion that evidence of all witnesses called by particular defendant be limited to that defendant *held* not error where there was no motion for separate trial of conspiracy charge (Pen. Code, §§ 484, 503, 504).

14. Criminal law ⇐878(3).

Conviction on count charging grand theft *held* not precluded by not guilty verdict on count for conspiracy to commit grand theft (Pen. Code, § 484).

15. Embezzlement ⇐44(4).

In prosecution for grand theft by embezzlement of corporation's funds, it was not essential to prove existence of corporation as corporation (Pen. Code, §§ 484, 503, 504).

16. Embezzlement ⇐44(1).

In prosecution of corporation president for grand theft by embezzlement, evidence of president's appropriations of corporate funds *held* not to show establishment of relation of debtor and creditor (Pen. Code, §§ 484, 503, 504).

17. Embezzlement ⇐44(2).

Evidence of felonious intent *held* sufficient to sustain conviction of corporation president for grand theft by embezzlement (Pen. Code, §§ 484, 503, 504).

18. Embezzlement ⇐44(2).

Evidence sustained conviction of vice president of corporation for grand theft by embezzlement, although showing intent to repay money appropriated (Pen. Code, §§ 484, 503, 504, 512, 513).

19. Criminal law ⇐1169(1).

In prosecution of vice president of corporation for conspiracy to commit grand theft and for grand theft by embezzlement, admission of purported resolutions of corporation's directors, authorizing guarantee of loans made to certain of corporation's employees, including accused, and of guarantees, *held* not prejudicial (Pen. Code, §§ 484, 503, 504).

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

James A. Talbot, Clarence M. Fuller, and Raymond W. McKee were convicted of grand theft, and they appeal.

Affirmed.

Prior opinion (Cal. App.) 22 P.(2d) 587.

James T. Boyle, Forrest F. Murray, Eugene D. Williams, Jerry Giesler, all of Los Angeles, and Edwin V. McKenzie and Walter H. Linforth, both of San Francisco (Monroe B. Kulberg, Clare Woolwine, Leonard Wilson, and Bourke Jones, all of Los Angeles, of counsel), for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 2, to consider the question whether the appropriation of corporate funds by the defendants was made with fraudulent intent, an element necessary to constitute embezzlement. 22 P.(2d) 587. We have painstakingly re-examined the record on this issue. Certain evidence tended to show that defendants were not conscious that their acts amounted to embezzlement even if they did constitute bad business practice. The record shows that each of the defendants and numerous employees had drawing accounts with the corporation; that the withdrawals by defendants were made openly, with no attempt at concealment; that the canceled checks were returned to the corporation; that defendants were charged on the books with all of the expenditures; and that no manipulation of accounts took place. It is further contended, and we may assume that it is true, that the practice of making advances of this sort to corporate officers and employees during this period was common, not only in the Richfield Company, but in other corporations as well. The prevalence of

this unlawful practice cannot, of course, justify it.

These and other facts were before the trial court, and that court was permitted to draw the inference of fraudulent intent from the admitted fact that the funds were appropriated and used for the personal purposes of the defendants. In this state of the record, the appellate court may not disturb the findings and judgment.

We therefore adopt the opinion prepared by Mr. Justice pro tem. Archbald, of the District Court of Appeal, as the opinion of this court. It reads as follows:

James A. Talbot, Clarence M. Fuller, and Raymond W. McKee were charged in count I of an indictment with conspiracy to commit the crime of grand theft, and in the remaining nine counts thereof they were charged with nine separate offenses of the same nature. The defendants were tried jointly on all counts before the court without a jury, the trial resulting in an acquittal of all three on the charge of conspiracy. Talbot was found guilty on counts II and VI, Fuller guilty as to counts III, IV, V, VII, VIII, and IX, and McKee guilty under count X. Each defendant was found not guilty as to all counts other than the ones upon which he was convicted. From the judgments of conviction entered upon such findings, and from the orders denying their respective motions for a new trial, defendants have separately appealed.

At the time the nine alleged acts of grand theft were committed, Talbot was chairman of the board of directors of the Richfield Oil Company of California, Fuller was president, and McKee a vice president and assistant to Talbot. As chairman of the board, Talbot had charge of financing and production, Fuller of refining and marketing, and McKee of accounting. The amount which the defendants are charged in the first count with having conspired to take from the company is $245,325, which is the sum total of the nine overt acts of taking set out in said count. The amounts charged in counts II to X, inclusive, as having been taken by defendants, and the dates on which they were respectively taken, are the same as alleged in count I with reference to the nine overt acts, and each is the amount of a check drawn against the funds of said company.

Prior to becoming chairman of the board of directors of the Richfield Oil Company, Talbot was the president of that corporation, the by-laws providing that the president should have "general and active management of the business of the corporation." When the office of chairman of the board of directors was created, an amendment to the by-laws was adopted providing that such chairman should "share with the president in the general management of the business of the company and the direction of all other officers of the corporation." The transcript of testimony herein impresses the reader with the fact that the very general powers thus delegated were used to their utmost by Talbot, when president of the company, and by Talbot and Fuller later. As one witness expressed it, "it was more or less a two man company," and apparently the directors reposed "absolute confidence" in them. Counsel in their briefs agree that the head of the company exercised "almost autocratic powers" in handling its affairs, from the beginning to the calamitous end. In fact, the only limit that seems to have been imposed on such autocratic powers by the board of directors was in July of 1929, when an amendment to the by-laws was adopted providing that "no single item of capital expenditure shall be made by the company in excess of $50,000" without the approval of one of the two representatives of certain investment bankers on the finance committee of the institution.

With this preamble we shall discuss the case of each appellant separately.

Appeal of J. A. Talbot.

Count II of the indictment, on which this appellant was found guilty, involves a check of the Richfield Oil Company in the sum of $50,000 dated October 2, 1929, payable to the order of Ingoldsby-Giles & Co., a stock brokerage firm in Los Angeles. There is testimony to the effect that this check was issued at the request of Talbot, through McKee, and that Talbot directed that it be charged to his account on the books of the company, but also to charge Fuller's account with $25,000 of it, crediting his, Talbot's, account with a like amount. Talbot testified that he ordered his secretary to send a check for $50,000 to the brokerage firm but that he did not know until later that a Richfield check was sent. His secretary, however, testified that Talbot called her from San Francisco and told her that a Richfield check had been sent to Ingoldsby-Giles & Co., to charge it to his account and to advise the brokerage concern to credit him with $25,000 and Fuller with $25,000. Appellant Talbot had an account with the brokerage firm called "J. A. Talbot No. 7 Account," in which one Newberger, also a director of the Richfield Oil Company, was jointly interested, and also a private account. The brokerage house also carried an account called "Richfield Employees' Account," in which was kept the stock transactions of several officers and employees of the company. Prior to October 2d, money was requested by the brokers "principally for the adjustment of said No. 7 account." Talbot owed said firm on his personal account, on September 30, 1929, $74,024.10, and was short 360 shares of common stock of the Richfield Company of the then approximate market value of $40 per share. Appellant Fuller owed the same firm on October 1, 1929, the

sum of $306,709.73, and apparently the brokerage office was holding at the time, to protect such balance, 8,000 shares of Richfield and 1,000 shares of so-called Fokker stock. Fuller knew nothing of the credit of $25,000 to his account until later, when Talbot told him that it was necessary to advance it to the brokerage firm to keep the stock from being sold.

Count VI, under which, also, Talbot was convicted, involves a check of the Richfield Oil Company dated October 24, 1929, in the sum of $50,000, payable to Fuller and indorsed by him, and signed by Talbot and McKee. Fuller told Talbot a day or so before the check was issued that the brokerage firm had about 17,000 shares of Richfield stock, apparently deposited to cover the account of the "Richfield Employees," carried in the name of their New York correspondent; that margins were being demanded on such account; and that the stock would be sold if the brokers did not get $100,000 immediately. Talbot arranged to have a loan made to Fuller of $50,000 by a certain bank and had the check for $50,000 issued which is the basis of count VI. Fuller then issued his check for $100,000 in favor of the brokerage firm. The $100,000 was not paid in time, however, to stop the sale in New York, but was apportioned to the "Employees' Account" with Ingoldsby-Giles & Co., $59,000 of it going to the credit of Fuller in such account and the balance being apportioned between other names therein. There is evidence which indicates that appellant Talbot knew at the time Fuller's check was delivered by him to the brokerage firm that the 17,000 shares had been sold in the east and that he gave it to the firm because he had promised them $100,000.

For the purpose of proving "felonious intent" evidence was introduced of fourteen Richfield company checks ordered by Talbot aggregating the sum of $186,886.10, which apparently went entirely for the personal use of said appellant and not for any company expense. One of the checks was for $80,000, the balance of the purchase price of his private yacht, and others aggregating approximately $15,000 were for insurance thereon. The evidence also shows that such withdrawals were not authorized by the board of directors and were without the personal knowledge of the directors, with the possible exception of one of the $50,000 checks which was brought to the attention of director Newberger after it reached the hands of the brokerage firm above mentioned. It likewise appears that the withdrawals made were charged in the personal accounts of the respective officers, which were kept under the heading, "Due from officers and employees. Account 418 A." Up to 1927 it was apparently the practice of Peat, Merrick, Mitchell & Co., who audited the books of the Richfield company semiannually, to submit a detailed report of such account to the board of directors, but after that year the practice was changed and two types of balance sheets were made, one "a detailed report supporting the certified statements and giving in greater detail all of the assets and liabilities and discussing them," and the other a "condensed balance sheet," which did not contain the details of the officers' accounts. This "condensed balance sheet usually goes to the stockholders and is printed, published." The detailed report "is a sort of confidential balance sheet for the executives of the company" or "for reference."

As bearing on the question of fraudulent intent and showing his good faith and lack of motive for wrongdoing as charged, appellant Talbot introduced evidence of his financial condition. Such evidence tended to show that his net worth on August 31, 1929, was approximately $5,439,000, consisting of real estate, accounts receivable, secured and unsecured, life insurance, and stocks. Among the latter was an equity in Richfield stocks amounting to $937,697 of the common stock and $24,440 of the preferred. His books showed $20,686.69 in cash in bank at that time. The dividends on his Richfield stock for the year 1929, in excess of $100,000, were left with the brokerage houses holding such stock. It was also shown that during the year 1929 Talbot paid into the market for the purpose of supporting the price of Richfield stock $1,577,571.18, and that $50,000 additional was paid to banks for the reduction of loans secured by Richfield stock, the market price of which had depreciated. Approximately $600,000 of this amount was borrowed from banks during the month of October alone, which went "into the Richfield stock in the market." The evidence further shows that at the end of 1929 the following real estate, as valued on this appellant's personal books, was unincumbered: His home, $350,000; Albany (¼ interest), $20,000; Long Lake, $5,000; and Bakersfield, $15,000, and that by October of 1930 the last of this real estate was encumbered. In January, 1931, Talbot filed a voluntary petition in bankruptcy, due, as he states, "almost exclusively" to his efforts to "stabilize" Richfield stock on the market. On October 1, 1929, he held 58,736 shares of Richfield common stock, but sold about 18,000 shares during the month and bought 14,810 more. He was sold out of the difference by Plunkett & Lillienthal, certain of the brokers he was dealing with. Space forbids detailing anything except the most important points of the evidence.

Appellant urges: (1) That the evidence does not show any criminal or fraudulent intent but on the contrary affirmatively excludes such intent; that the court erred: (2) In finding him guilty as to count VI, whereas appellant Fuller was found not guilty there-

on; (3) in admitting in evidence the "disavowal" resolution of December 8, 1930; (4) in admitting evidence of other acts dissimilar in character and too remote as to time and conditions; (5) in permitting the introduction into evidence of the New York accounts without sufficient foundation laid; (6) in admitting into evidence certain inventories and testimony relating thereto; and (7) in not limiting evidence on behalf of a particular defendant to such defendant.

[1] (1) Appellant contends that it had been his custom, not only in the Richfield Company but in other companies of which he had been an executive, to have drawing accounts against which were charged advances made to officers and employees; that both sums of money he is charged with taking were taken openly and without concealment or any of the other usual indicia of fraudulent acts.

The taking charged as grand theft was on the theory of embezzlement. Section 484 of the Penal Code, so far as material to such theory, provides: "Every person * * * who shall fraudulently appropriate property which has been entrusted to him * * * is guilty of theft." Section 503 of the same Code defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been entrusted." Section 504 provides that "every officer, director, trustee, clerk, servant or agent of any * * * corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust * * * is guilty of embezzlement." From these sections it clearly appears that fraudulent intent is an essential element of the offense of embezzlement, and such is the ruling of our courts. People v. Mitchell, 74 Cal. App. 164, 240 P. 36; People v. Morley, 89 Cal. App. 451, 265 P. 276. Appellant says that the element of concealment is lacking, and points to the case of People v. O'Brien, 106 Cal. 104, 39 P. 325, as one emphasizing the necessity of concealment as a fact from which fraudulent intent may be inferred. We do not read the case that way. The court decided in effect that the evidence showed simply a case of disputed mutual accounts, which might have been embezzlement if the defendant had not acted openly and without any attempt at concealment.

[2] While secrecy or concealment is evidence of a criminal or felonious intent, nevertheless there may be embezzlement where the appropriation is openly made and consequently without concealment. People v. Connelly, 4 Cal. Unrep. 858, 38 P. 42; Gurley v. State, 157 Ark. 413, 248 S. W. 902; Russell v. State, 112 Ark. 282, 166 S. W. 540.

It is urged that such fraudulent intent must be shown by facts or circumstances independent of and in addition to the act of conversion, and among other cases cited in support of the contention is People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524. In that case the treasurer of a corporation received a draft for $10,350 and deposited it in his personal account at a bank, notifying the bookkeeper of that fact. No depository bank had ever been named by the directors of the corporation. Three days after the deposit was made the company received from him the sum of $8,310.35. He was charged with embezzlement. The evidence apparently did not show what became of the balance or that defendant did not have it ready to be produced when called for, and there was no evidence that a demand to produce was made upon him. Under such circumstances no felonious intent was shown.

[3, 4] The element of felonious intent in every contested criminal case must necessarily be determined from the facts and circumstances of the case. People v. Kirk, 94 Cal. App. 378, 271 P. 347. In our opinion the law is well expressed in the case of Mangham v. State, 11 Ga. App. 427, 75 S. E. 512, 516, where the court says: "An officer or agent of a corporation cannot take the money of the corporation which is intrusted to him, or which comes into his possession by virtue of his office or agency, and use it even temporarily for his personal benefit and avoid criminal responsibility by calling it a loan. The law calls such a transaction a wrongful conversion, from which a fraudulent intent can be inferred." See, also, People v. Lyon, 33 Hun [N. Y.] 623, 637; People v. Schrager, 315 Ill. 169, 146 N. E. 151, 154; Orr v. State, 6 Ga. App. 628, 65 S. E. 582; Com. v. Tenney, 97 Mass. 50, 58; State v. Leicham, 41 Wis. 565; People v. Butts, 128 Mich. 208, 87 N. W. 224; State v. Merkel, 189 Mo. 315, 319, 87 S. W. 1186; State v. Kortgaard, 62 Minn. 7, 16, 64 N. W. 51, 55; National Life, etc., Ins. Co. v. Gibson, 31 Ky. Law Rep. 101, 101 S. W. 895, 897. [12 L. R. A. (N. S.) 717]; Gurley v. State, supra; Patterson v. U. S., 39 App. D. C. 84, 90.

[5] The crime of embezzlement is purely statutory, and legislation with reference thereto resulted from the failure of prosecutions under the common-law crime of larceny to reach a case where the possession of property was obtained by consent, and the resulting breach of trust by the agent, officer, or bailee, although it as effectually deprived the owner of his property as though it had been taken out of his possession by stealth, was not punishable at common law. In the case of People v. Gordon, 133 Cal. 328, 65 P. 746, 747, 85 Am. St. Rep. 174, speaking of our Code definition of embezzlement, the court says: "The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property

by the latter." There would seem to be no hidden meaning in the use of the word fraudulent in such definition. It is true that where, as in the cases of People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524, and People v. Page, 116 Cal. 386, 48 P. 326, the money is deposited in the personal account of the defendant but no evidence is introduced showing that it was ever converted to his own use, no "fraudulent appropriation" is shown. But we are sure that if the evidence in such cases showed, without question, an appropriation of the money to the personal use of the defendants, and contrary to the purposes of the trusts, the fraudulent intent would have been imputed to them.

[6] One of the definitions of "fraud" given by the Standard Dictionary is: "Any act * * * that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another," and an act is declared to be fraudulent that is characterized by fraud. We think the Legislature used the word "fraudulent," in its definition of embezzlement, to distinguish an "appropriation" by an agent of money or property under circumstances that might be merely tinged with suspicion as to the agent's intent, from an appropriation for purely personal uses of the agent, as contrasted with the purpose for which the money or property was intrusted to him. In other words, in every case where the officers of a corporation who are necessarily intrusted with the money and property of the concern use it, knowingly and intentionally, for their own purposes, there is a "fraudulent appropriation" thereof which is termed embezzlement by the statute, and the fact that such officers intended to restore the money or property is of no avail to them if it has not been restored before information laid or indictment found charging them with embezzlement (Pen. Code, § 512); and even if prior to the bringing of such charges the officers voluntarily and actually restore the property, such fact does not constitute a defense but merely authorizes the court in its discretion to mitigate the offense (section 513). It would seem that the Legislature here has shown in very clear terms that it is the immediate breach of trust that makes the offense, rather than the permanent deprivation of the owner of his property.

[7, 8] In the recent case of People v. Gordon, 206 Cal. 29, 273 P. 568, 571, the defendant, an attorney, was intrusted with the collection of amounts due on certain bonds. The money was collected but only about half of it was paid over to his client by the defendant. When the balance was demanded, the attorney claimed that he was to receive one-half as his fee for collection. The court there said: "Defendant claims there is no showing of fraudulent intent on his part, as his actions were unconcealed and were based upon his understanding that he was to receive half of the sum collected. In our opinion, however, the evidence was amply sufficient to establish the fraud. Defendant's testimony at most raised a conflict, which was resolved by the verdict of the jury in favor of the people. The jury was properly instructed on the subject of the element of specific intent, and its determination of the matter is final." We think the reasoning of that case applies with great force to the one before us. Under the evidence produced by the prosecution serious misappropriations of funds of the corporation are shown, contrary to all authority given and in violation of the trust imposed. The fact that this appellant intended to repay the money taken, or was amply able to do so, is of no avail in the face of the fact that the money was not replaced prior to indictment found. The claim that he used the money in an honest effort to stabilize the price of stock on the market, for the benefit of the corporation and its stockholders and not for the selfish purpose of making his own holdings more valuable, created but a conflict in the evidence which the court, trier of the facts, decided against him, and that determination is final so far as an appellate court is concerned. Neither does the claim that appellant had been accustomed to drawing and using the funds of the corporation for his personal needs, having such withdrawals charged to his personal account and eventually paying the money back by credits due him or payments made by him, relieve the acts from the stain of criminality. Nor can we subscribe to the doctrine that long-continued wrongdoing sanctifies or purifies such conduct. Even if all of the directors of the corporation knew of such custom, the wrong was not made right. They were each charged with the trust to use the funds of the company for company needs, and it might be seriously questioned whether an authorization or ratification by the board of such acts would not have resulted in involving the directors rather than in excusing the officers. That the trial judge understood the law as to intent clearly appears from the record, and in our opinion the evidence amply sustains the conclusion he must have reached thereon.

[9-11] (2) The evidence shows that appellant Talbot signed the check on the Richfield Company for $50,000, which was given to appellant Fuller and went into the $100,000 check given by the latter and which there is evidence to show was finally turned over to Ingoldsby-Giles & Co. by Talbot himself, in accordance with his promise to give them that sum. It is to be remembered, also, that appellant Talbot arranged for the loan to Fuller which made up the balance of the $100,000. If the evidence under the point

now under consideration affects the parties jointly charged alike, the rule invoked by this appellant applies. However, where there is the slightest difference in the testimony as between two jointly tried, the jury or the judge, as the trier of facts, may weigh such testimony and make such difference (Davis v. State, 75 Miss. 637, 23 So. 770, 941); and when that is done, the fact that the evidence also involves the other to some extent will not relieve the one of culpability. We think such rule applies here. People v. Edwards, 72 Cal. App. 102, 117, 236 P. 944.

(3) We see no error in admitting the so-called "disavowal" resolution in evidence. It is true it was passed some time after the acts charged were committed, but it had some bearing on the question of whether they were done with the consent of the board of directors, and this in turn might have had some bearing on the question of the intent of appellant. In addition, each director had also testified that no consent was given.

[12] (4) We have heretofore indicated that in our opinion evidence of the several acts, introduced to show intent, under the circumstances of this case had a direct bearing on the question of fraudulent intent. The fact that some of them were of a later date would not seem to make the admission of testimony concerning them erroneous. Bearing on intent as they do, they showed a continuous practice of the same nature both before and after the acts on which convictions resulted. Widely separated acts might not exclude the idea of inadvertence, but happening as they did here, they bear, in our opinion, even more directly on the question of intent.

(5) We agree with appellant that the statement of the New York accounts should not have been admitted in evidence. While there is evidence showing that both appellants Talbot and McKee knew there was a discrepancy of some kind existing between the accounts of the Richfield Oil Corporation of New York, a subsidiary of the California corporation, and the parent organization, which resulted in the showing of certain expenses as assets and which inflated the profits of the company for the year 1929 as shown by the books, which in turn increased the bonus money divided among the executives, there seems to be no evidence connecting any of appellants with the making of the entries which resulted in such discrepancy. We therefore fail to see how the books themselves could have been properly used against them, much less a summary taken therefrom, the books not being present. But after an examination of the entire cause, including the evidence, we are forced to the conclusion that the judgment of the court would have been the same regardless of such error.

(6) Over the objection of appellant evidence of certain changes made in the inventories on the direction of appellant McKee, which resulted in inflating the showing of profits of the company for the year 1929 and hence increased to a certain extent the bonuses paid on the profits shown for that year, was introduced. The only connection shown with such changes, so far as appellant Talbot is concerned, is that his office was in close proximity to McKee's, probably across the corridor, at the time they were made. The trial judge permitted the evidence to go in, although, as he stated, it would have to be connected up with all defendants and its materiality as bearing on intent shown, otherwise he would entertain a motion to strike. While such changes in the inventories and consequent taking of increased bonus money might be the subject of a separate conspiracy, it could hardly be a part of the conspiracy pleaded, as that was limited to a definite sum, viz., the total of the amount taken by the several overt acts pleaded, none of which included any sums received by way of fictitious bonus payments. Possibly a conspiracy to take money by a different method might have some bearing on the intent with which the takings in the alleged conspiracy were consummated, but on that point we express no opinion. The fact remains, however, that apparently no motion to strike was made when all the evidence as to the changing of the inventories was concluded. Assuming that one had been properly presented and overruled—which ruling, however, so far as appellants Talbot and McKee are concerned, we are compelled to conclude the court would not have made—still we are of the opinion that such evidence did not in any way affect the judgment rendered by the court.

[13] (7) Appellant complains because his motion that the evidence of all witnesses called by a particular defendant be limited to that defendant was denied. Such motion was made almost at the close of this appellant's defense and prior to the introduction of evidence on behalf of his codefendants. The same motion was also made by appellants Fuller and McKee and the same ruling followed. Appellant Talbot cites as an example of the harm done him by the court's ruling the testimony of his codefendant McKee as to the issuance of the check involved in count II, stating that up to that time there had been no direct evidence to show that he, Talbot, personally requested the check to be issued. Prior to McKee's testimony both Talbot and his secretary had testified concerning such check, which testimony we have heretofore referred to. From such evidence the conclusion could readily be drawn that Talbot ordered the Richfield check to be issued and directed its application. The testimony of McKee was corroborative only, and we fail to see how Talbot could have been prejudiced thereby. Nor was he prejudiced by the testi-

mony of McKee regarding the check for $100,000, which was admitted in evidence as against McKee only and which was rejected by Talbot who told McKee he had made other arrangements, viz., the arrangements by which the $100,000 payment was made through the $50,000 check which is involved in count VI and the $50,000 bank loan to McKee arranged by Talbot. The trial court was faced with a delicate situation, in view of the fact that a conspiracy charge was joined with several other joint charges. No motion was made for a separate trial of the conspiracy charge. In our opinion the court did the best it could under the circumstances, and we see no error in the ruling complained of.

Appeal of C. M. Fuller.

Counts III, IV, V, VII, VIII, and IX, upon which this appellant was found guilty, involve checks of the Richfield Oil Company which were charged to the account of Fuller on the books of the company as follows: Count III: Check for $50,325 dated October 2, 1929, used to pay personal obligation of Fuller and Talbot and to release 3,500 shares of Richfield stock so that a larger personal loan could be obtained thereon. Count IV: Check for $5,000 dated October 4, 1929, used for personal expenses of Fuller. Count V: Check for $25,000 dated October 4, 1929, used to protect margin account of Fuller with stock brokers. Counts VII, VIII, and IX involve three checks all dated October 29, 1929, one for $25,000, issued to Fuller, one for $10,000, issued to his secretary, and one for $15,000 issued to his assistant, Randall. The last two were deposited in the accounts of the payees, who gave Fuller their individual checks for the amount of those deposited by them, appellant depositing such individual checks in his own account. Fuller's explanation was that he did not want to deposit in his own account more than the $25,000 check of the company on the same day. He admits the use of the checks as stated.

Appellant Fuller contends: (1) That inasmuch as the conspiracy count upon which he was found not guilty involves as overt acts the same checks for the misappropriation of which he was found guilty, it follows that he should have been found not guilty of the substantive offenses; (2) that there was no proof of the existence of the Richfield Oil Company as a corporation; (3) that subsequent acts were improperly admitted to show prior guilty intent; (4) that the prosecution is estopped to deny the right of appellant to withdraw such sums from the treasury of the company; (5) that the district attorney, "as a representative of the stockholders," is denied the right to accuse appellant of any criminal intent, as the monetary advances received established the relation of debtor and creditor; (6) that verdicts on several counts must not be inconsistent; and (7) that the evidence is insufficient to justify the verdict, as no criminal intent was shown, but good intent was proven.

[14] (1) An essential element of the first count was the criminal conspiracy, which was not included in the nine substantive offenses pleaded, so there was no jeopardy by reason of the verdict of not guilty on such count. People v. Clensey, 97 Cal. App. 71, 274 P. 1018.

[15] (2) We see no merit in this contention. It would hardly lie in the mouth of one profiting by funds unlawfully taken from an entity even pretending to act as a corporation to deny its corporate existence. Appellant could not have been misled under the circumstances, and it would seem to be immaterial whether the Richfield Oil Company was a corporation de jure or de facto, as it clearly appears it was the money of such company that was taken. However, the certificate of incorporation of such company was introduced in evidence without objection.

(3) The contention raised under this numeral is answered in our discussion of the fourth point in the Talbot appeal.

(4) There could be no estoppel on the part of the prosecution to deny the right of appellant to make withdrawals under the facts of this case.

[16] (5) We fail to see how the relation of debtor and creditor is established by the facts and circumstances presented, or how the district attorney could be prevented from prosecuting a criminal charge based on such acts. It is not shown that the stockholders were advised as to what was going on. The evidence is to the effect that since 1927, after which date the large withdrawals for private purposes were made, the details of account 418-A were not sent to the stockholders. Even such details as were sent them before would not put them on notice of the use being put to the withdrawals.

(6) We see no inconsistency in the verdicts.

[17] (7) We have discussed this contention under the appeal of Talbot, and in our opinion the same conclusion must be reached here.

In his reply brief appellant Fuller assigns as additional error the introduction in evidence of the statement taken from the books of the Richfield Oil Company of New York, and also the "disavowal resolution." We have discussed these both under the Talbot appeal, and in our opinion the conclusions there reached are applicable here.

Appeal of R. W. McKee.

It is conceded by this appellant that he was an employee of the Richfield Oil Company of California and that the $15,000 mentioned in count X of the indictment belonged to such company; that such sum was technically or constructively in his possession; and that it

was applied by him to his personal use. On October 24, 1929, one G. A. Smith loaned McKee $15,000, which the latter gave to his stock broker in payment of margins demanded. A few days later Smith was arrested and charged with conspiracy to evade the gasoline tax, his bail being fixed in the sum of $15,000. Some one in Smith's office telephoned these facts to McKee and wanted to know if "we" would furnish the bond. McKee then called the insurance department of the Richfield Company and asked them to arrange it. He was informed that a check had to be posted for the amount of the bond, whereupon appellant ordered a check issued, on November 7, 1929, payable to the Fidelity & Deposit Company of Maryland. This money was later paid to Smith in satisfaction of McKee's loan. Apparently neither appellants Talbot nor Fuller knew of the issuing of the check or of the deposit of the bond until after it was done.

Appellant McKee contends: (1) That the evidence is insufficient to support the judgment; that the court erred (2) in admitting evidence of subsequent withdrawals, (3) in admitting evidence of a mutilated check of the Richfield Company for $100,000, (4) in admitting in evidence certain resolutions guaranteeing loans made by the Bank of Italy to certain groups of officers and employees and testimony concerning same, (5) in admitting in evidence the "disavowal resolution" and (6) the New York statement.

[18] (1) The evidence shows that McKee was also convicted on a later indictment containing three counts charging withdrawals of $1,000, on September 28, 1929; $2,000, on October 4, 1929; and $2,000, on October 22, 1929. Appellant's testimony shows withdrawals in 1929 of $33,450.13 and credits of $15,843.67, of which latter amount $11,045.07 is a bonus credit of date December 31, 1929. He was also credited with an additional bonus in February of 1930, which it is said was due him in 1929, and appellant urges that there was then paid back in 1929 an amount in excess of all withdrawals made, in view of the fact that the account had a debit balance in December of 1928 of $16,873.21. His debit balance on September 30, 1929, two days after the first withdrawal involved here, was $22,532.14, after receiving credits in September for an item of "expense" of $494. The only other credits to the account in 1929 are as follows: October 31st, "Expense," $875; November 30th, "Expense," $426; December 31st, "Expense," $57.10, and the bonus of $11,045.07. In other words, the best that can be said of such showing is that appellant McKee intended to repay, which is no defense. Nor is actual restoration to be considered except in mitigation. Section 513, Pen. Code. We have considered this contention in the appeal of Talbot and see nothing in the facts with respect to this appellant that would change our opinion in that regard. McKee, as an officer of the company, was under Talbot, and made the withdrawal of $15,000 without even the latter's consent, although that could have availed nothing.

(2) There was no error in admitting evidence of subsequent withdrawals.

(3) The check mentioned on this point was issued at McKee's request, thinking Talbot intended to use it in connection with the $100,000 payment to Ingoldsby-Giles & Co. It was rejected by Talbot and a $50,000 check of the company used. Appellant was acquitted on the count to which such testimony relates, and we fail to see how any prejudice could possibly have resulted.

[19] (4) During the first week in November of 1929 appellant Talbot informed the treasurer of the Richfield Oil Company that he wanted to do something for certain employees in the purchase of stock, as a reward for faithful services and also because they had suffered rather heavily in loss of stock, and told him to see McKee and get the details of the plan. The treasurer interviewed McKee, who gave him a list of names of employees, among which was McKee's. The latter then either asked him to go to the Bank of Italy and arrange for a loan of $50,000 or told him that arrangement had already been made. At any rate, the treasurer went to the bank and received a note for $50,000, which he had the several employees so to be helped sign. Subsequently the bank asked for a guarantee of the note and the request was conveyed to McKee, who later gave the treasurer a copy of what purported to be a resolution of the board of directors authorizing the execution of a guarantee of the instrument by the company and a guarantee purporting to have been executed pursuant thereto. The resolution was dated May 7, 1930, and the guarantee May 12th, the treasurer delivering them to the bank. Later, the bank being dissatisfied with such resolution and guarantee, it was presented with others satisfactory to it. Certain checks of the company making interest payments on the note, issued at the request of McKee, were introduced in evidence. Later the bank demanded a payment on said loan, which demand the treasurer communicated to McKee, and a Richfield company check for $20,000 was drawn and sent to him for delivery to the bank. There was no renewal clause in the first guarantee, and the bank asked for another. This request was communicated to McKee by the treasurer, appellant saying, "we will give it to them." Shortly thereafter a purported resolution authorizing the guaranteeing by the company of the $30,000 balance due on said note and a guarantee thereof issued by the company were delivered to the treasurer, who gave them to the bank. Appellant asked the company's attorney to draw up the first resolution, and the latter

advised him that in his opinion the board of directors had no power to make such a guarantee. McKee then told the attorney "that was our instructions" and that he was not asked for advice. It was the introduction in evidence of these three sets of resolutions and guarantees of which this appellant complains.

The money obtained on the $50,000 loan was added to the sum of $26,237.50 obtained by the same employees on another loan, and forwarded to the Bank of Italy in San Francisco to cover a draft drawn by appellant McKee for $76,237.50, with 2,500 shares of Richfield stock attached. A loan of $100,000 was made by the same bank to this group of employees on November 15, 1929, out of which the $26,237.50 loaned was paid, and on April 3, 1930, a check of the Richfield Oil Company for $25,000 was issued and applied on the $100,000 loan. Various other checks of the company were issued at the request of McKee and applied on said loan in payment of either interest or principal. Several of the directors of the company testified that at no time were the resolutions above referred to passed upon or approved by the board. Appellant urges that such guarantees and resolutions were not material to the conspiracy charge because of a date later than the completion of the conspiracy; that his connection with the procuring thereof was open and aboveboard and that, not being on the directorate, he knew nothing of whatever action was taken.

The evidence is almost inextricably interwoven with the payment of interest and principal made with the company's checks of which this appellant had knowledge and which the trial court evidently considered the material part of the transaction. It would seem that, even though subsequent to the conspiracy, there was some evidence connecting joint action by Talbot and McKee in their issuance. It was brought to McKee's knowledge that in the opinion of the attorney for the company the directors had no power to make the resolutions or guarantees referred to. They were apparently executed without any actual meeting of the board of directors, which must have been known by McKee from his connection with their procurement, and, as the court said, might be evidence of other joint offenses indicating intent. In view of the finding of not guilty on count I the court certainly gave no weight to them on any joint charge, and we fail to see how they could have affected the individual charges on which appellant was found guilty.

(5) In view of the testimony of each director that no consent was given to the withdrawals made, we fail to see where any prejudice resulted in admitting in evidence the so-called "disavowal resolution."

(6) We have discussed this point as well as the preceding one in the appeal of Talbot, and the conclusions there reached, in our opinion, apply here.

In the oral argument, by special permission of this court, a point was presented which was not raised in the District Court of Appeal. This was to the effect that the opinion gives an unconstitutional interpretation to the embezzlement statute. We are satisfied that no provision of the Federal or State Constitution has been violated in this case.

The judgment and orders are affirmed as to each appellant.

220 Cal. 778

PEOPLE of the State of California, Plaintiff and Respondent, v. Raymond W. McKEE, Defendant and Appellant.

Cr. 3669.

Supreme Court of California.

Jan. 31, 1934.

Rehearing Denied March 1, 1934

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Monroe B. Kulberg and Clare Woolwine, both of Los Angeles (Bourke Jones, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen, and Buron Fitts, Dist. Atty., and Jesse Frampton, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Second Appellate District, Division 2. 22 P. (2d) 596. For the reasons expressed by us in People v. Talbot et al., Cr. 3668, 28 P.(2d) 1057, we adopt the opinion of Mr. Justice pro tem. Archbald of said District Court of Appeal as the opinion of this court. It reads as follows:

Defendant was charged with grand theft in an indictment containing eighty-nine counts. He was tried jointly with J. A. Talbot and C. M. Fuller before the court sitting without a jury, and at the conclusion thereof it was stipulated that the evidence in such case should be the evidence herein as to counts XVII, XIX, and XX, all other counts being ordered off calendar also by stipulation. The court found him guilty as to such counts, and from the judgments entered thereon and the orders denying his motions for a new trial defendant has appealed.

Count XVII involves the withdrawal of $1,000 from the funds of the Richfield Oil Company of California on September 28, 1929, and their use by appellant for his own personal purposes, count XIX a similar withdrawal and use of the sum of $2,000 on Oc-

tober 4, 1929, and count XX, the same as to $2,000 on October 22, 1929, the withdrawals, personal use, and the fact that such sums were technically or constructively in appellant's possession being admitted by him.

The contentions of appellant here are raised by the briefs filed in the appeal of McKee in People v. Talbot, Fuller & McKee, 28 P. (2d) 1057 files of this court, and such contentions are discussed and decided in the opinion this day filed therein.

Judgments and orders affirmed.

136 Cal.App. 513

LUTTRELL v. COLUMBIA CASUALTY CO. et al.

Civ. 8819.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1934.

Rehearing Denied Feb. 28, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Notaries ⇨11.

Surety on bond of notary public is liable in damages to party injured by false certificate of acknowledgment (Pol. Code, § 801).

2. Notaries ⇨11.

In action on notary's bond for injury through false certificate of acknowledgment on trust deed, denial of owner of property that he ever signed or acknowledged instrument is sufficient to shift burden of proof to officer making certificate; only slight evidence of falseness being required (Pol. Code, § 801).

3. Notaries ⇨11.

Undisputed testimony by owners of property that they knew nothing of transaction involving loan was sufficient to sustain finding that notary's certificate of acknowledgment on trust deed covering property was false, in action to recover on notary's bond (Pol. Code, § 801).

4. Acknowledgment ⇨52.

Notarial certificate based on personal knowledge is guaranty of genuineness of instrument.

5. Notaries ⇨11.

Plaintiff, deceived by false certificate of acknowledgment on trust deed, *held* not guilty of contributory negligence barring recovery on notary's bond (Pol. Code, § 801).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Ethel J. Luttrell against the Columbia Casualty Company and another, to recover upon a notary's bond. From an adverse judgment, named defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Paul Helmore, of Sausalito, and Walter H. Robinson, of Los Angeles, for respondent.

KNIGHT, Justice.

The respondent, Mrs. Ethel J. Luttrell, was induced by one John J. MacArthur, a real estate agent and notary public in Mill Valley, Marin county, to make a loan of $1,000 on two lots in Mill Valley owned by W. C. Wright of Los Angeles, in consummation of which MacArthur delivered to Mrs. Luttrell a deed of trust purporting to have been signed by the owner and his wife, and bearing MacArthur's notarial certificate of acknowledgment, wherein he certified that W. C. Wright and Ethel R. W. C. Wright, known to him to be the persons whose names were subscribed to said trust deed, had personally appeared before him and acknowledged to him that they executed said instrument. A cashier's check for the amount of the loan was delivered to MacArthur, who subsequently absconded, and thereafter his whereabouts were unknown. Following his disappearance, Mrs. Luttrell discovered that the signatures attached to the deed of trust and the promissory note accompanying the same were forgeries, and that the recitals in the certificate of acknowledgment were wholly false; whereupon she brought this action upon the notary's official bond to recover the loss she had sustained, and was awarded judgment against the appellant casualty company, as the surety on the bond. The contentions made by said company in furtherance of the appeal which it has taken from said judgment are that the evidence is insufficient to establish that the notary was guilty of any official misconduct or neglect, or that any official misconduct or neglect on his part was the proximate cause of respondent's loss. The grounds urged are wholly without merit.

[1-3] It has been repeatedly held in this state that under the provisions of section 801 of the Political Code the surety on the bond of a notary public is liable in damages to a party injured by a false certificate of acknowledgment. Heidt v. Minor, 89 Cal. 115, 26 P. 627; Joost v. Craig, 131 Cal. 504, 63 P. 840, 82 Am. St. Rep. 374; Kleinpeter v. Castro, 11 Cal. App. 83, 103 P. 1090; Hungate v. Wells, 129 Cal. App. 133, 18 P.(2d) 64. As said in the case last cited, the facts of which are almost identical with those of the present case, when a notary public assumes office he is re-

quired to perform his duties with honesty, integrity, diligence, and skill. His bond is executed for the purpose of protecting those who may suffer by his dishonesty, and the bondsman is liable for damages resulting from the fraudulent acts of the notary committed in the performance of his duty, such as the making of a false certificate of acknowledgment.

Appellant's argument that the evidence fails to impeach the recitals in said certificate is entirely unfounded. As pointed out by the decisions, the truthfulness of the recitals in a certificate of acknowledgment is a matter peculiarly within the knowledge of the notary public, and in the nature of things difficult for the injured party to prove. It is held, therefore, that under these circumstances, and in order to shift the burden of proof on this issue, the injured party is not required to produce more than slight evidence of the falseness of such recitals, and that the denial of the owner of the property that he ever signed or acknowledged any instrument affecting the property is legally sufficient to controvert such recitals, and to shift the burden of proof to the officer making the certificate. Kleinpeter v. Castro, supra; Joost v. Craig, supra. In the present case the testimony of the owner shows that he knew MacArthur and had some conversation with him about the property; but he and his wife both testified positively that they knew nothing of the transaction involving the loan, that they had neither signed nor acknowledged any instrument whatever relating to the property, nor had they ever appeared before MacArthur for any such purpose; furthermore, that they received no part of the money obtained on the loan. Their testimony was not disputed, and therefore, under the foregoing authorities, it was clearly sufficient to sustain the trial court's finding that said certificate of acknowledgment was false.

[4, 5] Appellant's claim that Mrs. Luttrell was guilty of contributory negligence which bars a recovery is likewise wholly unsupported. As held in Joost v. Craig, supra, and again in Anderson v. Aronsohn, 181 Cal. 294, 184 P. 12, 10 A. L. R. 866, a notarial certificate based upon personal knowledge is a guaranty of the genuineness of the instrument; and the following cases hold that the falseness of such a certificate constitutes the proximate cause of the injured party's loss: Kleinpeter v. Castro, supra; State ex rel. Matter v. Ogden, 187 Mo. App. 39, 172 S. W. 1172. The evidence here shows that, after MacArthur solicited the loan and Mrs. Luttrell had inspected the property and agreed to lend the money, he presented to her for approval the proposed deed of trust, and stated he had to hurry back to his office because Mr. and Mrs. Wright were waiting there to sign it, and he returned shortly with the deed of trust and the promissory note bearing the purported signatures of the owner and his wife. Attached to the deed of trust was his notarial certificate of acknowledgment in due form, with his official seal affixed. MacArthur then accompanied Mrs. Luttrell to the bank, where she drew the money from her savings account, and from there they proceeded to the recorder's office in San Rafael, where she handed to him the cashier's check covering the amount of the loan and he delivered to her the promissory note and the deed of trust. As was said in Joost v. Craig, supra, respondent had a right to rely upon the certificate and to presume without question that the notary had done his duty. No circumstance was brought to her attention which could have raised a suspicion to the contrary. There was nothing, so far as the evidence shows, which could have put a most prudent person upon inquiry.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

136 Cal.App. 341

PEOPLE v. BAYNE.

Cr. 1303.

District Court of Appeal, Third District, California.

Jan. 23, 1934.

Rehearing Denied Feb. 7, 1934.

Hearing Denied by Supreme Court Feb. 19, 1934.

1. Criminal law ⇐999(1).

Commitment for burglary, reciting defendant was convicted of burglary of the first degree and prior conviction of another felony, *held* not invalid because not stating defendant was not armed with a deadly weapon, since such statement, while necessary to enable prison board to determine punishment, was not necessary to validity of judgment (Pen. Code, §§ 1168, 1192a).

2. Criminal law ⇐1144(½).

Reviewing court presumes that trial court complied with statute requiring court to ascertain facts of assistance to board of prison directors and send copy to warden of prison (Pen. Code, § 1192a).

3. Criminal law ⇐1144(17).

Reviewing court cannot assume that judgment of commitment is rendered void by trial court's failure to furnish prison warden with facts calculated to be of assistance to board of prison directors (Pen. Code, § 1192a).

4. Criminal law ⇐1144(17).

Reviewing court will assume that prison board will fix term for burglary on basis that

prisoner was not armed with deadly weapon, in absence of competent information to contrary (Pen. Code, § 1192a).

5. Criminal law ⇐1141(2).

Where judgment of commitment was valid on face, defendant had burden to show alleged infirmity.

6. Judgment ⇐470.

On collateral attack, all presumptions favor validity of judgment, and regularity of proceedings on which it was based.

7. Criminal law ⇐1177.

Defendant cannot complain of amendment to judgment favorable to him.

8. Burglary ⇐2.
Constitutional law ⇐250.

Statute defining burglary as entry of building with intent to commit petit larceny *held* not unconstitutional as discriminatory (Pen. Code, § 459).

9. Burglary ⇐19.

There was no fatal variance between allegation charging defendant with entering building with intent to commit "theft" and statutory definition of crime as entry with intent to commit "grand or petit larceny" (Pen. Code, §§ 459, 490a).

10. Burglary ⇐3.

Term "larceny" as used in definition of burglary in one section of statute, is included within term "theft," as defined in another section (Pen. Code, §§ 459, 484).

11. Burglary ⇐10.

"Burglary" of first degree is accomplished by entering building in nighttime with intent to commit either petit or grand theft, regardless of value of property or whether accused was armed (Pen. Code, § 459).

[Ed. Note.—For other definitions of "Burglary," see Words & Phrases.]

12. Criminal law ⇐1159(2).

On appeal from order denying motion to vacate judgment of conviction of burglary of first degree, sufficiency of evidence to support charge could not be considered.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Joseph Bayne was convicted of burglary of the first degree with a prior conviction, and, from an order denying a motion to vacate the judgment of conviction, he appeals.

Affirmed.

Joseph Bayne, in pro. per.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted by the court sitting without a jury of the crime of burglary of the first degree, and a prior conviction of another felony. Evidence was adduced, pursuant to section 1192a of the Penal Code, of the fact that the defendant was not armed with a deadly weapon at the time of the commission of the offense. He was sentenced to imprisonment in the state prison at Folsom for the term prescribed by law. The commitment is in the usual form, and recites the fact that the defendant was convicted of burglary of the first degree and a prior conviction of another felony. It did not allege that the defendant was unarmed at the time of the commission of the offense. No appeal was taken from that judgment.

After one and a half years of his sentence had been served, the defendant presented to the trial court a motion to vacate the judgment for failure to specify therein the facts upon which the degree of the crime was determined, and because it contained no statement that the defendant was not armed with a deadly weapon. The motion to vacate the judgment was denied August 28, 1933. At that time the court amended the judgment by reciting therein that the defendant was unarmed at the time he committed the offense. From this order denying the motion to vacate the judgment, this appeal was perfected.

At the time the motion to vacate the judgment was denied, the court amended the original commitment by adding thereto the following language: "The court finds that at the time of the commission of the alleged offense in the information the defendant was not armed with a deadly weapon." The evidence which was received at the original trial of the case is not before us. It was not offered at the hearing of the motion to vacate the judgment. For that reason a motion for diminution of the record to supply this court with that evidence would have been ineffectual. But the motion for diminution of the record was not presented to this court. In denying the motion to vacate the judgment the court said: "At the time of the trial of this case there was testimony offered and received in the court which justified the finding of the court that the degree of burglary was burglary of the first degree. The testimony satisfied the court that the burglary occurred in the night-time. * * * The testimony taken at the time of pronouncing judgment shows conclusively that the defendant was not armed with a deadly weapon." There is no evidence to the contrary.

On appeal from the order denying the motion to vacate the judgment, it is contended the commitment is void for various reasons hereafter referred to, and that the defendant

is therefore entitled to be discharged from custody.

[1] The judgment of commitment in this case is not invalid. It properly declares that upon competent evidence adduced the defendant was duly convicted of the crime of burglary of the first degree. It appears that the trial court received evidence pursuant to section 1192a of the Penal Code before pronouncing sentence on the defendant, from which it was determined that he was guilty of burglary of the first degree, for the reason that he entered the building in the nighttime, and that he was not armed with a deadly weapon The degree of the crime was properly ascertained and fixed by the terms of the commitment. The law requires the degree of a crime to be ascertained by the court before pronouncing sentence. A judgment of commitment which fails to determine the degree of crime is defective. The law does not require the commitment to show upon its face the facts upon which the court determines the degree of the crime, the fact that the accused was armed with a deadly weapon, or any of the other facts upon which the prison board is enabled to subsequently fix the maximum and minimum term of sentence under the provisions of section 1168 of the Penal Code.

It is necessary to inform the prison board as to whether the prisoner was armed with a deadly weapon at the time of the commission of the offense to enable it to determine the maximum and minimum term of sentence, as required by section 1168, supra. These facts may properly be inserted in the commitment, but they are not necessary to the validity of the judgment. These facts may be ascertained and certified to the prison board in the manner provided by section 1192a of the Penal Code. That section provides in part: "Before judgment is pronounced upon any person convicted of an offense punishable by imprisonment in the state prison, it shall be the duty of the court * * * to ascertain in a summary manner, and by such evidence as is obtainable, * * * facts * * * calculated to be of assistance to the court in determining the proper punishment of such person, or to the state board of prison directors in the performance of the duties imposed upon it by law. * * * Within thirty days after judgment has been pronounced by the court, one copy of such transcript * * * shall be sent by mail * * * to the warden of the prison to which such convicted person shall have been sentenced."

[2-4] In the absence of evidence to the contrary, we must presume the court complied with the foregoing statute, and that the prison board was furnished with all obtainable facts with relation to the crime enabling it to determine the proper punishment according to law. It is not contended this information was not furnished to the board. It is merely asserted the judgment is void because findings to that effect were not inserted therein. We may not assume the mere failure to comply with the provisions of section 1192a, supra, will render a judgment of commitment void. Since no fact may be presumed against a defendant which will aggravate his offense, we must assume the prison board will necessarily fix a term of sentence on the basis that a prisoner was not armed with a deadly weapon at the time of the commission of an offense, in the absence of competent information to the contrary.

[5-7] The commitment was amended at the time the motion to vacate the judgment was denied, by adding thereto the following: "The court finds that at the time of the commission of the alleged offense in the information the defendant was not armed with a deadly weapon." It is now asserted that, since the judgment is void, the court was without authority to amend it. We have heretofore held that the judgment was not void for failure to include therein the statement that the defendant was unarmed. Since the judgment was valid on its face, the burden was on the defendant to show any alleged infirmity thereof. Upon a collateral attack all presumptions are in favor of the validity of such a judgment and of the regularity of the proceedings upon which it is based. 14 Cal. Jur., p. 859, § 5; Fletcher v. Superior Court, 79 Cal. App. 468, 250 P. 195. Moreover, the amendment to the judgment was favorable to the defendant, and he may therefore not complain of it.

It has been frequently held that, when a judgment of commitment fails to determine the degree of crime of which an accused has been convicted, the cause may be properly remanded to the trial court, with directions to ascertain the degree of the crime as required by law and amend the judgment accordingly. People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585; People v. Walker, 132 Cal. 137, 64 P. 133; In re Lee, 177 Cal. 690, 171 P. 958; People v. O'Brien, 122 Cal. App. 147, 9 P.(2d) 902; People v. Scott, 39 Cal. App. 128, 178 P. 298; Ex parte Stroff (Cal. App.) 22 P.(2d) 770; People v. Stratton (Cal. App.) 24 P.(2d) 174. In the case last cited, the cause was remanded, with directions to the trial court to determine the degree of robbery of which the defendant had been convicted, and amend the judgment to conform therewith, including therein also a finding as to whether the defendant was armed with a deadly weapon. In that case it affirmatively appeared the court had failed to take evidence upon which the degree of the crime was determined, and, upon the contrary, that the court had fixed the degree solely upon the ex parte statement of the district attorney. This court quite properly remanded that case, with directions to take evidence respecting the degree of the crime and regarding the question as to whether the defendant was armed, and to include

these findings in the amended commitment. That case does not hold that a commitment is void for failure to include therein the facts upon which the degree of a crime is determined or for failure to include therein a finding regarding the question as to whether the defendant was armed. The last-mentioned fact does not affect the judgment, but is required to be furnished to the prison board to enable it to fix the maximum and minimum term of sentence. That information may be supplied to the board either in the commitment or in the certified statement pursuant to section 1192a, supra.

[8] The appellant contends that section 459 of the Penal Code, under which he was prosecuted for burglary, is unconstitutional and discriminatory, since it defines burglary as the entry of a building with the intent to commit petit larceny, a mere misdemeanor, as distinguished from any other misdemeanor such as battery. We are satisfied section 459, supra, is not unconstitutional. The common-law definition of burglary has been greatly enlarged by frequent amendments of statute. The portion of the section which is challenged as discriminatory is intended for the protection of property, as distinguished from certain personal rights, which are also protected by the same act. The challenged portion of the section applies to acts which involve moral turpitude. It is a reasonable and natural classification, the protection of which is wholly within the province of the Legislature. In the case of People v. Barry, 94 Cal. 481, 29 P. 1026, it is said: "It will thus be seen that common-law burglary and the statutory burglary of this state have but few elements in common. * * * Even under the present section of the Penal Code, many acts constitute burglary which but a few years ago were a different offense, or no offense whatever. As to the acts which shall constitute the crime of burglary, that is a matter left entirely to the policy of the legislature, within its constitutional powers; and, when that body has said that every person who enters a store with the intent to commit larceny is guilty of a burglary, the language is so plain and simple that rules of statutory construction are not required to be consulted. The meaning is patent upon the face of the statute."

[9] It is asserted there is a fatal variance between the allegation of the information which charges the defendant with entering the building with the intent to commit "theft," and the definition of burglary as it appears in section 459 of the Penal Code, which characterizes the crime as the entry of a building with intent to commit "grand or petit larceny." It is argued that the term "theft" includes crimes other than the offense of larceny, for instance, the procuring of property by means of fraud or deceit. There is no merit in this contention. Section 490a of the Penal Code specifically authorizes the substitution of the word "theft" for that of "larceny," as it appears in that section of the statute which defines the crime of burglary. These terms are made interchangeable by statute. Section 490a of the Penal Code provides that: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."

[10, 11] The term "larceny," as it is used in the definition of burglary appearing in section 459 of the Penal Code, is included within the term "theft" as it is defined in section 484 of the same Code. Burglary of the first degree is therefore accomplished by entering a building in the nighttime, with the intent to commit either petit or grand theft, regardless of the value of the property sought to be stolen, and regardless of whether the accused is armed with a deadly weapon.

[12] Finally, the appellant argues at great length that the judgment is not supported by the evidence, for the reason that it was not shown that he entered the building with the intent to commit larceny. This contention is also without merit on this appeal. This is not an appeal from the original judgment. It is a mere appeal from the order denying the motion to vacate the judgment. The evidence which was adduced at the trial is not before this court. It could not properly be received for consideration on this appeal. It was not offered at the hearing of this motion. There was no appeal from the original judgment. We must therefore assume that every necessary element of the crime with which the defendant was charged was adequately proved. The sufficiency of the evidence to support the charge may not be considered on this appeal.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

136 Cal.App. 323

BURROWS v. BURROWS et ux.

Civ. 5035.

District Court of Appeal, Third District, California.

Jan. 22, 1934.

1. Appeal and error ⇐110.
No appeal lies from order denying new trial.

2. Trusts ⇐110.
As regards issue of fraud in action to compel reconveyance, evidence supported conclusion that defendant promised reconveyance with no intention of performing (Civ. Code, § 1572, subd. 4).

3. Trusts ⇐110.
In action to compel reconveyance, evidence supported conclusion that conveyance was made on defendants' promise to reconvey, thus creating trust (Civ. Code, § 2224).

4. Evidence ⇐419(2).
Consideration for deed can always be inquired into though consideration was recited therein.

5. Contracts ⇐94(1).
Persons in confidential relation, such as parent and child, cannot hold benefits conferred by others in such relationship unless such others had independent advice.

6. Contracts ⇐99(1).
Deeds ⇐196(2).
Gifts ⇐47(3).
All gifts, contracts, or benefits from principal to one occupying fiduciary or confidential relation to him, are constructively fraudulent and void.

7. Trusts ⇐96.
Evidence justified court's conclusion that trust was violated when son, to get conveyance of land, promised reconveyance without intention of keeping promise and failed to reconvey.

8. Trusts ⇐17, 18(5).
Oral promise to reconvey will be enforced.

Appeal from Superior Court, Los Angeles County; Miner Moore, Judge.

Action by Charles Burrows against Ray Burrows and wife, to compel reconveyance of real and personal property. From an adverse judgment, defendants appeal.

Affirmed as amended.

L. Kenneth Rhodes and Harry B. Ellison, both of Los Angeles, for appellants.

Elwood Bowles, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

[1] The plaintiff had judgment in this action brought for the purpose of compelling a reconveyance from the defendants of certain real and personal property. From this judgment and an order denying a new trial, the defendants appeal. As no appeal lies from an order denying a new trial, that portion of the appeal is hereby dismissed.

The complaint in the action and the findings of the court are to the effect that for many years prior to the 2d day of April, 1929, the plaintiff and his wife, Agnes Burrows, now deceased, were the owners of the real property described in the complaint, being a certain dwelling house situate on a lot of land in the city of Los Angeles, and including the personal property therein; that prior to the 2d day of April, 1929, the plaintiff and his wife had borrowed money, and given as security a trust deed on the real property herein referred to; that the money was due for which the trust deed had been executed, and there was likelihood of foreclosure proceedings. At the same time it appears that there was more or less of a disagreement existing between the plaintiff and his wife, and that the wife refused to join in the execution of any papers necessary to refinance the loan for the security of which a trust deed had been given. Following this the record shows, according to the complaint and the findings of the court, that the plaintiff and his wife executed and delivered to the defendants a deed to the property involved in this action, upon the express promise that after the loan existing against said property had been refinanced, a reconveyance would be executed in favor of the plaintiffs.

It further appears from the record that Agnes Burrows, the wife of the plaintiff, died intestate during the month of August, 1929; that the defendants refinanced the loan referred to by borrowing money and executing a trust deed to secure the repayment thereof. The amount of the money borrowed by the defendants in refinancing the incumbrance theretofore existing upon the premises involved herein appears to have been the sum of $2,500, $500 of which was used in paying off street assessment liens, etc. No money was paid to the plaintiff, or to the plaintiff's then living wife, in consideration of the conveyance. There does appear some testimony to the effect that Ray Burrows stated that he would give a trust deed to the plaintiff and also to the plaintiff's wife, in the sum of $1,000.

Upon this appeal it is contended: First, that the court should have granted defendants' motion for nonsuit; and, second, that the evidence is insufficient to support the findings of the trial court. We do not need

to give any consideration to denial of the motion for nonsuit because if the evidence submitted to the trial court for its consideration supports its findings, the judgment should be affirmed. 2 Cal. Jur. 1025; Long Beach Brick Co. v. De Dodson, 104 Cal. App. 99, 285 P. 382.

The testimony of the plaintiff is to the following effect: That the defendant Ray Burrows came to him some time during the month of February or March, 1929, and said that his mother (meaning the plaintiff's wife) was willing to deed the place over to Effie and himself, and then he would deed it back to the plaintiff any time the plaintiff wanted it. The plaintiff testified that he refused, and nothing was done until later. In the latter part of March he stated that the defendant Ray Burrows came to him at Inglewood, and said: "Dad, Agnes (meaning the plaintiff's wife), is willing to sign the place over to Effie and myself, and we will deed it back to you any time you want it." The plaintiff testified that he refused this request; that later Ray Burrows came back to him and said: "Father, do you think for one minute that I would beat you out of one penny? I don't want you to lose one penny. Mother is on her high horse, and if you will deed the property over to Effie and me, I will deed it back any time you want it." The plaintiff testified that he said: "Well, if you pay out any money on it, I am willing to refinance and pay it back."

The plaintiff testified that Ray Burrows then said: "We will give you $1000.00 to go on, and we will go on there and live in the house. We agreed on that, and then he tried to get the money to give me the $1000.00 and he could not get it." The plaintiff further testified as follows: "I let it lay right there until Ray came down and said she (referring to plaintiff's wife), wanted to deed it over to him and said: 'Dad, if you will do that, Effie and I will deed it back to you; we don't want to see you lose your property, and you will lose it if you don't. She (referring to the plaintiff's wife), is willing to turn it over to you, and we will deed it back to you any time.'" There was further testimony of the plaintiff to the same effect, including, also, the statement of the fact that the plaintiff was not able to work.

Earl Burrows, a son of the plaintiff, testified that the defendant told Dad (meaning the plaintiff): "If you will deed that place over to him, he will give it back."

Myra E. Bowles, a sister of the plaintiff, testified as follows: "And Ray wanted me to advise Charlie, and tried to get Charlie to deed over the property to him. He said that was the only way to save it for them because his mother would not sign the papers for refinancing, and that if they would deed it to him, he would deed it back to Charlie after they had refinanced it, and saved it for them."

Upon cross-examination this witness further testified: "He (referring to Ray Burrows), wanted to persuade me to persuade my brother to deed the property to him so that he could save the property for them."

Fred Gardner, son-in-law of the plaintiff, testified as follows: "Well, the only thing Ray says, he wishes the folks could get along better so that they could settle their agreements or disagreements without having him come into it, and I said, 'How are you going to do it?' He says, 'Well,' he says, 'he is going to have the property deeded over to him by his mother and father, and he is going to give his mother a trust deed for $1000.00, and give his father a trust deed for $1000.00, and that would give him a hold on the property, and then, at any time they could get together, wanted the property back, he would deed it back to them and they could pay him what he was out.'" This witness testified to a further conversation with Ray Burrows to the effect that after the property had been deeded over to him he (Ray Burrows) stated, in answer to a question, that he had not given to either his mother or father a trust deed, and did not care if they never received it. One or two other witnesses testified to occurrences similar to those herein related.

There was also testimony to the effect that the real estate involved was of the value of between $6,500 and $7,000. The court found the value of the property at $7,000. There was further testimony to the effect that the plaintiff relied upon Ray Burrows for advice. Being father and son, a confidential relation existed between the parties. 12 C. J. 421. The complaint alleges the existence of confidential relations, and this relationship is not denied by the defendants. The defendant Ray Burrows testified that his father "always came to him for everything." It was also shown by the testimony that Ray Burrows promised that he would take care of the mother as long as she lived, and likewise, testimony to the effect that the mother paid board to Ray Burrows after the execution and delivery of the conveyance involved in this action. After the taking of possession of the premises by the defendants, the defendants expended thereon several hundred dollars, allowance for which is made in the judgment.

The court found in effect that the conveyance was made to the defendants upon the express promise that reconveyance would be made whenever asked for by the plaintiff, and as the testimony shows, would be subject to any liens placed thereon in order to refinance the loan heretofore mentioned, and also to reimburse the defendants for such expenditures as should be necessarily incurred by them.

[2, 3] Upon this appeal it is contended that the findings are not supported by the judgment. First: That there is no showing of

fraud. This contention, however, appears to be controverted by the testimony. Subdivision 4 of section 1572 of the Civil Code, in defining "fraud," reads: "A promise made without any intention of performing it." If accepted by the trial court as true, the testimony which we have summarized herein is sufficient to lead to the conclusion that the defendant, Ray Burrows, made a promise of reconveyance with no intention of performing the same. Again, that the conveyance was made upon the promise of the defendants to reconvey, and thus created a trust, appears to be without controversy. Under section 2224 of the Civil Code, the violation of the promise to reconvey would create what is denominated an involuntary trust. That section, in defining involuntary trusts, reads: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust," etc.

Accepting the testimony as true, it clearly shows the violation of the trust upon which the property was conveyed, and as we have said, a violation of a promise which the court was justified in finding was made without any intention of either present or subsequent performance.

[4] While the deed by which the property was conveyed to the defendants contains a recital of $10, the evidence shows that nothing was paid. The law is so well settled that the consideration can always be inquired into that we need not cite authorities in support thereof. There was a promise and an undertaking on the part of the defendants to refinance the indebtedness then existing for the payment of which the property in question was covered by a trust deed. It does not appear in the record that the defendants subjected any of their own property to any lien in the refinancing operations. All that was done was the taking up of the then existing indebtedness, and the placing of a loan upon the property by way of a trust deed, increased in amount in the sum of about $500 to enable payment to be made of taxes and assessments which appear to have been allowed to go delinquent. The defendants paid no money of their own in their refinancing operations.

It thus appears, according to the findings of the trial court that they received, without consideration, property worth $4,500 in excess of the indebtedness existing thereon. No other property appears to have been owned or possessed by the plaintiffs at the time of the conveyance made by the plaintiff to the defendants. Nor does it appear that the plaintiff had any independent advice.

We find no testimony in the record as to any mental incapacity on the part of the plaintiff, it being simply alleged that he was a man of 68 years of age. However, it does appear in the exhibits, made a part of the record, that the plaintiff was not only uneducated, but blankly ignorant.

[5, 6] We think the following language found in the opinion in the case of Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289, 293, pertinent here: "It is a well-established principle that persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them." Citing a large number of cases. Again, in the same opinion, we find the following: "It is a well-settled rule of equity jurisprudence, that all gifts, contracts, or benefits from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void. The court, in such cases, acts upon the principle that if confidence is reposed it must be faithfully acted upon; if influence is acquired it must be kept free from the taint of selfish interest, and cunning and overreaching bargains. In this class of cases there is often found some intermixture of deceit, imposition, or overreaching advantage or other mark of positive or direct fraud. But the principle upon which courts of equity act in regard thereto stands independent of any such ingredient, upon a motive of general public policy. Among the relations subject to the foregoing rule are those of parent and child, attorney and client, and principal and agent."

[7] That these rules are more often applied to dealings between mother and son, may be admitted, yet from the circumstances appearing in this case, we think the trial court was correct in concluding that a promise was made to induce the conveyance; that this promise was made without any intention of keeping the same; and therefore, that a trust has been violated.

As to the inferences that may be drawn of undue influence, violations of confidence, etc., arising from transactions between mother and son, we cite the case of Piercy v. Piercy, 18 Cal. App. 751, 124 P. 561; Hillyer et al., Appellants, v. Hynes, Administrator, etc., 33 Cal. App. 506, 165 P. 718.

[8] That an oral promise to reconvey will be enforced, is supported by the leading case of Brison v. Brison, 90 Cal. 323, 27 P. 186, where a husband conveyed property to his wife upon a promise to reconvey. Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; Hayne v. Hermann, 97 Cal. 259, 32 P. 171; Smith v. Lombard, 201 Cal. 518, 258 P. 55, 59. In this latter case the rule is thus stated: "It has been established by a number of decisions in this state, that where confidential relations exist between two parties and one of them executes a conveyance of real estate to

the other, upon a parol promise by the other that he will hold it for the benefit of * * some third person in whom the grantor is interested, there being no other consideration for the conveyance, a trust arises by operation of law in favor of the grantor, or in favor of the third person, for whom the property is to be held. It is the violation of the parol promise which constitutes the fraud upon which the trust arises. If made in good faith, and if it is of a continuing nature, the performance of it for a time does not prevent a trust from arising when it is broken and repudiated." Citing a large number of cases, including those to which we have herein referred.

The appellant cites cases on the question of gifts, and also cases to the effect that in order to establish a trust, the evidence must be clear and convincing. Without discussing the question as to where the burden of proof would lie on the question of alleged gift, we think the testimony which we have summarized amply justified the court in concluding that the property was conveyed upon a trust, and that the testimony was sufficiently clear to establish the existence of the trust, the promise made of reconveyance, the refusal to reconvey, and, likewise, the intention never to reconvey.

The record further shows that the wife of the plaintiff (now deceased), prior to the conveyance made to the defendants, had refused to sign the papers necessary to be signed in order to refinance the loan existing upon the premises. The testimony shows, and the court should have found, that the defendants refinanced the loan existing upon the premises involved in this action, and in so doing, executed a trust deed as security for the payment, and that the refinancing should be made subject to the payment of the amount of the lien still existing upon the premises involved herein.

It is therefore ordered that finding No. 8 be amended to read as follows: "That it is true that the defendants Ray Burrows and Effie Burrows have expended the sum of $967.83 upon said real property, and also in refinancing the same executed a trust deed for the sum of $2500.00, necessary to be borrowed in order to discharge the liens existing against the premises on April 2, 1929, upon which there is still an unpaid balance."

We are unable to find in the record the exact amount of the unpaid balance due on the trust deed executed by the defendants.

It is also ordered that the second conclusion of law be amended to read as follows: "That the plaintiff is entitled to a reconveyance of said real property from the defendants, subject, however, to the unpaid balance of the lien existing against said property by reason of the trust deed given in refinancing the indebtedness constituting a lien on said premises on April 2nd, 1929."

It is further ordered that the judgment in this cause be amended by adding thereto the following: "That the reconveyance herein directed to be made, be made subject to the payment of the unpaid balance of the moneys secured to be paid by the trust deed executed by the defendants in refinancing the indebtedness existing and owing by the plaintiff, constituting a lien upon said premises on the 2nd day of April, 1929."

As so amended, the judgment is affirmed. Respondent is allowed his costs.

We concur: PULLEN, P. J.; THOMPSON, J.

136 Cal.App. 332

HUNTER v. PAXTON et al.

Civ. 1288.

District Court of Appeal, Fourth District, California.

Jan. 22, 1934.

Appeal and error ⊜554(2), 627(2).

Appeal was dismissed where no transcript or bill of exceptions was filed, time within which record on appeal might be prepared and filed had expired, and trial court made order terminating proceedings for obtaining transcript, and dismissed appellant's application therefor (Code Civ. Proc. §§ 650, 953a; Rules for the Supreme Court and District Courts of Appeal, rule 6).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Wayne Hunter against Hale Paxton and another. From the judgment, plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

E. L. Chloupek, of San Francisco, and Ray W. Hays and Ben H. Johnson, both of Fresno, for appellant.

J. E. Manning, of Sanger, and Conley, Conley & Conley, of Fresno, for respondents.

JENNINGS, Justice.

In support of their motion to dismiss the appeal herein for failure of the appellant to file a transcript of the record within the prescribed time, respondents have presented the certificate of the county clerk as required by rule VI of the Rules for the Supreme Court and District Courts of Appeal. The

facts stated in the certificate are uncontradicted, and it therefrom appears that notice of appeal was filed on June 2, 1932; that no bill of exceptions has been filed as provided in section 650 of the Code of Civil Procedure; that no transcript prepared in conformity with the provisions of section 953a of the Code of Civil Procedure has been filed; that the time within which a record on appeal may be prepared and filed under either method has expired; that on July 14, 1933, the trial court, on motion of respondents, made an order terminating the proceedings for obtaining a transcript and dismissing appellant's application for such transcript. The motion of respondents should therefore be granted. Union Trust Company of San Diego v. Novotny, 125 Cal. App. 417, 13 P.(2d) 974; Steffey v. Standard Stations, Inc., 131 Cal. App. 202, 20 P.(2d) 971.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 466

PEOPLE v. HANSEN.

Cr. 255.

District Court of Appeal, Fourth District, California.

Jan. 27, 1934.

Criminal law ⇐1182.

On appeal from conviction of robbery, where time granted for filing of opening brief had expired and no appearance was made, judgment was affirmed.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Gordon Fred Adolph Hansen was convicted of robbery, and he appeals.

Affirmed.

Ray Miller, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The clerk's and reporter's transcripts were filed in this court on September 2, 1933. The matter was placed on the calendar for October 10, 1933, and then continued to November 14, 1933. On November 9, 1933, a stipulation to dismiss the appeal was filed, signed by the attorney for the appellant and by a Deputy Attorney General. On the same day a letter was received from the appellant stating that his attorney had dropped the case and that he desired time in which to himself file a brief. Accordingly, on November 14, 1933, the court extended the time in which to file the opening brief for fifteen days, and continued the matter to December 12, 1933. No appearance was then made, and the matter was continued to January 9, 1934. On that date a telegram was received from another attorney asking for ten days in which to file an opening brief, which request was granted. On the same day the Attorney General moved to affirm under section 1253 of the Penal Code; the motion being taken under advisement.

No other appearance having been made, no brief having been filed, and the time given having expired, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

136 Cal.App. 541

PEOPLE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9471.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1934.

Criminal law ⇐982.

Accused, who pleaded guilty to petit larceny and to charge that prior to date on which petit larceny was committed he had been convicted of a felony and served term therefor in penal institution, *held* ineligible for probation (Pen. Code, §§ 667, 1203).

Application for a writ of mandate by the People of the State of California against the Superior Court of the State of California in and for the County of Los Angeles, and the Honorable Ruben S. Schmidt, Judge thereof, to require respondent to vacate its order granting probation to Jack Coffee and pronounce judgment according to law.

Writ granted.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, Justice.

The essential facts herein are that one Jack Coffee having pleaded "guilty" to a charge of petit larceny contained in an information theretofore filed against him in

the Superior Court, and at the same time having admitted the additional fact (also charged against him in said information) that prior to the date on which said offense was committed he had been convicted of a felony and had "served a term therefor in a penal institution," on application made by him to the Superior Court for probation, by an order of said court the said application was granted. Thereupon a petition for a writ of mandate was presented to this court for the purpose of procuring its order by which the Superior Court may be directed to vacate its said order by which the said defendant was granted probation and thereupon to pronounce judgment upon and against said defendant "according to law."

In the premises, the power of the Superior Court depends upon the construction which should be given to sections 667 and 1203 of the Penal Code. The pertinent provisions of the former statute are that "every person who, having been convicted of any felony either in this state or elsewhere, and having served a term therefor in any penal institution, commits petit theft after such conviction, is punishable therefor by imprisonment in the state prison not exceeding five years. * * *" And by the terms of the latter statute, it is provided that "probation shall not be granted * * * to any defendant unless the court shall be satisfied that he has never in any place been previously convicted of a felony. * * *"

In substance, as is stated in petitioner's closing brief, it is contended by the respondent herein "that when the pleading charges the defendant with the crime of petit theft and alleges that before the commission of the theft the defendant was convicted of a felony and served a term therefor in a penal institution, the felony is by operation of section 667 of the Penal Code a part of the crime of petit theft, and, therefore, upon conviction of the charge of petit theft, the defendant 'has never in any place been previously convicted of a felony,' within the meaning of section 1203, Penal Code, and the court may grant him probation."

An examination of the several authorities cited by respective counsel herein discloses the situation that such authorities are not in complete harmony one with the other or the others with respect to the assumed foundational point that in an accusation of petit theft against a defendant, together with the allegation of the fact that prior to the commission by him of such offense he was convicted of a felony and "served a term therefor," the latter fact is an integral part of the offense charged. But from a reading of the provisions of the statutes to which attention has been directed, we are of the opinion that whether the point is or is not well taken is immaterial to the question here involved. From the record herein it affirmatively appears that in substance the defendant admitted not only his guilt as to the charge of petit theft, but as well that he had been "previously convicted of a felony"; in which circumstances, by the express language of section 1203 of the Penal Code, he was ineligible for probation.

It is ordered that the respondent herein be and it is directed to vacate its former order by which the defendant Jack Coffee was granted probation following his conviction of the crime of petit theft, and thereupon, in accord with the statutes in such cases provided, to pronounce judgment upon and against the defendant Jack Coffee for the commission by him of said offense of petit theft, with prior conviction of a felony (he theretofore having been convicted of a felony and having served a term therefor in a penal institution), as alleged in the information on file in the Superior Court in and for the County of Los Angeles.

We concur: CONREY, P. J.; YORK, J.

138 Cal.App.Supp. 777

STELL v. TOWNSEND CALIFORNIA GLACE FRUITS, Inc.

No. 436.

Appellate Department, Superior Court, City and County of San Francisco, California.

Jan. 8, 1934.

Rehearing Denied Jan. 29, 1934.

1. Sales ⇐274.

Proprietor of restaurant is not insurer nor chargeable with implied warranty of quality of food served to patrons.

2. Food ⇐25.

Proprietor of restaurant who serves unwholesome food to patron because of lack of due care is liable for illness of patron caused thereby.

3. Food ⇐25.

In action against restaurant keeper for serving unwholesome food, plaintiff has burden of proving negligence of restaurant keeper.

4. Food ⇐25.

In action against restaurant keeper for serving unwholesome food, plaintiff establishes prima facie case where there is evidence

justifying inference that food was contaminated and caused illness of plaintiff.

5. Food ⊂⇒25.

In action against restaurant keeper for serving unwholesome food, evidence that plaintiff had not eaten since breakfast and that she became violently ill shortly after eating fish at dinner in defendant's restaurant raised question for jury as to negligence of defendant and contributory negligence of plaintiff.

Appeal from Municipal Court of City and County of San Francisco; Daniel S. O'Brien, Judge.

Action by Ida Stell against the Townsend California Glace Fruits, Incorporated. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

James H. Phillips, of Oakland, for appellant.

J. Hampton Hoge, of San Francisco, for respondent.

JOHNSON, Presiding Judge.

This case presents the question of the liability of a restaurant keeper charged with negligently serving a patron with food unfit for human consumption, whereby the patron is made ill.

The complaint alleges that on October 22, 1932, at about 6 o'clock in the evening, plaintiff had dinner served to her for pay at the restaurant of the defendant, Townsend California Glace Fruits, Inc., and that through negligence of the defendant and its servants, the food served was impure, unwholesome, and unfit for human consumption, and as a result of eating the food so served plaintiff suffered severe illness accompanied by physical and mental pain.

The answer puts in issue the averments charging liability and alleges contributory negligence on the part of plaintiff.

A jury was impaneled to try the action; but when plaintiff rested her case, the trial court granted defendant's motion for a nonsuit; and judgment was thereupon entered in favor of the defendant. From that judgment plaintiff prosecutes this appeal.

The evidence introduced by plaintiff exhibited the following state of facts. On the evening named, plaintiff and her husband had dinner at defendant's restaurant. Plaintiff's dinner consisted of cream soup, Waldorf salad, halibut covered with a sauce, mashed potatoes, stewed corn, mince pie, and coffee. The husband's order was the same as plaintiff's, except that he had veal cutlet instead of halibut. As plaintiff ate the fish, she noticed that it had a peculiar taste, but attributed that taste to some ingredient in the sauce. When she had eaten about two-thirds of the fish and all of the sauce, the taste became more pronounced. Upon examination she saw that the fish had a slimy, soft appearance; and finding that it "tasted spoiled," she left the remainder uneaten. After finishing dinner, plaintiff spent a short time looking at the shop windows while her husband made a business call; but in about fifteen minutes after leaving the restaurant, and before her husband could join her at the place where they had left their automobile, she became suddenly ill and suffered from cramps. She made her way to the dressing room of a neighboring hotel where she had assistance from the attendants, and they summoned a physician who treated her. About midnight plaintiff was taken home by her husband, and there she was kept in bed for three or four days. It was three or four weeks, however, before she could eat solid food. Plaintiff was thirty-eight years of age at the time, had always had good health, and had never previously experienced any such illness from eating fish or any other food. Plaintiff testified also that in her home she had frequently cooked halibut in the same way as the halibut served to her by defendant and that sound halibut so cooked is not soft or slimy, but hard and firm. The physician who attended plaintiff diagnosed her illness as a case of ptomaine poisoning due to taking into the stomach food that had previously become putrified.

It appeared further from plaintiff's testimony that she had a light breakfast, and, as was frequently her habit, had not eaten lunch, or partaken of food that day between breakfast and dinner. During the day she had pursued her activities in her usual good health, and had experienced no discomfort or pain until seized with cramps soon after leaving the restaurant.

[1-2] The nonsuit against plaintiff appears to have been granted by the trial court on the ground that the defendant was neither an insurer nor chargeable with any implied warranty of the quality of food served to patrons. Such is the rule in this state as declared in Loucks v. Morley, 39 Cal. App. 570, 179 P. 529; and though the contrary rule has been promulgated in a few states, the decision in the case cited accords with the great weight of authority. The complaint in the present case, however, is not based upon a breach of warranty or on any contractual liability. It charges commission of a tort in the alleged failure of defendant as the proprietor of a restaurant to use reasonable care in selecting, preparing, and serving food for consumption by plaintiff as a patron.

The distinction is made clear by comparison of two opinions written by Chief Justice Rugg of Massachusetts and filed on the same day. In Friend v. Childs Dining Hall Co.,

231 Mass. 65, 120 N. E. 407, 410, 5 A. L. R. 1100, a leading case, it was established as the law of Massachusetts, notwithstanding a strong dissenting opinion, that there is an implied contract on the part of a restaurant keeper that food furnished by him to a patron is fit to eat. In that case it was pleaded that the defendant promised, and under implied warranty represented, that the food furnished was, and would prove to be, in good and wholesome condition and fit to eat. In the majority opinion written by the Chief Justice, the subject of implied warranty of food is elaborately discussed with a historical review of the course of the common law; but recognition is given to the fact that "apparently the larger number of decisions by courts of this country hold that the liability of the innholder and restaurant keeper for furnishing deleterious food rests upon negligence."

While the case just cited held restaurant keepers to an implied warranty, it was also held the same day, in an opinion of the Chief Justice in the case of Ash v. Childs Dining Hall Co., 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1556, that under a complaint charging negligence, the restaurant keeper, upon proof of causal connection, would be answerable in tort. In that case the court said: "It is well settled that the duty rests upon the keeper of an inn, restaurant, or other eating place to use due care to furnish wholesome food, fit to eat. Failure in this respect resulting in injury is foundation for an action of negligence."

As already remarked, California is in accord with the weight of authority in adopting the rule that one serving food to be immediately consumed on the premises is not an insurer of the fitness or wholesomeness of the food served, nor is he chargeable with an implied covenant of warranty. But if in Massachusetts where the rule of implied warranty obtains, action may be predicated on negligence as well as on implied warranty, then with all the more propriety may liability for negligence attach in a jurisdiction where sanction of the rule of implied warranty is withheld.

A concise statement of the rule resting liability on negligence is given in Roseberry v. Wachter, 3 W. W. Harr. (33 Del.) 253, 138 A. 273, in these words: "It is well settled that innkeepers, proprietors of restaurants, lunch rooms, and other persons who undertake to furnish the public with food are bound to use due care to see that such food is fit for human consumption, and can be partaken of without causing sickness, injury or endangering human life because of its unwholesome and deleterious condition or because of the presence of foreign substances; and for any negligence in this particular which proximately results in injury to a patron, they will be responsible. (Citing cases.) This liability of innkeepers, proprietors of restaurants, eatinghouses, etc., is based on their failure to exercise reasonable or ordinary care in the preparation and serving of food to the public, and is not based upon their liability as insurers." Citing cases.

So in Costello v. Morrison Cafeteria Co., 18 La. App. 40, 135 So. 245, where plaintiff alleged negligence in furnishing unwholesome and poisonous cream cheese, the court ruled that the complaint was not demurrable on the ground that the precise act of negligence causing plaintiff's illness was not averred, and declared that a general allegation of negligence was sufficient for the purposes of the action.

Likewise in Travis v. L. & N. R. R. Co., 183 Ala. 415, at page 424, 62 So. 851, 854, it is said concerning the duty of the proprietor of a restaurant: "The law requires that in the selection of the food for his restaurant and in cooking it for his customers, he shall exercise that same degree of care which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. If, in the selection of such food or in preparing it for his customer, the keeper of a restaurant does not exercise *that* care, and through such *want* of care his customer who eats the food so selected and prepared is thereby made sick, *then* he is liable to such customer for the damages so suffered by him."

And at page 426 of 183 Ala., 62 So. 851, 854, it is said further: "The care which the law exacts of a restaurant keeper is, as we have already said, that degree of care which a man of ordinary prudence, skilled in the art of selecting and preparing food for human consumption, would exercise in selecting and preparing food for his own private use, and not the ordinary care of a man of ordinary prudence who possesses no such knowledge."

See, also, 26 C. J. 786, and 11 R. C. L. 1118.

Cases against restaurant keepers on account of sickness or injury caused by food may be divided into two classes: On the one hand, those in which the ill effects are produced by foreign substances in foods, such as glass, tacks, or dead insects or animals; and on the other hand, those in which the effects are caused by the impure or noxious condition of the foods themselves. We are not concerned here with the presence of a foreign substance in the food served, but many such cases are listed in the notes in 4 A. L. R. 1559 and 47 A. L. R. 148.

In the present case the charge against defendant is that through lack of due care the food served to plaintiff was impure, unwholesome, and unfit for human consumption.

[3, 4] Whether complaint is made of the presence of foreign substances or of an im-

pure and deleterious condition of the food itself, the burden is of course upon the complainant to prove negligence on the part of the restaurant keeper. Each case must depend upon its own facts and circumstances; and the reasonable inferences to be drawn from the evidence adduced are ordinarily to be left to the fair and rational judgment of the triers of the facts. In general, it may be said that the plaintiff makes out a prima facie case when there is evidence justifying an inference that the food served was contaminated and unfit to be eaten, and that illness was caused thereby.

Upon such an inference recovery of damages was had by the plaintiff in Doyle v. Fuerst & Kraemer, 129 La. 838, 56 So. 906, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913B, 1110, by reason of ptomaine poisoning caused by ice cream and cakes of which plaintiff partook at a confectionery store. Likewise in Bark v. Dixson, 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, a verdict was rendered in favor of the plaintiff who had been served with tainted meat, and in Greenwood Cafe v. Lovinggood, 197 Ala. 34, 72 So. 354, the plaintiff had a verdict because of illness resulting from service of roast chicken which was tainted.

There are also cases where bad fish was found to have been the cause of illness. In George's Restaurant v. Dukes, 216 Ala. 239, 113 So. 53, poisoning resulted from eating a fish sandwich; and in C. C. Hooper Cafe Co. v. Henderson, 223 Ala. 579, 137 So. 419, complaint was made that ptomaine poisoning was caused by fried red snapper. In that case the plaintiff stated that the fish did not taste right; and after eating a small portion she desisted, and observed that the fish had an unpleasant odor. The ill effects were felt promptly and developed into sickness diagnosed by plaintiff's physician as ptomaine poisoning. The court ruled that the evidence made a case for the jury; but the verdict in favor of plaintiff was reversed because of refusal of certain instructions proposed by the defendant. In Picard v. Smith, 59 App. D. C. 291, 40 F.(2d) 803, damages were recovered in an action of tort for the death of officer Smith, a chief pharmacist in the naval service, who with two other officers partook of fried oysters at a luncheon at Harvey's restaurant in Washington. All three became suddenly ill; and though prompt medical treatment was obtained, Officer Smith died that evening. It was held that a sufficient case of negligence was made out.

In Pantaze v. West, 7 Ala. App. 599, 61 So. 42, damages were had because of poisoning due to eating a dish containing as one of the ingredients some contaminated brains. Speaking there of the functions of the court and the jury in passing upon the question of negligence in such cases, the court said (page 607 of 7 Ala. App., 61 So. 42, 44): "It was not for the court to pass upon the conflicting, probable or reasonable inferences to be drawn from the evidence, nor to weigh or balance one inference that could be so drawn against another contra inference deduced from other testimony, and thus determine and pass upon these different and conflicting inferences afforded by the evidence for or against one or the other of the parties to the suit; for this, under our system, is exclusively the province of the jury. And as negligence, and the failure to exercise due care and ordinary caution, like any other fact, may be inferred from circumstances, the court would not have been justified in taking the case from the jury unless, as a matter of law, no recovery could have been had in the case upon any view which could properly have been taken of the evidence and of the reasonable tendencies afforded by it."

See, also, McPherson v. Capuano & Co., 31 Ga. App. 82, 121 S. E. 580.

[5] In the case in hand, we are of the opinion that it may not be said as a matter of law that the facts and circumstances brought out in plaintiff's evidence were insufficient to establish a prima facie case. Indeed, the evidence is closely parallel to that of the plaintiff in Leahy v. Essex Company, 164 App. Div. 903, 148 N. Y. S. 1063, 1064, where in an action based on implied warranty there was a reversal of a judgment of dismissal given without letting the case go to the jury. The plaintiff's evidence in that case showed that she was taken violently sick immediately after lunching at defendant's restaurant and there being served with toast and tea and a piece of chocolate pie, of which she ate only one-half because of its unusual color and taste. She had taken into the stomach nothing previously that day except an orange and a cup of cocoa at breakfast, and a glass of water during the forenoon. The trial judge dismissed the complaint on the ground that it could not be determined with reasonable certainty that the food poisoning was caused by the food supplied by the defendant. The appellate court declared, however, that "the evidence was sufficient to enable the jury to determine that the plaintiff was suffering from food poisoning, and that the food purchased of the defendant was the cause thereof," and that the case was, therefore, improperly taken from the jury. Accordingly the judgment was reversed and a new trial ordered.

In like manner here, the plaintiff had breakfasted on crackers and orange juice, and had eaten nothing between breakfast and the dinner served by the defendant, which included fish covered with a sauce. Noticing a peculiar taste, especially after there was no sauce left, plaintiff then observed that the fish was soft and slimy, and for that reason she refrained from eating more. Almost immediately after leaving the restaurant, she became

violently ill and suffered from what her physician diagnosed as ptomaine poisoning.

Under such circumstances, it could not be said as a matter of law either that plaintiff was guilty of contributory negligence or that she had not made a sufficient case to go to the jury.

The judgment is reversed, and the cause remanded to the municipal court for a new trial.

CONLAN and GOODELL, JJ., concur.



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